No. _____

# In The
# Supreme Court of the United States

JENNIFER STRANG,

*Petitioner,*

v.

FORD MOTOR COMPANY GENERAL RETIREMENT PLAN and FORD MOTOR COMPANY,

*Respondents.*

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

## PETITION FOR WRIT OF CERTIORARI

ROBERT B. JUNE
*Counsel of Record*
LAW OFFICES OF ROBERT JUNE, P.C.
415 Detroit Street, 2nd Floor
Ann Arbor, MI 48104-1117
(734) 481-1000
bobjune@junelaw.com

*Counsel for Petitioner*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

## QUESTION PRESENTED

This petition presents a single question about the interplay of two important remedial provisions of the Employee Retirement Income Security Act of 1974 (ERISA). Under one ERISA remedial provision, a plan participant or beneficiary may bring a civil action "to recover benefits due to him under the terms of his plan." ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). Under another remedial provision, a plan participant or beneficiary may bring a civil action "to obtain other appropriate equitable relief" to redress violations of ERISA or the plan, including claims for breach of fiduciary duty. ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3).

The question presented is: Whether the Sixth Circuit erred in holding – in conflict with the Second, Eighth, and Ninth Circuits – that an ERISA claimant is barred from alleging a claim for breach of fiduciary duty under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), whenever that claimant has the opportunity to allege a claim for benefits under ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

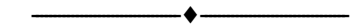
Page

CASES

TABLE OF AUTHORITIES – Continued

## INTRODUCTION

This petition presents an isolated question about the interplay of two important remedial provisions of ERISA: Whether the Sixth Circuit erred in holding – in conflict with the Second, Eighth, and Ninth Circuits – that an ERISA claimant is barred from alleging a claim for breach of fiduciary duty under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), whenever that claimant has the opportunity to allege a claim for benefits under ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). Under the Sixth Circuit formulation, an ERISA fiduciary can refuse to provide a plan participant with proper claim forms, then deny the participant's claim because the proper forms were not submitted, and there would be no remedy under section 502(a)(3) for the fiduciary's conduct because the participant could file an assuredly doomed claim for benefits under section 502(a)(1)(B). This cannot withstand scrutiny. The Sixth Circuit decision stands in direct conflict with the decisions of other circuits as well as this Court's cases, and review is necessary to provide a uniform answer to an exceptionally important question regarding ERISA jurisprudence. Sup. Ct. R. 10(a); Sup. Ct. R. 10(c).



## OPINIONS BELOW

The opinion of the Sixth Circuit in this case (Pet. App. 1-13) is unreported but available electronically at 2017 U.S. App. Lexis 8849. The Sixth Circuit decision

by which the panel in this case stated it was bound (Pet. App. 11-12) is reported: *Rochow v. Life Ins. Co. of North America*, 780 F.3d 364 (6th Cir. 2015). The district court opinion dismissing the claim for breach of fiduciary duty at issue in this petition (Pet. App. 14-23) is unreported. The district court opinion denying the claim for benefits (Pet. App. 24-45) is reported at 194 F.Supp.3d 625.

## JURISDICTION

The order of the court of appeals denying the petition for rehearing was entered on July 7, 2017. Pet. App. 46. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

Section 502 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132, provides in relevant part:

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought –

(1) by a participant or beneficiary –

* * *

> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.
>
> * * *
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.

Employee Retirement Income Security Act of 1974, section 502(a)(1)(B) and (a)(3), 29 U.S.C. § 1132(a)(1)(B) and (a)(3).



## STATEMENT OF THE CASE

This petition presents a narrow issue regarding the propriety of pleading alternative claims for relief under ERISA section 502(a)(1)(B) and section 502(a)(3). The Sixth Circuit decision in this case conflicts directly with decisions from the Second, Eighth, and Ninth Circuits, and it is an important issue in ERISA pleading and practice. To clearly explain the need for further review, this petition provides a brief discussion of the statutory context as well as factual

background, followed by the relevant procedural history of this case.

### A. Statutory Context

ERISA was designed "to promote the interests of employees and their beneficiaries in employee benefit plans." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989) (citations omitted). Section 502(a) sets forth the exclusive remedies that are available to a civil litigant under ERISA, and perhaps the most controversial remedy provided under ERISA is section 502(a)(3), which entitles plan participants and beneficiaries to bring a civil action "to obtain other appropriate equitable relief" to redress violations of ERISA or the plan, including claims for breach of fiduciary duty. 29 U.S.C. § 1132(a)(3). Courts have addressed the contours of section 502(a)(3) on several occasions, including most importantly for this petition:

1. In 1995, this Court explicated the language and legislative history of ERISA, concluding that section 502(a)(3) provides a "catchall" or "safety net" provision that offers "appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." *Varity Corp. v. Howe*, 516 U.S. 489, 505-13 (1996). As the Court explained, given the objectives of ERISA, "it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy." *Id*. at 513. Consequently,

the Court held that section 502(a)(3) provides a remedy for breach of fiduciary duty, and that granting this remedy "is consistent with the literal language of the statute, the Act's purposes, and pre-existing trust law." *Id.* at 515.

In a more recent landmark decision, this Court clarified the nature of the equitable relief available under section 502(a)(3) even where a claimant had made a claim for benefits under section 502(a)(1)(B). *CIGNA Corp. v. Amara*, 563 U.S. 421, 438-45 (2011). Noting the maxim that "[e]quity suffers not a right to be without a remedy," the Court described equitable remedies available under section 502(a)(3) including surcharge, equitable estoppel, and reformation of contracts. *Id*. at 440-41. The surcharge remedy, in particular, is a "monetary remedy against a trustee" that extends "to a breach . . . of a duty imposed upon that fiduciary." *Id*. at 442. Despite the fact that this relief takes the form of a money payment, it falls firmly "within the scope of the term 'appropriate equitable relief' in § 502(a)(3)." *Id*.

2. Following the *Amara* decision, several circuit courts have addressed the availability of equitable relief to ERISA benefit claimants alleging a breach of fiduciary duty. The Fourth Circuit has approved a claim for surcharge seeking "the amount of life insurance proceeds lost" because of an insurer's breach of fiduciary duty. *McCravy v. Metropolitan Life Ins. Co.*, 690 F.3d 176, 181-82 (4th Cir. 2012). Although the plaintiff did not expressly plead "surcharge," the Fifth Circuit has allowed a suit for breach of fiduciary duty in which

the plaintiff argued that "he should be made whole in the form of compensation for lost benefits." *Gearlds v. Entergy Servs.*, 709 F.3d 448, 450-52 (5th Cir. 2013). The Seventh Circuit has found that a breach of fiduciary duty claim may be cognizable by a claimant seeking coverage of health care benefits. *Kenseth v. Dean Health Plan, Inc.*, 722 F.3d 869, 885-90 (7th Cir. 2013). While these circuit courts have clearly approved claims for breach of fiduciary duty in the context of benefit claims, they did not explicitly address the interplay of section 502(a)(1)(B) and section 502(a)(3), but three other circuits have done so.

In a case alleging that medical claims were improperly administered in a manner that discriminated unfairly against mental health benefits, the Second Circuit determined that pleading claims under both section 502(a)(1)(B) and section 502(a)(3) was permissible, and that the pleading stage was too early to determine whether the relief sought under the two remedies would actually be duplicative. *New York State Psychiatric Ass'n v. UnitedHealth Grp.*, 798 F.3d 125, 131-35 (2d Cir. 2015). The Eighth Circuit has rejected earlier precedent in holding that dual pleading of claims for benefits under section 502(a)(1)(B) and claims for breach of fiduciary duty under section 502(a)(3) is now permissible following *Amara*, even though both claims seek "the payment of benefits that were seemingly owed under the plan." *Silva v. Metropolitan Life Ins. Co.*, 762 F.3d 711, 724-28 (8th Cir. 2014), overruling *Pilger v. Sweeney*, 725 F.3d 922 (8th Cir. 2013). As the Eighth Circuit put it: "Silva presents

two alternative – as opposed to duplicative – theories of liability and is allowed to plead both." *Silva*, 762 F.3d at 726 (8th Cir. 2014), citing Fed. R. Civ. P. 8(d)(2). The Eighth Circuit recently affirmed this dual-pleading holding in *Jones v. Aetna Life Ins. Co.*, 856 F.3d 541, 545-47 (8th Cir. 2017). Although its decision is unpublished, the Ninth Circuit also has held that simultaneous claims under section 502(a)(1)(B) and section 502(a)(3) are permissible. *Moyle v. Liberty Mutual Ret. Benefit Plan*, Nos. 13-56330, 13-56412, 2016 U.S. App. LEXIS 15202, at *23-31 (9th Cir. Aug. 18, 2016). The Sixth Circuit now appears to be in conflict with these other circuits regarding this dual pleading analysis.

## B. Factual Background[1]

In 2012, Ford Motor Company (Ford) decided to proceed with an amendment to the Ford Motor Company General Retirement Plan (Ford Plan) regarding lump sum distribution of retiree pension benefits. A June 27, 2012 memo regarding "Amendment to the General Retirement Plan (GRP)," explained that the intent of the lump sum proposal was "to permit a Retiree Lump Sum Window for any remaining payments payable to retirees who commence benefit payments on or before February 1, 2013," which would result in an

[1] Because petitioner's claim for breach of fiduciary duty was dismissed pursuant to Fed. R. Civ. P. 12(b)(6), the applicable facts stated here are drawn from the plan documents in the appendix and the amended complaint (Am. Comp.), and they are also substantiated by the evidence contained in the administrative record (A.R.) below.

expected decrease in plan obligations totaling $3.7 billion. Pet. App. 48-49. The Ford Plan was formally amended with the addition of "Appendix L Lump Sum Windows" on August 1, 2012. Pet. App. 51-58. Appendix L established a specifically defined Lump Sum Window "during the period August 1, 2012 through July 31, 2013." Pet. App. 51. Appendix L then vested each eligible member with the entitlement to elect a lump sum benefit:

> Any Lump Sum Window Eligible Member shall be entitled to make an election under the Lump Sum Window effective as of their Lump Sum Window Qualified Retirement Date. Any Lump Sum Window Eligible Member who wishes to make an election under the Lump Sum Window must submit to the Company a completed and signed election form, in such manner as may be required by the Committee. If a completed and signed election form from a Lump Sum Window Eligible Member is received by the Company during such Member's Lump Sum Window Election Period, and such Member dies prior to the payment of any benefits, such election shall be effective.

Pet. App. 53. Importantly, this provision explicitly contemplated the possibility that a retiree may elect a lump sum retirement benefit and die before benefits were paid. Pet. App. 53. In such cases, Appendix L dictated that the election of the lump sum retirement benefit "shall be effective." Pet. App. 53.

Appendix L also required that the electing retiree "must submit to the Company a completed and signed

election form, in such manner as may be required by the Committee." Pet. App. 53. Thus, Appendix L clearly imposed upon Ford the fiduciary duty to provide each eligible retiree with the means to elect a lump sum distribution. Appendix L did not authorize Ford to refuse to provide an eligible retiree with the means to make an election. Appendix L also did not incorporate a specific "election form" within the body of official plan documents, but it did require the submission of a signed election form of some sort "before the expiration of the Lump Sum Window Election Period." Pet. App. 53-54. Notably, although this provision of Appendix L prohibited late elections, after the expiration of the election period, it did not contain any similar provision restricting early elections. Rather, so long as a signed election form was "received by the Company" before the expiration of the election period, "such election shall be effective." Pet. App. 53.

Finally, Appendix L established that it "shall be interpreted and applied by the Committee in a consistent and nondiscriminatory manner in accordance with the purposes of this Appendix L and of the Plan as a whole." Pet. App. 58. This clearly incorporates the more general Ford Plan provision that the Committee "shall not, however, take any action not uniformly applicable to all employees similarly situated." Pet. App. 60. Interpreted as a whole, the Ford Plan imposes on Ford the fiduciary duty to accommodate every retiree's opportunity to make such an election.

John Strang was hospitalized in March 2012 with complications from chronic obstructive pulmonary disorder and respiratory failure, and he never fully regained his health. Am. Comp. ¶10. In April 2012, Ford sent John Strang a notice that the Ford Plan would provide retiree participants with an option to take a lump sum distribution of their remaining retirement benefits beginning in August 2012. Am. Comp. ¶11. Ford informed John Strang that information and forms for electing the lump sum option would be made available through Ford's National Employee Service Center (NESC), a centralized human resources activity within Ford that provides various services to salaried and hourly employees throughout the United States. Am. Comp. ¶12. John Strang promptly began contacting NESC to inquire about his lump sum option, but NESC did not provide John Strang with any additional information. Am. Comp. ¶13.

John Strang was diagnosed with terminal cancer in July 2012, and he immediately began planning to take his lump sum retirement option as part of his estate planning effort. Am. Comp. ¶14. John Strang contacted NESC in July 2012 and requested an expedited lump sum package due to health reasons. Am. Comp. ¶15. Throughout August and September 2012, John Strang and his wife, Petitioner Jennifer Strang, again contacted NESC on several occasions to request information and forms for selecting the lump sum option that had become effective at the beginning of August 2012, but NESC did not provide any additional information. Am. Comp. ¶16. When John Strang contacted

NESC again multiple times in October 2012, he was told that no information would be available perhaps until the end of 2012, despite the fact that the program reportedly took effect in August 2012. Am. Comp. ¶17.

On October 31, 2012, Jennifer Strang called Ford to ask when additional information would be provided, but she was told only that "we do not have a definite time frame; the offer is being made until at least December 31, 2012." A.R. 185. In early November 2012, Ford sent John Strang a postcard notifying him that: "As previously announced, you are now eligible for a lump sum payment from the Ford Motor Company General Retirement Plan (GRP)." Am. Comp. ¶18; A.R. 38-39. The postcard did not provide the means to make the election, but merely indicated that more information would be sent in the future. A.R. 39.

Jennifer Strang called Ford again on November 13, 2012, explaining that John Strang "was very ill and may not live to the end of the year." A.R. 185. Ford log notes confirm that Ms. Strang "wanted to know if paperwork for the GRP Lump Sum offer can be sent to him now, due to participant illness." A.R. 185. But the Ford representative called back to inform Ms. Strang on November 16, 2012 "that no exceptions are being made regarding the GRP Lump Sum program." A.R. 185. It was unclear what rule had "no exceptions," particularly given that Ford did not provide Mr. Strang with any plan documents or summary plan description regarding the lump sum program, and Jennifer Strang followed up, only to be told by Ford that: "the process cannot be rushed but must proceed as follows: first he

received the post card, next he would receive a decision guide, then an election kit." Am. Comp. ¶20; A.R. 185. Appendix L did not establish such a "process," though it did establish that any eligible retiree was entitled to elect the lump sum retirement benefit. Pet. App. 53. Nevertheless, when the Strangs asked for clarification, the Ford representative merely "[o]ffered to send them to voicemail where they could leave a message and be contacted in 24 to 48 hours." A.R. 185.

Given that Ford was refusing to provide him with the official forms, John Strang executed a lump sum election letter, which was sent to Ford together with a letter from Jennifer Strang on November 16, 2012. Am. Comp. ¶19; A.R. 5-6. John Strang's election letter noted that Jennifer Strang had been told nothing could be done before December 14, 2012, and explained: "I am concerned that I may not survive until that date and therefore I am documenting that my election to receive my retirement distribution shall be the lump sum retirement distribution." A.R. 5. Numerous Ford Plan participants were permitted to elect the lump sum option from August through November 2012, and those Ford Plan participants received their lump sum packages successfully. Am. Comp. ¶21. Ford never offered John Strang a rational explanation, or any written explanation at all, for its refusal to provide him with the opportunity to elect the lump sum package during this time period. Am. Comp. ¶22. John Strang passed away on November 18, 2012. Am. Comp. ¶23; A.R. 7.

On November 30, 2012, after he had passed away, Ford sent John Strang a letter informing him that he

was eligible to take a lump sum retirement benefit distribution in the amount of $1,071,039.64, confirming that Ford had all the information it needed to calculate Mr. Strang's lump sum entitlement precisely. A.R. 61-62. The November 30, 2012 letter indicated that Mr. Strang's election would be valid if it was made by March 13, 2013. A.R. 61. The letter did not suggest that an early election would be deemed invalid for any reason. A.R. 61-62.

When Jennifer Strang pursued the claim, Ford took the position that John Strang's eligibility to take the lump sum option expired when he died. Am. Comp. ¶¶24-25. Ford acknowledged that "Mr. Strang and his spouse, Jennifer R. Strang, attempted to elect a lump sum payment of the remaining value of Mr. Strang's GRP pension benefit prior to his death on November 18, 2012," but "[s]ince he died before his election period opened, his eligibility for the lump sum opportunity ceased upon his death." Am. Comp. ¶27; A.R. 112. Unlike the situation for many other Ford Plan participants, Ford claimed that "Mr. Strang's election period did not open until December 14, 2012." A.R. 112.

Ford then told Jennifer Strang's attorney that he should submit a claim if he wanted to pursue the issue, and Ford subsequently treated the formal claim as an appeal of the initial adverse decision. Am. Comp. ¶¶28-32. Ford issued its denial of the appeal on July 2, 2013, and the minutes of the committee meeting suggest that the committee was not informed of any communications earlier than November 28, 2012. Am. Comp.

¶¶34-36; A.R. 14-15. The committee minutes also suggest that the decision was made on the basis of plan documents and amendments that were never provided to John Strang. Am. Comp. ¶35.

Ford provided a plan document to Jennifer Strang's attorney, who then requested Ford to reconsider its decision, arguing among other things that "[t]he only reference to the death of an eligible member is if a member dies after making the election," and there was nothing evident to preclude John Strang's supposedly early election of the lump sum option. Am. Comp. ¶37; A.R. 19-20. Appendix L does not actually state that eligibility ceases upon death of a retiree who had submitted an election, but only required that the election must be "received" during the election period, and deems that such an election "shall be effective" even if the participant "dies prior to the payment of any benefits." Pet. App. 53. Nevertheless, Ford upheld its denial based on John Strang's failure to submit the official election forms that Ford had refused to provide him before his death. Am. Comp. ¶43; A.R. 26-29.

It later came to light that Ford had taken an opposite interpretation of this aspect of Appendix L with at least one other plan participant in a case that Ford portrayed as "presenting just such a circumstance" as this case. Ford Court of Appeals Br. 17. Ford argued that the participant had submitted an invalid election form before her assigned election period, and she "died before the new period commenced and a corrected election form could be completed; her estate's claim for

benefits was denied." *Id*. This turned out to be a mischaracterization of those proceedings. Ford did determine that the participant's initial election was "invalid," and that she died before a proper election kit was provided to her by Ford. Strang Court of Appeals Rep. Br. 5. Unlike the Strang decision, however, Ford decided to *honor* the invalid and premature election by that participant because she "clearly intended to elect a lump sum distribution of her monthly benefits." *Id*. at 6. Thus, Ford's denial of Jennifer Strang's claim, where Ford acknowledged John Strang's similarly clear intent to elect a lump sum distribution, runs contrary to the Ford plan edict prohibiting the fiduciary from taking "any action not uniformly applicable to all employees similarly situated." Pet. App. 60.

### C. Proceedings Below

After exhausting her administrative remedies, Jennifer Strang sued the Ford Plan and Ford in the United States District Court for the Eastern District of Michigan. Her complaint alleged a claim for benefits pursuant to ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), and in the alternative, a claim for breach of fiduciary duty seeking the remedies of surcharge and restitution based on unjust enrichment pursuant to section 502(a)(3), 29 U.S.C. § 1132(a)(3). Am. Comp. 1-13. Pursuant to Ford's motion under Fed. R. Civ. P. 12(b)(6), the district court dismissed the claim for breach of fiduciary duty at the pleading stage. Pet. App. 22-23. The district court reasoned that a plaintiff may not plead a claim under section 502(a)(3) "when it

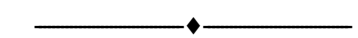
would duplicate the relief available under other ERISA sections." Pet. App. 22. The district court cited *Wilkins v. Baptist Healthcare Sys., Inc.*, 150 F.3d 609, 615 (6th Cir. 1998), for the "holding that plaintiff did 'not have a right to a cause of action for breach of fiduciary duty' because this relief was duplicative of his request for benefits, which he could seek under 29 U.S.C. § 1132(a)(1)(B)." Pet. App. 22-23. The district court concluded: "As in *Wilkins*, plaintiff's remedy in this matter is to seek the allegedly unpaid lump sum benefits, not equitable remedies for Ford's alleged breach of fiduciary duty." Pet. App. 23.

In a later proceeding, the district court entered a judgment denying Jennifer Strang's claim for benefits under section 502(a)(1)(B). Pet. App. 24-45. Although recognizing that "[p]laintiff presents a sympathetic case," the district court found that it was "rational in light of the plan's provisions" to disallow the benefit claim on the grounds that John Strang submitted his election before his election period purportedly opened and because it was not made on a proper election form. Pet. App. 39-44.

The Sixth Circuit panel issued its opinion affirming the district court on May 19, 2017. Pet. App. 1-13. In affirming the dismissal of the claim for breach of fiduciary duty at the pleading stage, the panel relied on the published decision of *Rochow v. Life Ins. Co. of North America*, 780 F.3d 364, 372 (6th Cir. 2015) (en banc). Pet. App. 11-12. But *Rochow* involved a situation in which the plaintiff had already "recovered all benefits that he had been wrongfully denied under

§ 502(a)(1)(B)." *Id*. at 370. In *Rochow*, the plaintiff was seeking additional damages under section 502(a)(3) after being fully compensated under section 502(a)(1)(B), not pleading in the alternative. *Id*. Nevertheless, the Sixth Circuit panel rejected the argument that "[*Rochow's*] focus is on prohibiting duplicative relief, not alternative pleading." Pet. App. 12. The Sixth Circuit decision declared: "where an avenue of relief for the injury was available under § 1132(a)(1)(B), '*irrespective of the degree of success obtained*,' a breach-of-fiduciary claim cannot be brought." Pet. App. 12, quoting *Rochow*, 780 F.3d at 372 (emphasis added by the Sixth Circuit panel).

Jennifer Strang filed a petition for rehearing that was summarily denied on July 7, 2017. Pet. App. 46. Jennifer Strang now petitions this Court for a writ of certiorari to correct the holding below.



## REASONS FOR GRANTING THE PETITION

This petition presents an isolated question about the interplay of two important remedial provisions of ERISA: Whether the Sixth Circuit erred in holding – in conflict with the Second, Eighth, and Ninth Circuits – that an ERISA claimant is barred from alleging a claim for breach of fiduciary duty under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), whenever that claimant has the opportunity to allege a claim for benefits under ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). Under the Sixth Circuit formulation,

an ERISA fiduciary can refuse to provide a plan participant with proper claim forms, then deny the participant's claim because the proper forms were not submitted, and there would be no remedy under section 502(a)(3) for the fiduciary's conduct because the participant could file an assuredly doomed claim for benefits under section 502(a)(1)(B). This cannot withstand scrutiny. The Sixth Circuit decision stands in direct conflict with the decisions of other circuits as well as this Court's cases, and review is necessary to provide a uniform answer to an exceptionally important question regarding ERISA jurisprudence.

## I. The Question Presented Has Divided the Circuits.

The Sixth Circuit decision in this case stands in direct conflict with decisions of the Second, Eighth, and Ninth Circuits. The most succinct and applicable of these is the Eighth Circuit decision in *Silva*. As in this case, the district court in *Silva* initially ruled that the plaintiff could not bring a claim for equitable relief in the form of monetary damages under section 502(a)(3) "because that would be a compensatory remedy, not an equitable one." *Silva*, 762 F.3d at 717. The district court then granted summary judgment on the claim for benefits on the ground that the insured had failed to submit a proper Statement of Health form even though it was learned that nearly 200 other employees lacked the same form. *Id*. The Eighth Circuit noted that this

Court's decision in *Amara* "changed the legal landscape by clearly spelling out the possibility of an equitable remedy under ERISA for breaches of fiduciary obligations by plan administrators." *Id*. at 722, citing *Amara*, 131 S.Ct. at 1881. Therefore, a claim for breach of fiduciary duty was allowable, particularly given the allegation that the fiduciary failed to provide the participant with a required summary plan description, "which could have explained the Statement of Health form requirement as being a prerequisite." *Id*. at 720-22.

The Eighth Circuit then addressed in detail what it referred to as an issue of "redundancy" – whether dual pleading of claims under section 502(a)(1)(B) and section 502(a)(3) is permissible. *Id*. at 725-28. Viewing this primarily as a matter of alternative pleading in accordance with Fed. R. Civ. P. 8(d)(2), the Eighth Circuit noted that, at the motion to dismiss stage, "it is difficult for a court to discern the intricacies of the plaintiff's claims to determine if the claims are indeed duplicative, rather than alternative, and determine if one or both could provide adequate relief." *Id*. at 727 (citations omitted). The Eighth Circuit concluded that a determination of whether the claims were impermissibly duplicative would be more appropriately made at the summary judgment stage, when "a court is better equipped to assess the likelihood for duplicate recovery, analyze the overlap between claims, and determine whether one claim alone will provide the plaintiff with 'adequate relief.'" *Id*. at 727. The Sixth Circuit has clearly rejected this dual-pleading analysis, Pet.

App. 11-12, but the Eighth Circuit has reaffirmed it in *Jones*, 856 F.3d at 545-47.

The Second and Ninth Circuits have likewise determined expressly that dual pleading of claims under section 502(a)(1)(B) and section 502(a)(3) is permissible. *New York State Psychiatric Ass'n*, 798 F.3d at 131-35; *Moyle*, 2016 U.S. App. LEXIS 15202, at *23-31. The Sixth Circuit decision in this case is also implicitly in conflict with decisions from the Fourth, Fifth, and Seventh Circuits that have approved claims for breach of fiduciary duty in the context of benefit claims, although those decisions do not explicitly address the dual pleading issue. *McCravy*, 690 F.3d at 181-82; *Gearlds*, 709 F.3d at 450-52; *Kenseth*, 722 F.3d at 885-90.

The irreconcilable conflict of the Sixth Circuit decision with cases from these other circuits regarding this fundamental issue clearly justifies a grant of a writ of certiorari at this time. Sup. Ct. R. 10(a).

## II. The Sixth Circuit Decision Conflicts with Relevant Decisions of this Court and Presents an Exceptionally Important Question of Federal Law that Requires a Uniform National Answer.

The Sixth Circuit decision in this case also conflicts in a very practical manner with this Court's decisions in *Amara* and *Varity*. *Amara* stands for the maxim that "[e]quity suffers not a right to be without a remedy," and that the remedy of surcharge falls

firmly "within the scope of the term 'appropriate equitable relief' in § 502(a)(3)." *Amara*, 563 U.S. at 442. The fact that the Court authorized equitable remedies in a case involving a benefit claim should put an end to this issue, and the Court recognized that the district court had declined to address the availability of equitable relief under section 502(a)(3) specifically because "the same relief was available under § 502(a)(1)(B)." *Id*. at 434. Clearly, this Court's analysis in *Amara* cannot accommodate the Sixth Circuit formulation that, "where an avenue of relief for the injury was available under § 1132(a)(1)(B), '*irrespective of the degree of success obtained*,' a breach-of-fiduciary claim cannot be brought." Pet. App. 12.

Resort to *Varity* is no more availing. The Court's decision in *Varity* grew directly out of its analysis of the objectives of ERISA, noting that "it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy." *Varity*, 516 U.S. at 513. Nothing in *Varity* requires a Court to dismiss a claim for breach of fiduciary duty simply because it rests on the same factual basis as a claim for benefits. The analysis of this issue in the Eighth Circuit's *Silva* decision is directly on point in this regard: "We do not read *Varity* and *Pilger* to stand for the proposition that Silva may only plead one cause of action to seek recovery of his son's supplemental life insurance benefits. Rather, we conclude those cases prohibit duplicate recoveries when a more specific section of the statute, such as § 1132(a)(1)(B), provides a remedy similar to

what the plaintiff seeks under the equitable catchall provision, § 1132(a)(3)." *Silva*, 762 F.3d at 726. "*Varity* does not limit the number of ways a party can initially seek relief at the motion to dismiss stage," and nothing in *Varity* overrules federal pleading rules permitting litigants to plead claims hypothetically or alternatively. *Id*. at 726, citing *Black v. Long Term Disability Insurance*, 373 F.Supp.2d 897, 902-03 (E.D. Wis. 2005).

The principles discussed in *Amara* and *Varity* lead directly to the conclusion that Jennifer Strang should be permitted to plead alternative claims for relief under ERISA section 502(a)(1)(B) and section 502(a)(3) without being subject to dismissal at the pleading stage. This is an important issue affecting the rights of employees and their beneficiaries to earned pension benefits, and it invokes the expectation that our courts will "develop a 'federal common law of rights and obligations under ERISA-regulated plans.'" *Firestone*, 489 U.S. at 110-11, quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987). This question deserves a uniform national answer consistent with the Court's prior decisions, and it therefore warrants a grant of a writ of certiorari at this time. Sup. Ct. R. 10(c).

## CONCLUSION

For all of these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT B. JUNE
*Counsel of Record*
LAW OFFICES OF ROBERT JUNE, P.C.
415 Detroit Street, 2nd Floor
Ann Arbor, MI 48104-1117
(734) 481-1000
bobjune@junelaw.com

*Counsel for Petitioner*

**NOT RECOMMENDED FOR PUBLICATION**
**File Name: 17a0282n.06**

**No. 16-2090**

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

| | |
|---|---|
| JENNIFER STRANG,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>FORD MOTOR COMPANY GENERAL RETIREMENT PLAN; FORD MOTOR COMPANY,<br><br>Defendants-Appellees. | ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN<br><br>(Filed May 19, 2017) |

BEFORE: BOGGS, MOORE, and McKEAGUE, Circuit Judges.

BOGGS, Circuit Judge. This case is at once an easy case and a hard one. We review whether Ford's interpretation of its plan was arbitrary or capricious, the "least demanding form of judicial review." *McClain v. Eaton Corp. Disability Plan*, 740 F.3d 1059, 1064 (6th Cir. 2014) (quoting *Cozzie v. Metro. Life Ins.*, 140 F.3d 1104, 1107 (7th Cir. 1998)). The terms of this plan are relatively straightforward and any ambiguities were resolved reasonably by the plan administrator. But in the end, the case is a hard one because, due primarily to the vicissitudes of fate, a retiree who made significant efforts to exercise an option to choose a lump-sum

benefit and care for his family did not meet the requirements established by the plan and thereby missed an opportunity at a much greater payout for his benefits. Yet precedent and the standard of review compel us to affirm the district court's dismissal of the breach-of-fiduciary-duty claim and grant of judgment on the administrative record to the Appellee, Ford.

## I.

John Strang had worked for the Ford Motor Company for over thirty-eight years and, following his retirement in 2007, was the beneficiary of a company pension. In April 2012, Ford notified Mr. Strang that "the Ford Plan would provide retiree participants with an option to take a lump sum distribution of their remaining retirement benefits beginning in August 2012."[1] In a letter sent to pensioners under Ford's General Retirement Plan, Ford explained that "a series of election periods will be held throughout 2012 and 2013. You will be assigned a specific election period based on a random process. . . . Under no circumstances will you be able to change your assigned election period." According to Appellant, Mr. Strang sought additional information from Ford's National Employee Service Center (NESC) without success. Not long afterward, at the end of July 2012, Mr. Strang was diagnosed with terminal cancer.

[1] The lump-sum option was not a preexisting entitlement or contractual benefit, but was a voluntary offer by Ford as an alternative to the existing benefits then being received by retirees.

Appellant claims that Mr. Strang and his wife contacted NESC on several occasions between July and October 2012 to request an expedited lump-sum package containing required forms. Although the district court notes that "the earliest such communication that appears in the administrative record is a telephone call from plaintiff . . . on November 13, 2012," the record does indicate that on October 31, Jennifer Strang – Mr. Strang's wife – called to inquire when the lump-sum package would be arriving. By this time, Mr. Strang's health had begun to deteriorate rapidly. Additional phone calls followed on November 13 and 16, with Mrs. Strang informing Ford that her husband was "very ill and may not live to the end of the year" and seeking a method to expedite the lump-sum election period; she was told by Ford that "no exceptions are being made." Sometime before November 16, a postcard from Ford reached the Strangs, informing Mr. Strang that his election period would be between December 14, 2012, and March 13, 2013. In a phone call on November 16, Mrs. Strang requested that Ford "rush the process . . . for her husband to get [the election forms] as soon as possible." The NESC again informed her that it could not be rushed.

The Strangs sent two letters to Ford that day. The first was from Mr. Strang, who wrote that his "death may be imminent" and, as a result, he wanted Ford to have documentation that his "election to receive my retirement distribution shall be the lump sum retirement distribution." The letter was somewhat contradictory, however. While it stated that "I

wish [the election choice] to be honored should I not survive," it also stated that "if I should not survive until December 14, 2012 and it is determined that making this plan election is NOT in the best interests of my spouse then she shall be empowered to make the election that is in her best interests." Mrs. Strang, who had power of attorney from Mr. Strang, also sent a letter in which she explained that Mr. Strang had been hospitalized, his prognosis was bleak, and he "wishe[d] to take the buyout." On November 18, 2012, Mr. Strang died.

On February 14, 2013, Ford sent Mrs. Strang a letter informing her that Mr. Strang had not submitted "a complete and valid election form during [his] election period" and, as he had died before his election period began, his attempt to elect a lump-sum payment was ineffective. Mrs. Strang retained the ability to take a future lump-sum payout of her survivor's benefits later in 2013, but the new offer was $463,254.78 less than the amount that the Strangs would have received had Mr. Strang's election been effective. Mrs. Strang, through her lawyer, submitted a claim to NESC on February 20, 2013, for the lump-sum benefits. The claim was "inadvertently delayed," and so with Mrs. Strang's consent the matter was treated as an appeal. On June 28, 2013, the Ford General Retirement Plan Retirement Committee (which administers the Plan) denied the appeal of the denial of lump-sum benefits on the basis that Mr. Strang's attempt to elect the lump-sum option "did not include the required election forms and was completed prior to Mr. Strang's lump

sum window election period." Furthermore, it found that "[w]hen Mr. Strang died on November 18, 2012, his eligibility for the lump sum opportunity ceased." The Committee denied Mrs. Strang's request for reconsideration on August 27, 2013.

Mrs. Strang brought suit on November 17, 2014, in the United States District Court for the Eastern District of Michigan. In her later, amended complaint, she sought penalties for failure to provide plan documents in accordance with 29 U.S.C. § 1132(c)(1)(B), equitable relief to reform the retirement plan and restitution pursuant to 29 U.S.C. § 1132(a)(3), and an award of unpaid lump-sum benefits pursuant to 29 U.S.C. § 1132(a)(1)(B). The district court granted Ford's motion to dismiss in part, dismissing the equitable claims on the basis that reformation was unavailable and restitution could not be sought where it would duplicate the relief available under another ERISA section. Mrs. Strang later withdrew the § 1132(c)(1)(B) claim. After both parties filed motions for judgment on the administrative record, the district court granted Ford's motion for judgment on the administrative record, holding that the plan administrator's decision to deny the lump-sum benefit was not arbitrary or capricious. Mrs. Strang timely appealed.

## II

### A. Denial-of-Benefits Claim

We generally review de novo a district court's judgment on the administrative record regarding an

ERISA denial of benefits. *Shelby Cty. Health Care Corp. v. Majestic Star Casino*, 581 F.3d 355, 367-68 (6th Cir. 2009). But where the plan gives the plan administrator discretionary authority to determine eligibility or construe terms of the plan, we review the denial of benefits "only to determine if it was 'arbitrary and capricious.'" *Marks v. Newcourt Credit Grp., Inc.*, 342 F.3d 444, 456 (6th Cir. 2003) (quoting *Miller v. Metro. Life Ins.*, 925 F.2d 979, 983 (6th Cir. 1991)); *see also Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). "Decisions of the administrator or fiduciary must be upheld, under the latter standard, if 'rational in light of the plan's provisions.'" *Borda v. Hardy, Lewis, Pollard & Page, P.C.*, 138 F.3d 1062, 1066 (6th Cir. 1998) (quoting *Miller*, 925 F.2d at 983). In this case, it is clear that the plan vests (and did vest at the time of decision) the Committee with "discretionary authority to administer the benefit structure of the Plan" and the power to "construe and interpret the Plan."

The plan explains that:

> Any Lump Sum Window Eligible Member shall be entitled to make an election under the Lump Sum Window effective as of their Lump Sum Window Qualified Retirement Date [i.e., a date designated for the Member]. Any Lump Sum Window Eligible Member who wishes to make an election under the Lump Sum Window must submit to the Company a completed and signed election form, in such manner as may be required by the Committee. . . .
>
> . . .

> An election under the Lump Sum Window shall not be effective unless a completed and signed election form is received by the Company before the expiration of the Lump Sum Window Election Period.

The term "Lump Sum Window Election Period" is further defined as "a consideration period of not less than 60 days and no more than 90 days assigned to a Lump Sum Window Eligible Member." It is plain in this case that the period assigned to Mr. Strang was from December 14, 2012, to March 13, 2013.

Ford denied the lump-sum amount for two reasons: Mr. Strang "died prior to his assigned Lump Sum Window Election Period" and "a proper election form was not submitted." Appellant argues that Ford was arbitrary and capricious in a number of ways, which we address in turn. First, Appellant argues that Ford was required to "furnish Mr. Strang with the means to" elect the lump-sum option when Mr. Strang requested them early. Second, she asserts that there is no reason why a retiree who dies prior to the assigned election period should be considered ineligible. Third, she contends that once Ford had all of the information it needed, it should have considered the election within the appropriate period and permitted it then. Finally, she claims that the assignment of the election period beginning in December was discriminatory because of Mr. Strang's terminal illness.

It is clear that submission of a "completed and signed election form, in such a manner as may be required by the Committee" was a prerequisite to choosing the lump-sum option. The election form was in fact provided to the Strangs on November 30, 2012. Thus, the core of Appellant's first claim is that the Strangs' requests for the forms earlier should have been honored. But there is nothing in the plan to suggest that the forms could be demanded before the election period, and Ford sent the form two weeks before Mr. Strang's election period began. It was not, then, irrational, arbitrary, or capricious to send the forms only in the weeks before the election period began.

Appellant contends, however, that the submission of Mr. Strang's letter in November should have sufficed to indicate his election, as it provided all the necessary information. Under this theory, once December 14, 2012, arrived, Ford should have determined that Mr. Strang had elected the lump-sum option and paid Mrs. Strang the money. But there are two problems with that reading. First, the plan clearly demarcates a fixed period for a retiree to elect an option. By describing a "Lump Sum Window Election Period" with a fixed length of "no more than 90 days" assigned to members, the plan contemplates that elections must take place within the period to be effective. Here, that period was from December 14, 2012, to March 13, 2013. Thus, it is reasonable that the period could begin no earlier than December 14 (else, the consideration period would be longer than ninety days), and Mr. Strang was not entitled to make an election before that date. Accordingly,

while the district court was right to observe that there is no provision explicitly requiring that a member make an election no earlier than the election period, an interpretation limiting the effectiveness of elections to that period is certainly "rational in light of the plan's provisions." *Miller*, 925 F.2d at 983.

Second, the letter was not the proper form, nor was it in truth really an election at all. Appellant argues that Mr. Strang's November 16 letter demonstrates his election, but it is equivocal at best. The letter contains strong language indicating that Mr. Strang wanted to elect the lump-sum option, but later contains language that purports to permit his wife to make an election choice if his choice were not in her best interests. While the letter gave some indications of how such best interests could be determined – indications that were explicitly left open-ended – the letter's decision leaves its determination so far open to further decisionmaking that it is not an election at all. Thus, it was not arbitrary or capricious to find that the letter was insufficient to constitute a proper election by Mr. Strang.

Furthermore, once Mr. Strang died on November 18, his wife was unable to elect for him. Even though Mrs. Strang had power of attorney from her husband, "a power of attorney, though irrevocable during the life of the party, becomes extinct by his death." *Hunt v. Rousmanier's Adm'rs*, 21 U.S. 174, 202 (8 Wheat. 1823). What was required was that Mr. Strang or someone with power of attorney over him make the election during the period and do so by submitting "a completed and signed election form." The letter was not in the

form required by the plan, nor were the appropriate forms filled out and submitted by Mr. Strang. True, he could not fill out the forms because he did not have them, but as noted above there was no obligation to send them far in advance of the election period. Reading the plan as requiring a particular signed election form "as may be required by the Committee" is not arbitrary or capricious.

Appellant claims that there is no reason why a retiree who dies prior to the assigned election period should be considered ineligible to receive lump-sum benefits. Ford responds that the plan requires that the "Lump Sum Window Eligible Member . . . submit" the election form, which is not possible after the member's death. Given that no power of attorney exists after death and Mr. Strang did not submit the form, Ford is correct to note that Mr. Strang did not comply with the terms of the plan. Such an interpretation is not arbitrary or capricious.

Finally, Appellant argues that providing a December window was discriminatory against a retiree who was likely to die before reaching the election period. But Mr. Strang's period was assigned randomly. To say that Ford had an obligation to move up the dates for anyone who claimed that their claim was urgent would have required an entirely new claim system. As the district court properly noted, "Defendants' adherence to a system whereby election periods were randomly assigned based on Social Security numbers is neither unfair nor discriminatory, but ensure[d] orderly and even-handed administration of the plan."

In sum, Ford's interpretation of the plan to include a fixed period during which the eligible member was required to submit specific election forms was "rational in light of the plan's provisions." *Miller*, 925 F.2d at 983. It is true that the facts here present a tragic case of the sometimes difficult nature of hard-line rules, but there is nothing in the plan that prevents Ford from keeping its structured plan intact so that it could provide an orderly system for the many other retirees that may have wished to elect their own lump-sum option. The interpretation was not arbitrary or capricious, and we affirm the district court holding.

B. Breach-of-Fiduciary-Duty Claim

Appellant also argues that the district court erred in dismissing its breach-of-fiduciary claim, as it should have been permitted as an alternative ground for relief. Not so. We held in *Rochow v. Life Insurance Co.*, 780 F.3d 364 (6th Cir. 2015) (en banc), that:

> [a] claimant can pursue a breach-of-fiduciary-duty claim under [29 U.S.C. § 1132(a)(3)], irrespective of the degree of success obtained on a claim for recovery of benefits under [§ 1132(a)(1)(B)], only where the breach of fiduciary duty claim is based on an *injury* separate and distinct from the denial of benefits or where the remedy afforded by Congress under [§ 1132(a)(1)(B)] is otherwise shown to be inadequate.

*Id.* at 372. Here, the injury for the breach of fiduciary duty and for the denial of benefits is one and the same.

Appellant contends that Ford's withholding of the election forms and failure to consider Mr. Strang's letter a proper election were both a breach of fiduciary duty and a denial of benefits. Perhaps recognizing this, Appellant argues that "[*Rochow*'s] focus is on prohibiting duplicative relief, not alternative pleading." But *Rochow* also noted that in the previous case of *Wilkins v. Baptist Healthcare System, Inc.*, 150 F.3d 609 (6th Cir. 1998), this Circuit had stated:

> [b]ecause [§ 1132(a)(1)(B)] provides a remedy for [the plaintiff's] alleged injury that allows him to bring a lawsuit to challenge the Plan Administrator's denial of benefits to which he believes he is entitled, he does not have a right to a cause of action for breach of fiduciary duty pursuant to [§ 1132(a)(3)].

*Rochow*, 780 F.3d at 372 (quoting *Wilkins*, 150 F.3d at 615). In *Wilkins* the plaintiff was unsuccessful in seeking the denial-of-benefits remedy, but was still precluded from bringing the breach-of-fiduciary-duty claim. *Wilkins* and *Rochow* demonstrate that where an avenue of relief for the injury was available under § 1132(a)(1)(B), "*irrespective of the degree of success obtained*," a breach-of-fiduciary-duty claim cannot be brought. *Rochow*, 780 F.3d at 372 (emphasis added). The only exception to this rule is, as noted above, where the injury is different or it would not be adequately remedied under § 1132(a)(1)(B). Appellant has not shown that the injury is different or that the remedy, were she successful, would be inadequate. "[T]he only asserted injury to [Strang] is the denial of benefits

and withholding of the same benefits. These are not distinct injuries; they are one and the same injury." *Id.* at 373. And the remedy sought is the same: the $463,254.78 difference between what Appellant received and what she would have received had Mr. Strang's election been effective. Accordingly, we affirm the district court's dismissal of the breach-of-fiduciary-duty claim.

## III

For the foregoing reasons, we **AFFIRM** the district court's dismissal of the breach-of-fiduciary-duty claim and grant of judgment on the administrative record to Ford.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JENNIFER STRANG,

Plaintiff,

vs.

FORD MOTOR COMPANY GENERAL RETIREMENT PLAN and FORD MOTOR COMPANY,

Defendants. /

Civil Action No. 14-CV-14410

HON. BERNARD A. FRIEDMAN

**OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS**

(Filed Oct. 23, 2015)

This matter is presently before the Court on defendants' motion to dismiss [docket entry 15]. Plaintiff has filed a response in opposition and defendants have filed a reply. Pursuant to E.D. Mich. LR 7.1(f)(2), the Court shall decide this motion on the briefs.

Plaintiff Jennifer Strang brings this action as the personal representative of the estate of her deceased husband, John Strang, and individually as the named beneficiary of his pension from his former employer, Ford Motor Company. Plaintiff alleges that in April 2012 Ford notified her husband "that the Ford Plan would provide retiree participants with an option to

take a lump sum distribution of their remaining retirement benefits beginning in August 2012." Am. Compl. ¶ 11. Plaintiff's husband wished to exercise this option, but his requests for additional information and for election forms, directed to Ford's human resources office, National Employee Service Center ("NESC"), went unanswered. *Id.* ¶¶ 13-16. In October 2012, NESC told plaintiff's husband that no information about the lump sum option would be available until the end of the year. *Id.* ¶ 17. In November 2012 Ford sent plaintiff's husband a postcard "stating that he was now eligible for the lump sum option," in response to which he "promptly sent Ford a letter on November 16, 2012 declaring that he was electing the lump sum option." *Id.* ¶¶ 18-19. However, a representative of NESC told plaintiff and her husband by telephone "that he would have to wait until December 2012 to obtain forms for electing the lump sum option . . . " *Id.* ¶ 20. Plaintiff's husband died on November 18, 2012. *Id.* ¶ 23. In mid-February 2013 Ford informed plaintiff's counsel that plaintiff's husband was ineligible for the lump sum benefit because he died before December 14, 2012, when the election period for that benefit opened. *Id.* ¶ 27. In late February 2013 plaintiff "submitted a claim to NESC, . . . [requesting] that the lump sum option elected by John Strang should be honored by Ford." *Id.* ¶ 29. In August 2013 the NESC Employee Benefits Committee ("EBC") affirmed the denial of benefits "on the basis that John Strang had not made his election before death." *Id.* ¶ 43. As a result of this decision, plaintiff "was limited to receiving a lump sum

buyout of her survivor's share of [her husband's] pension, which was $463,254.78 less than the amount that would have been received if [his] election of a lump sum buyout had been honored." *Id.* ¶ 45.

The defendants in this matter are Ford Motor Company General Retirement Plan ("Ford Plan") and Ford Motor Company ("Ford"). The amended complaint asserts four claims. In Count I, brought against Ford under 29 U.S.C. § 1132(c)(1)(B),[1] plaintiff alleges that she and her husband "repeatedly requested Ford to provide all of the instruments of the plan necessary to elect the lump sum option, including applicable plan documents and forms for electing the benefits" and that "Ford did not provide these documents [and] . . . the claim for lump sum benefits was prejudiced." *Id.* ¶¶ 48-49. In Count II, brought against both defendants

---

[1] Section 1132(c) states in relevant part:

> (1) Any administrator . . . (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph . . . (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

under 29 U.S.C. § 1132(a)(3),[2] plaintiff seeks "reformation of the Ford Plan to conform to the representations made about it, particularly with reference to the availability of the lump sum option that became effective on August 1, 2012." *Id.* ¶ 54. In Count III, brought against the Ford Plan under 29 U.S.C. § 1132(a)(1)(B),[3] plaintiff seeks the benefits to which she is entitled under the plan. And in Count IV, brought against Ford under 29 U.S.C. § 1132(a)(3), plaintiff asserts a claim for breach of fiduciary duty for "unreasonably refus[ing] to allow John Strang to take a lump sum buyout of his Ford Plan pension at a time when other participants were able to take the lump sum option." *Id.* ¶ 63. Plaintiff seeks "equitable relief, in the form of surcharge and/or restitution, to make Plaintiff whole . . . " *Id.* ¶ 65.

Defendants seek dismissal of the complaint pursuant to Fed. R. Civ. P. 12(b)(6). To survive such a motion, "a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell*

---

[2] Section 1132 states in relevant part: "(a) A civil action may be brought – . . . (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."

[3] Section 1132 states in relevant part: "(a) A civil action may be brought – (1) by a participant or beneficiary – (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

*Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). "Threadbare recitals of all the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* The "complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005). In deciding a motion to dismiss, the Court "must construe the complaint in the light most favorable to the plaintiff and accept all of the complaint's factual allegations as true." *Ziegler v. IBP Hog Mkt., Inc.*, 249 F.3d 509, 512 (6th Cir. 2001).

Defendant Ford first argues that Count I fails to state a claim for penalties under 29 U.S.C. § 1132(c)(1)(B) because the complaint does not allege plaintiff or her husband made a written request for documents to which they are statutorily entitled and, further, because only a plan administrator can be held liable under this section and Ford is not a plan administrator.[4] Defendant correctly notes that under § 1132(c)(1)(B) the penalties apply only when a plan administrator

[4] Defendants appear to believe that this claim is asserted against both of them. *See, e.g.*, Defs.' Br. at 11 ("Plaintiff seeks to hold Ford Motor Company General Retirement Plan and Ford Motor Company liable for penalties"). The Court construes the complaint as asserting this claim only against Ford. *See* Am. Compl. ¶¶ 48-51.

fails to "comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary"; and that the administrator must furnish, "upon written request of any participant or beneficiary, . . . a copy of the latest updated summary[] plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated." 29 U.S.C. § 1024(b)(4).

Claim forms are not included within § 1024(b)(4) because they "are simply documents used in the ministerial day-to-day processing of individual claims pursuant to other documents that determine the plan's operation." *Allinder v. Inter-City Prods. Corp.*, 152 F.3d 544, 549 (6th Cir. 1998). Therefore, to the extent plaintiff's claim for penalties is based on the allegation that Ford failed to provide her or her husband with claim forms or election forms or general information concerning the lump sum option, *see, e.g.*, Am. Compl. ¶¶ 13, 15, 16, 19, no claim for relief under § 1132(c)(1)(B) is stated. However, plaintiff also alleges that she requested "all applicable plan documents" and that she and her husband "repeatedly requested Ford to provide all of the instruments of the plan necessary to elect the lump sum option, including applicable plan documents. . . ." *Id.* ¶¶ 44, 48. Based on these allegations, a claim for penalties under § 1132(c)(1)(B) is stated. Whether the requests were made in writing and whether they sought documents covered under § 1024(b)(4) are matters the Court cannot decide on a

motion to dismiss.[5] Ford also argues that the claim for penalties fails because such a claim may be asserted only against plan administrators and the plan in this case is administered by the Ford General Retirement Plan Committee appointed by Ford, not by Ford itself. This argument fails because the plan, at page 50, plainly identifies "Ford Motor Company" as the "Plan Administrator." Pl.'s Ex. 1.

Accordingly, the Court shall grant defendants' motion as to Count I to the extent this claim is based on Ford's alleged failure to provide plaintiff or her husband with claim or election forms or general information about the lump sum option. However, the motion is denied to the extent this claim is based on Ford's alleged failure to provide documents covered by 29 U.S.C. § 1024(b)(4).

Defendants next seek dismissal of Count II, in which plaintiff seeks reformation of the plan under 29 U.S.C. § 1132(a)(3). Defendants argue that reformation of an ERISA plan is available only in cases of "mutual mistake . . . or a mistake of one party induced by the other's fraud," *Curtis v. Alcoa, Inc.*, 525 F. App'x 371, 380 (6th Cir. 2013), and that no fraud or mutual mistake is alleged. In response plaintiff argues that the plan should be reformed to reflect the parties' "actual

---

[5] By the same token, the Court cannot decide at this stage of the case whether Ford fully responded to plaintiff's and plaintiff's husband's requests for documents. The fact that Ford provided *a* responsive document (i.e., "the most recent version of the Plan document dated August 1, 2013," Defs.' Br. at 9) does not establish that it provided *all* responsive documents.

agreement," which she believes was formed when plaintiff's husband accepted defendants' offer to take the lump sum option in August 2012.

Reformation is unavailable under the facts plaintiff has alleged. Plaintiff apparently relies on "mutual mistake" as a basis for seeking reformation of the plan, as she does not challenge the above-stated rule from *Curtis* and she does not charge defendants with fraud. However, for reformation to be "appropriate equitable relief" under § 1132(a)(3), the mutual mistake must be such that it prevented the complaining participant or beneficiary from obtaining a benefit to which he/she was entitled under the plan *as written*. The claim in the instant case is similar to that in *Gabriel v. Alaska Elec. Pension Fund*, 773 F.3d 945 (9th Cir. 2014), in which plaintiff sought reformation of an ERISA plan based on misinformation provided to him by a plan representative. The request for reformation was denied because "[e]quitable remedies are not available where the claim would result in a payment of benefits that would be inconsistent with the written plan." *Id.* at 962 (citation and internal quotation omitted). In the present case as well, reformation is unavailable because the complaint alleges at most a unilateral mistake by a representative of the plan (i.e., by stating, perhaps erroneously, that "the lump sum option . . . became effective on August 1, 2012," Am. Compl. ¶ 54) that allegedly is inconsistent with the written plan. The Court shall therefore grant the motion to dismiss as to Count II.

Defendants next seek dismissal of Count III, in which plaintiff seeks an award of unpaid lump sum benefits pursuant to 29 U.S.C. § 1132(a)(1)(B). Defendants argue that this claim is based solely on plaintiff's allegation that she "is entitled to make a proper claim for benefits under the correct terms of the Ford Plan, as may be reformed by the Court," and that dismissal of the claim is appropriate because reformation is unavailable. Defs.' Br. at 15-16. To the extent plaintiff's claim for benefits is based on a reformed plan, defendants are correct. However, the complaint also seeks benefits under "the correct terms of the Ford Plan," and "the correct terms" can reasonably be construed to mean the terms as written, i.e., under the unreformed plan. Defendants' motion is therefore denied as to this claim.

Finally, defendants seek dismissal of Count IV in which plaintiff alleges that Ford breached its fiduciary duty to participants and beneficiaries by "unreasonably refus[ing] to allow John Strang to take a lump sum buyout . . . " Am. Compl. ¶ 63. Plaintiff seeks "equitable relief[ ] in the form of surcharge and/or restitution[ ] to make Plaintiff whole pursuant to 29 U.S.C. § 1132(a)(3)." *Id.* ¶ 65. Defendants correctly note that a request for equitable relief under this section may not be made when it would duplicate the relief available under other ERISA sections. *See, e.g.*, *Wilkins v. Baptist Healthcare Sys., Inc.*, 150 F.3d 609, 615 (6th Cir. 1998) (holding that plaintiff did "not have a right to a cause of action for breach of fiduciary duty" because this relief was duplicative of his request for benefits,

which he could seek under 29 U.S.C. § 1132(a)(1)(B)). As in *Wilkins*, plaintiff's remedy in this matter is to seek the allegedly unpaid lump sum benefits, not equitable remedies for Ford's alleged breach of fiduciary duty. Accordingly,

IT IS ORDERED that defendants' motion to dismiss is granted in part and denied in part as follows: The motion is denied as to Counts I and III, and granted as to Counts II and IV.

S/ Bernard A. Friedman
BERNARD A. FRIEDMAN
SENIOR UNITED STATES
DISTRICT JUDGE

Dated: October 23, 2015
Detroit, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JENNIFER STRANG,

Plaintiff,

vs.

FORD MOTOR COMPANY GENERAL RETIREMENT PLAN and FORD MOTOR COMPANY,

Defendants. /

Civil Action No. 14-CV-14410

HON. BERNARD A. FRIEDMAN

**OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD**

(Filed Jul. 7, 2016)

This matter is presently before the Court on cross motions for judgment on the administrative record [docket entries 33, 35]. Both parties have filed response briefs. Pursuant to E.D. Mich. LR 7.1(f)(2), the Court shall decide these motions without a hearing.

***Background***

Plaintiff Jennifer Strang brings this action as the personal representative of the estate of her deceased husband, John Strang, and individually as the named

beneficiary of his pension from his former employer, Ford Motor Company. Plaintiff alleges that in April 2012 Ford notified her husband "that the Ford Plan would provide retiree participants with an option to take a lump sum distribution of their remaining retirement benefits beginning in August 2012." Am. Compl. ¶ 11. Plaintiff's husband wished to exercise this option, but his requests for additional information and for election forms, directed to Ford's National Employee Service Center ("NESC"), went unanswered. *Id.* ¶¶ 13-16. In October 2012, NESC told plaintiff's husband that no information about the lump sum option would be available until the end of the year. *Id.* ¶ 17. In November 2012 Ford sent plaintiff's husband a postcard "stating that he was now eligible for the lump sum option," in response to which he "promptly sent Ford a letter on November 16, 2012 declaring that he was electing the lump sum option." *Id.* ¶¶ 18-19. However, a representative of NESC told plaintiff and her husband by telephone "that he would have to wait until December 2012 to obtain forms for electing the lump sum option . . . " *Id.* ¶ 20. Plaintiff's husband died on November 18, 2012. *Id.* ¶ 23. In mid-February 2013 Ford informed plaintiff's counsel that plaintiff's husband was ineligible for the lump sum benefit because he died before December 14, 2012, when the election period for that benefit opened. *Id.* ¶ 27. In late February 2013 plaintiff "submitted a claim to NESC, . . . [requesting] that the lump sum option elected by John Strang should be honored by Ford." *Id.* ¶ 29. In August 2013 the NESC Employee Benefits Committee ("EBC") affirmed the denial of benefits "on the basis that John

Strang had not made his election before death." *Id.* ¶ 43. As a result of this decision, plaintiff "was limited to receiving a lump sum buyout of her survivor's share of [her husband's] pension, which was $463,254.78 less than the amount that would have been received if [his] election of a lump sum buyout had been honored." *Id.* ¶ 45.

The defendants in this matter are Ford Motor Company General Retirement Plan ("Ford Plan") and Ford Motor Company ("Ford"). The amended complaint asserts four claims. However, plaintiff has withdrawn Count I and the Court has dismissed Counts II and IV. Therefore, only Count III remains. In this count, which is brought against the Ford Plan under 29 U.S.C. § 1132(a)(1)(B),[1] plaintiff seeks the benefits to which she is entitled under the plan.

***The Administrative Record***

Documents included within the administrative record largely confirm plaintiff's factual allegations, which defendants do not deny. In a letter dated April 27, 2012, Ford provided eligible retirees, including John Strang, "with advance notice of a new opportunity to take the remaining value of your General Retirement Plan (GRP) pension benefit as a single lump

[1] Section 1132 states in relevant part: "(a) A civil action may be brought – (1) by a participant or beneficiary – . . . (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;"

sum payment. This advance notice allows you time to start considering whether a single lump sum payment is right for you." Pg ID 365.[2] This letter further stated:

> Due to the size of the eligible GRP population and the time needed to administer the offer and process payments, a series of election periods will be held throughout 2012 and 2013. You will be assigned a specific election period based on a random process using the last two digits of your Social Security Number. Under no circumstances will you be able to change your assigned election period. You will be notified approximately one month prior to the start of your election period and will have 90 days to make your decision.
>
> Prior to your election period, you will receive a postcard followed by:
>
> • A Decision Guide providing full details about the opportunity, and
>
> • A personalized Election Kit containing the value of your pension benefit, your specific payment options and instructions on how to make an election.
>
> To help you make an informed decision, Ford plans to provide you access to financial education through an independent financial services firm. Additional details will be provided in your Decision Guide.

---

[2] Citations to pages within the administrative record reference the "Pg ID" number in upper right-hand corner of each page.

*Id.* According to this letter, "[t]he announcement of this offering was included in Ford's most recent earnings release on April 27, 2012." Pg ID 366.

The details of the lump sum offer are found in Appendix L ("Lump Sum Windows") of Ford's General Retirement Plan dated August 1, 2012. *See* Pg ID 1239-1242. The relevant provisions of Appendix L state:

> **Section 1 – 2012/2013 Retiree Lump Sum Window**
>
> **A. Definitions**
>
> The following capitalized terms, when used in this Section 1 have the following meanings, notwithstanding any different definition of such terms elsewhere in the Plan.
>
> 1. "Lump Sum Window" means the 2012/2013 Retiree Lump Sum Window provided for under this Section 1 of Appendix L, which Window is available exclusively for the benefit of Lump Sum Window Retirees during the period August 1, 2012 through July 31, 2013.
>
> 2. "Lump Sum Window Election Period" means a consideration period of not less than 60 days and no more than 90 days assigned to a Lump Sum Window Eligible Member.
>
> 3. "Lump Sum Window Eligible Member" means a Member of the Plan who has a benefit commencement date on or before February 1, 2013 and who:

(a) is a Retired Member in one of the Participating Organizations (as defined below); and

(b) is not excluded because the Member incurred a break in service on or after January 3, 2012 and has a benefit commencement date of July 1, 2012 or later; and

(c) is not excluded because the Member is under age 65 and on Disability Retirement; and

(d) is not excluded by the Company for administrative reasons; and

(e) is selected to participate in the Lump Sum Window in accordance with Section 1C of this Appendix L.

4. "Lump Sum Window Qualified Retirement Date" means a date designated for the Member.

5. "Lump Sum Window Retiree" means a Lump Sum Window Eligible Member who has made an effective election under Section 1C of this Appendix L and in accordance with the terms and conditions of the Lump Sum Window as set forth in this Appendix L.

6. "Participating Organizations" means Ford Motor Company and subsidiaries identified as eligible for the Lump Sum Window.

**B. Temporary and Limited Application of this Section**

1. Section 1 of this Appendix L is not intended to constitute a permanent part of the Plan, but is of temporary duration and limited applicability. The sole purpose of Section 1 of this Appendix L is to provide a window basis for the computation of benefits payable to Lump Sum Window Retirees and certain Spouses described in Section 1D of this Appendix L. This Appendix L shall not affect, or be taken into account in determining, any other benefits under the Plan of any participant other than a Lump Sum Window Retiree.

2. Section 1 of this Appendix L shall continue to apply in determining the right to benefits of each Lump Sum Window Retiree and the computation of such benefits.

3. The Lump Sum Window is voluntary and elective. No participant shall be required to elect benefits under the Lump Sum Window.

**C. Elections**

1. Any Lump Sum Window Eligible Member shall be entitled to make an election under the Lump Sum Window effective as of their Lump Sum Window Qualified Retirement Date. Any Lump Sum Window Eligible Member who

wishes to make an election under the Lump Sum Window must submit to the Company a completed and signed election form, in such manner as may be required by the Committee. If a completed and signed election form from a Lump Sum Window Eligible Member is received by the Company during such Member's Lump Sum Window Election Period, and such Member dies prior to the payment of any benefits, such election shall be effective.

2. An election under the Lump Sum Window shall not be effective unless a completed and signed election form is received by the Company before the expiration of the Lump Sum Window Election Period. An election under the Lump Sum Window may be revoked prior to the Member's Lump Sum Window Qualified Retirement Date by giving written notice to the Company in a form and in a manner acceptable to the Committee.

3. If a Lump Sum Window Eligible Member, upon the expiration of the Lump Sum Window Election Period, has not submitted to the Company a completed and signed election form under the Lump Sum Window, then the Lump Sum Window Eligible Member shall be deemed to have declined to make an election under the Lump Sum Window.

> 4. The Committee reserves the right to reject the application of any Lump Sum Window Eligible Member if, based on communications from the Internal Revenue Service, rejection of the application is necessary to preserve the qualification of the Plan under Code Section 401(a) or the tax-exempt status of the trust under Code Section 501. An election under this Section 1C by a Lump Sum Window Eligible Member shall be effective only if the Committee does not reject the Member's application under the Lump Sum Window. The Committee may reject such an application before the commencement of the Lump Sum Window Eligible Member's benefits.

Pg ID 1239-40.

Between October 31 and November 16, 2012, plaintiff telephoned the NESC four times, inquiring about the time frame for electing the lump sum option and requesting that the paperwork (i.e., claim forms) be mailed to her husband as soon as possible, as he was seriously ill and might not survive to the end of the year. *See* Pg Id 532. Plaintiff was told that "no exceptions are being made regarding the GRP Lump Sum program" and that her husband had to wait for the postcard, which would be followed by a decision guide, which would be followed by an election kit. Pg ID 532, 559.

On November 14, 2012, Ford mailed John Strang the postcard informing him that his election period for

the lump sum option was December 14, 2012, to March 13, 2013.[3] *See* Pg ID 368. This was followed on November 29 and 30, 2012, respectively, by the Decision Guide and Election Kit.[4] *See* Pg ID 373-88, 390-426.

In a letter to Ford dated November 16, 2012, and signed by plaintiff on her husband's behalf, John

---

[3] This postcard is undated, but defendants state they mailed it on November 14, 2012, *see* Pg ID 362, and plaintiff does not appear to dispute this date. In his November 16, 2012, letter to Ford, John Strang referred to the dates of his election period, which indicates he had received the postcard by then. *See* Pg ID 332.

[4] The Decision Guide (Pg ID 373-88) provided information to assist participants in deciding whether to elect the lump sum and, if so, whether to take the distribution in the form of direct payment, rollover, or a combination of the two. Information was also provided as to how the lump sum is calculated and factors to consider in weighing the relative advantages of the lump sum versus continued monthly benefits, including possible tax consequences. Additional information was provided in a DVD attached to the Decision Guide.

The Election Kit (Pg ID 390-426) contained various election forms. To elect the lump sum, John Strang would have checked the box next to "Option 1 – Lump Sum Payment Option" on "Form 1 – Benefit Election." Pg ID 397. Section 3 of this form required John Strang to verify his date of birth and marital status, his spouse's date of birth, and any applicable assignment (e.g., QDRO or IRS levy). *See* Pg ID 400-01. Section 5 of this form required an acknowledgment that John Strang had been provided by the plan administrator with various information (e.g., tax consequences and relative values of the options). *See* Pg ID 406-08. "Form 2 – Payment Direction" required John Strang to indicate how he wished to receive the lump sum, i.e., in cash, as a rollover, or a combination of the two. *See* Pg ID 410-11. "Form 3 – Waiver of Survivor Benefit," which had to be notarized, required Jennifer Strang to acknowledge and waive her rights to survivor benefits. *See* Pg ID 414-15.

Strang stated that he was hospitalized and that his death may be imminent. *See* Pg ID 332. He expressed his desire to elect the lump sum option. *Id.*[5] This letter was received by NESC on November 28, 2012. *See* Pg ID 341. John Strang died on November 18, 2012.

Plaintiff retained counsel to pursue the lump sum benefits based on John Strang's November 16, 2012, letter to Ford. In a letter dated February 14, 2013, Ford denied the claim for the following reasons:

> In order to make a GRP lump sum election, however, a GRP retiree must submit a complete and valid election form during their election period. Mr. Strang's election period did not open until December 14, 2012. Since he died before his election period opened, his eligibility for the lump sum opportunity ceased upon his death.

Pg ID 331. On June 28, 2013, the Employee Benefits Committee ("EBC") denied the claim on similar grounds, i.e., because John Strang "died prior to his assigned Lump Sum Window Election Period and, therefore, was not eligible to elect the GRP lump sum. In addition, there was no proper election form submitted." Pg ID 342.

---

[5] In 1996, John Strang executed a general durable power of attorney, appointing his wife Jennifer Strang as his agent and attorney-in-fact. *See* Pg ID 428-34. Defendants do not contend that Jennifer Strang lacked authority to act on John Strang's behalf.

On August 22, 2013, plaintiff's request for reconsideration was denied by the EBC for essentially the same reasons:

> Based on the provisions of the Plan, a member was not eligible to elect a lump sum payment until the member was selected to participate in the Lump Sum Window (Appendix L, Section 1(A)(3)) and the member's assigned Lump Sum Window Election Period commenced (Appendix L, Section 1(C)(1)).
>
> Because Mr. Strang died prior to commencement of his assigned Lump Sum Window Election Period, he never became eligible to elect a lump sum distribution, and thus had no vested interest in the lump sum opportunity. Further, the Plan requires a member who wishes to elect a lump sum distribution to submit a completed and signed election form during such member's assigned Lump Sum Window Election Period as required by the Committee (Appendix L, Section 1(C)(1)). Since Mr. Strang did not submit, and could not have submitted, such a completed form during his assigned Lump Sum Window Election Period because he died prior to such period, Mr. Strang was not eligible to, nor did he effectively, elect a lump sum distribution.

Pg ID 355.

***The Parties' Cross Motions for Judgment on the Administrative Record***

Plaintiff argues essentially that defendants' decision was arbitrary and capricious because John Strang elected the lump sum option during the one-year "Lump Sum Window" (August 1, 2012, to July 31, 2013) specified in paragraph A.1. of Appendix L. She argues that there is no provision in the plan requiring participants to make this election on any particular form or prohibiting them from making the election before their specifically assigned "Lump Sum Window Election Period" (in this case December 14, 2012, to March 13, 2013) or specifying how the 60-90 day election period would be determined. Nor, plaintiff argues further, is there any plan provision requiring that a participant be alive at the commencement of his/her election period or when Ford receives the election. Finally, plaintiff argues that defendants' decision was discriminatory because defendants were aware John Strang was seriously ill and nonetheless delayed assigning him an election period and providing him with election forms.

Defendants argue essentially that their decision was not arbitrary or capricious but followed the plain language of Appendix L. In particular, defendants argue Appendix L requires that each eligible retiree be assigned a 60-90 day election period within the larger one-year window and that an election of the lump sum option could be made only during that period and only on a prescribed election form. In short, defendants' argument is that "[b]ecause Mr. Strang did not submit a

legally-acceptable election form during his lump-sum election window, the Committee properly denied Plaintiff's claim for lump-sum benefits . . . " Defs.' Br. at 3. To the extent the plan is ambiguous as to these requirements, defendants argue that the EBC exercised its discretion reasonably in interpreting the plan to require the submission of the official claim forms during the election period.

***Standard of Review***

In a case such as this, where plaintiff challenges an ERISA plan administrator's decision denying benefits, the Court uses the "arbitrary and capricious" standard to review the decision if the administrator "is vested with discretion to interpret the plan. . . ." *DeLisle v. Sun Life Assur. Co. of Canada*, 558 F.3d 440, 444 (6th Cir. 2009) (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989)). Under this standard, the Court must uphold the administrator's decision "if it is 'rational in light of the plan's provisions.' " *Marks v. Newcourt Credit Grp., Inc.*, 342 F.3d 444, 456-57 (6th Cir. 2003) (quoting *Borda v. Hardy, Lewis, Pollard & Page, P.C.*, 138 F.3d 1062, 1066 (6th Cir.1998)). Further, the Court "may consider only the evidence available to the administrator at the time the final decision was made." *McClain v. Eaton Corp. Disability Plan*, 740 F.3d 1059, 1064 (6th Cir. 2014) (citing *Wilkins v. Baptist Healthcare Sys., Inc.*, 150 F.3d 609, 618 (6th Cir.1998)).

In the present case, the arbitrary and capricious standard of review applies because the plan grants the plan administrator, the Retirement Committee, discretion to interpret the plan and award benefits. The applicable provision of the August 1, 2012, plan is found at Article XIII, Section 2, which states:

> The Committee shall have discretionary authority to administer the benefit structure of the Plan, and to this end may construe and interpret the Plan, and may correct any defect or supply any omission or reconcile any inconsistency in such manner and to such extent as it shall deem expedient to carry out the purpose of the Plan. It shall not, however, take any action not uniformly applicable to all employees similarly situated.
>
> * * *
>
> Benefits under this Plan will be paid only if the Committee decides in its discretion that the claimant is entitled to them. Any action of the Committee (within the scope of its functions) shall be final and conclusive upon any Member and upon every other person entitled to or claiming benefits or membership under the Plan, unless arbitrary and capricious. A member of the Committee who is also a member of the Plan shall not vote or act as a member of the Committee upon any matter relating solely to himself or herself.

Pg ID 1020. Subsequent versions of the plan contain the same provision. *See* Pg ID 1350 (December 31, 2012, plan); Pg ID 1684 (March 1, 2013, plan); Pg ID

2021 (June 1, 2013, plan). This significant degree of discretion delegated by the plan to the Retirement Committee requires the Court to review its decision in this matter under the arbitrary and capricious standard.

***Discussion***

Plaintiff presents a sympathetic case. Her husband died on November 18, 2012, just 26 days before the commencement of his election period. Had John Strang survived until December 14, 2012, and had he submitted a valid election form, he would have received a lump sum benefit of nearly $1.1 million. *See* Pg ID 390. But because he died before that date, plaintiff was entitled to a bit less than half of this amount, i.e., the lump sum of her survivor's share of his pension.[6] The significance of this financial loss, and the closeness of the timing, is not lost on the Court. Nonetheless, the Court must conclude that the EBC's decision is "rational in light of the plan's provisions."

As noted, the decision denying benefits in this matter rests on two reasons, one concerning the timing of the election and the other concerning the manner in which the election was made. The first, concerning timing, is that "[b]ecause Mr. Strang died prior to

[6] As noted above, plaintiff alleges that she "was limited to receiving a lump sum buyout of her survivor's share of John Strang's pension, which was $463,254.78 less than the amount that would have been received if John Strang's election of a lump sum buyout had been honored." First Am. Compl. ¶ 45.

commencement of his assigned Lump Sum Window Election Period, he never became eligible to elect a lump sum distribution." Plaintiff correctly notes that Appendix L does not specifically require that an eligible member make a lump sum election during his election period. Paragraph C.2. requires that the election be made before the election period expires. Similarly, paragraph C.3. states that a member will be deemed to have declined to make an election if he fails to submit an election form before expiration of the election period. And paragraph C.1. states that if a member submits an election form during his election period and dies before benefits are paid, the election will nonetheless be honored. There is no provision specifically requiring that a member make an election for the lump sum during the member's election period.

Nonetheless, the EBC's disallowance of John Strang's election on the grounds that it was not submitted during his election period is "rational in light of the plan's provisions" and a legitimate exercise of its discretion to construe and interpret the plan. Paragraph A.2. of Appendix L establishes a 'Lump Sum Window Election Period' [that] means a consideration period assigned to a [member] of not less than 60 days and no more than 90 days," and the EBC reasonably could interpret this to mean that a member had this period, and only this period, to consider whether to elect the lump sum option, as opposed to continuing to receive benefits monthly. By its nature, a "period" is a

span of time with a beginning and an end. The beginning date of the period would serve no purpose if a member could elect the lump sum option prior thereto.

Further support for the EBC's interpretation is found in paragraph A.5., which requires a member to make "an effective election" and one that is "in accordance with the terms and conditions of the Lump Sum Window. . . ." The EBC reasonably could interpret these terms as requiring a member to elect the lump sum option – if at all – only during the election period assigned to him Similarly, paragraph B.1. states that the purpose of the section "is to provide a window basis for the computation of benefits payable to Lump Sum Window Retirees. . . ." The EBC could reasonably conclude that the purposes of the plan are best effectuated, and most efficiently administered, by enforcing the "window basis" of both the one-year Lump Sum Window and the 60-90 day election period.

The EBC's second reason for denying the claim in this matter is that John Strang's purported election, by letter dated November 16, 2012, was not made on the proper election form. Plaintiff correctly notes that the plan does not specifically require a member to use a particular form to elect the lump sum option. Nonetheless, the EBC's disallowance of the claim on this basis is "rational in light of the plan's provisions" and a legitimate exercise of its discretion to construe and interpret the plan. Paragraph C.1. of Appendix L requires any member wishing to make the election to "submit to the Company a completed and signed election form, in such manner as may be required by the

Committee." Requiring all members to use the same form has the obvious benefits of ensuring that the claim process is administered efficiently and that all claims are handled uniformly. In addition, the EBC acted reasonably by requiring members to use only the company's form because it also ensures that all members acknowledge they have been provided with important information regarding such things as the tax consequences of taking the lump sum option and the relative value of the various options.[7] The company's form also ensures that each member verifies certain personal information, discloses any applicable assignments, submits his/her spouse's waiver to survivor benefits, and indicates the manner in which the lump sum should be paid. The EBC acted reasonably in carrying out Appendix L by requiring any lump sum election to be made on the company's form and, moreover, to provide members with election forms only after (or

[7] As to this issue, defendants note that a plan is prohibited by IRS regulations from distributing a plan participant's accrued benefits without first obtaining the participant's written consent, which is not valid unless the plan has provided certain information about the distribution being offered. *See* 26 C.F.R. § 1.411(a)-11(c)(2) (requiring consent from participants after providing them with "a general description of the material features of the optional forms of benefit available under the plan" and informing them of "the right, if any, to defer receipt of the distribution"); 26 C.F.R. § 1.417(e)-1 ("Generally plans may not commence the distribution of any portion of a participant's accrued benefit in any form unless the applicable consent requirements are satisfied."). In the present case, the plan administrator acted reasonably in requiring members to use only the prescribed forms to elect the lump sum option, so as to ensure compliance with these regulations.

contemporaneously with) the lengthy Decision Guide and Election Kit. As noted, defendants mailed this information, along with claim forms, to John Strang at the end of November 2012. *See* Pg ID 373-88, 390-426.

In sum, the Court concludes that the EBC did not act arbitrarily or capriciously in denying John Strang's attempted election of the lump sum option. The EBC reasonably disallowed the attempted election on the grounds that it was submitted before the commencement of his election period and not on the required forms. Further, the Court rejects plaintiff's argument that defendants discriminated against John Strang by "determin[ing] that his election period was being delayed while he was terminally ill." Pl.'s Br. at 15. Defendants indicate, and plaintiff does not dispute, that each member's election period was assigned randomly based on Social Security numbers. There is no basis for the suggestion that defendants "delayed" in determining John Strang's election period. Indeed, since the "Lump Sum Window" ran from August 1, 2012, through July 31, 2013, John Strang's election period fell closer to the beginning than the end of this time frame. In any event, there is nothing in the administrative record to suggest that the selection of the dates of John Strang's election period was anything other than random.

Further, plaintiff points to no plan provision or case law to support her argument that defendants should have provided John Strang with claim forms on

demand.[8] Appendix L, paragraphs A.2. and B.1., specified 60-90 day election periods for all members to facilitate the orderly "computation of benefits payable to Lump Sum Window Retirees." Defendants' adherence to a system whereby election periods were randomly assigned based on Social Security numbers is neither unfair nor discriminatory, but ensures orderly and even-handed administration of the plan. If defendants were required to make an exception in any particular case, any member could demand that an exception be made in his/her case. There is nothing unreasonable, unfair, or discriminatory about assigning election periods randomly and declining to make exceptions.

***Conclusion***

For the reasons stated above, the Court concludes that defendants' decision in matter was not arbitrary or capricious. Accordingly,

---

[8] Nor, as a practical matter, does it seem likely that John Strang would have received the Decision Guide and Election Kit before his death, even if defendants had mailed these documents immediately upon learning of his illness. While the complaint alleges that "in July 2012, John Strang contacted NESC and requested an expedited lump sum package due to health reasons," First Am. Compl. ¶ 15, the earliest such communication that appears in the administrative record is a telephone call from plaintiff to the NESC on November 13, 2012, at 2:07 p.m., to the effect that John Strang was "very ill and may not live to the end of the year." Pg. ID 532. He died five days later, early in the morning on November 18, 2012.

IT IS ORDERED that plaintiff's motion for judgment on the administrative record is denied.

IT IS FURTHER ORDERED that defendants' motion for judgment on the administrative record is granted.

S/ Bernard A. Friedman
BERNARD A. FRIEDMAN
SENIOR UNITED STATES
DISTRICT JUDGE

Dated: July 7, 2016
Detroit, Michigan

No. 16-2090

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| JENNIFER STRANG,<br>Plaintiff-Appellant,<br>v.<br>FORD MOTOR COMPANY GENERAL RETIREMENT PLAN; FORD MOTOR COMPANY,<br>Defendants-Appellees. | ) | ORDER<br>(Filed Jul. 7, 2017) |

**BEFORE**: BOGGS, MOORE, and McKEAGUE, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

**ENTERED BY ORDER OF THE COURT**

/s/ Deb S. Hunt
**Deborah S. Hunt, Clerk**

* Judges Cook and Donald recused themselves from participation in this ruling.

**29 U.S.C. § 1132(a)(1)(B) and (a)(3)**

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought –

(1) by a participant or beneficiary –

* * *

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

* * *

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

Employee Retirement Income Security Act of 1974, § 502(a)(3), 29 U.S.C. § 1132(a)(1)(B) and (a)(3).

[LOGO]

**Inter Office** **CONFIDENTIAL**
**Employee Benefits**

June 27, 2012

To: F. J. Fields
D. G. Leitch
R. L. Shanks

Subject: Amendment to the General Retirement Plan ("GRP")

Purpose

To obtain approval, pursuant to authority delegated by the Board of Directors, of a plan amendment to the GRP as described below and as set forth substantially in the form of the attached document.

Background

The following amendment is being proposed in order to implement a Retiree Lump Sum Window for the period August 1, 2012 to July 31, 2013. This is the first of several voluntary one-time lump sum pension payment offerings from the GRP to retirees, surviving beneficiaries, and terminated vested participants, that are planned through December 31, 2013.

Proposal

It is proposed that the GRP be amended to permit a Retiree Lump Sum Window for any remaining payments payable to retirees who commence benefit

payments on or before February 1, 2013, excluding those retirees who were previously eligible to elect a lump sum pension payment upon their break in service. The one-time voluntary lump sum pension payment offering to Salaried retirees and Hourly retirees who receive benefits from the GRP will be contained within the 12 month period from August 1, 2012 to July 31, 2013. Retirees will be offered a limited number of immediate annuity options, in addition to the lump sum.

Cost

Retirees will be offered the actuarial present value of their benefit. The expected decrease in plan obligation for this retiree group as a result of this lump sum offering is $3.7 billion.

Staff Reviews

Employee Benefits Finance has no objection.

The Office of the General Counsel and the Office of Tax Counsel have no legal or tax objections.

Concur:

/s/ [B. A. Benson] 6/20/12
B. A. Benson

/s/ [Richard M. Popp] 6/20/12
R.M. Popp

/s/ [B. Gorichan]
B. Gorichan

Approve:

/s/ [F.J. Fields] /s/ [D. G. Leitch]
F.J. Fields D. G. Leitch

/s/ [R. L. Shanks]
R. L. Shanks

**[Ford Motor Company General Retirement Plan]**

## Appendix L
## Lump Sum Windows

### Section 1 – 2012/2013 Retiree Lump Sum Window

### A. Definitions

The following capitalized terms, when used in this Section 1 have the following meanings, notwithstanding any different definition of such terms elsewhere in the Plan.

1. "Lump Sum Window" means the 2012/2013 Retiree Lump Sum Window provided for under this Section 1 of Appendix L, which Window is available exclusively for the benefit of Lump Sum Window Retirees during the period August 1, 2012 through July 31, 2013.

2. "Lump Sum Window Election Period" means a consideration period of not less than 60 days and no more than 90 days assigned to a Lump Sum Window Eligible Member.

3. "Lump Sum Window Eligible Member" means a Member of the Plan who has a benefit commencement date on or before February 1, 2013 and who:

   (a) is a Retired Member in one of the Participating Organizations (as defined below); and

   (b) is not excluded because the Member incurred a break in service on or after January 3, 2012 and has a benefit commencement date of July 1, 2012 or later; and

(c) is not excluded because the Member is under age 65 and on Disability Retirement; and

(d) is not excluded by the Company for administrative reasons; and

(e) is selected to participate in the Lump Sum Window in accordance with Section 1C of this Appendix L.

4. "Lump Sum Window Qualified Retirement Date" means a date designated for the Member.

5. "Lump Sum Window Retiree" means a Lump Sum Window Eligible Member who has made an effective election under Section 1C of this Appendix L and in accordance with the terms and conditions of the Lump Sum Window as set forth in this Appendix L.

6. "Participating Organizations" means Ford Motor Company and subsidiaries identified as eligible for the Lump Sum Window.

**B. Temporary and Limited Application of this Section**

1. Section 1 of this Appendix L is not intended to constitute a permanent part of the Plan, but is of temporary duration and limited applicability. The sole purpose of Section 1 of this Appendix L is to provide a window basis for the computation of benefits payable to Lump Sum Window Retirees and certain Spouses described in Section 1D of this Appendix L. This

Appendix L shall not affect, or be taken into account in determining, any other benefits under the Plan of any participant other than a Lump Sum Window Retiree.

2. Section 1 of this Appendix L shall continue to apply in determining the right to benefits of each Lump Sum Window Retiree and the computation of such benefits.

3. The Lump Sum Window is voluntary and elective. No participant shall be required to elect benefits under the Lump Sum Window.

**C. Elections**

1. Any Lump Sum Window Eligible Member shall be entitled to make an election under the Lump Sum Window effective as of their Lump Sum Window Qualified Retirement Date. Any Lump Sum Window Eligible Member who wishes to make an election under the Lump Sum Window must submit to the Company a completed and signed election form, in such manner as may be required by the Committee. If a completed and signed election form from a Lump Sum Window Eligible Member is received by the Company during such Member's Lump Sum Window Election Period, and such Member dies prior to the payment of any benefits, such election shall be effective.

2. An election under the Lump Sum Window shall not be effective unless a completed and signed election form is received by the Company before the expiration of the Lump Sum

Window Election Period. An election under the Lump Sum Window may be revoked prior to the Member's Lump Sum Window Qualified Retirement Date by giving written notice to the Company in a form and in a manner acceptable to the Committee.

3. If a Lump Sum Window Eligible Member, upon the expiration of the Lump Sum Window Election Period, has not submitted to the Company a completed and signed election form under the Lump Sum Window, then the Lump Sum Window Eligible Member shall be deemed to have declined to make an election under the Lump Sum Window.

4. The Committee reserves the right to reject the application of any Lump Sum Window Eligible Member if, based on communications from the Internal Revenue Service, rejection of the application is necessary to preserve the qualification of the Plan under Code Section 401(a) or the tax-exempt status of the trust under Code Section 501. An election under this Section 1C by a Lump Sum Window Eligible Member shall be effective only if the Committee does not reject the Member's application under the Lump Sum Window. The Committee may reject such an application before the commencement of the Lump Sum Window Eligible Member's benefits.

**D. Computation of Benefits under the Window**

The computation of benefit provisions under Section 1 of this Appendix L shall recognize a Lump Sum Window Retiree's election of one of the following benefits:

1. A lump sum retirement benefit, which shall be an amount equal to the Actuarial Equivalent of the remaining monthly benefits payable, including the following, if applicable:

   (i) Life Income Benefit; and

   (ii) Supplemental Allowance and/or Temporary Benefit; and

   (iii) survivor's benefit; and

   (iv) Special Age 65 Benefit; and

   (v) restoration of survivorship coverage upon death of surviving spouse.

   The lump sum retirement benefit shall be calculated on the following basis:

   (i) The mortality table as defined under Code Section 417(e)(3)(B); and

   (ii) The annual rate of interest as defined under Code Section 417(e)(3)(C), determined for the third calendar month preceding the first day of the year which includes the date on which the distribution is paid from the Trust, or such other rate of interest as may be prescribed by law.

Note: Participants married as of the date of distribution, or participants who have a Qualified Domestic Relations Order ("QDRO") may be required to obtain their Spouse's consent (or former Spouse under a QDRO) to receive payment of the lump sum retirement benefit. Without such consent, the Lump Sum Window Eligible Member shall be deemed to have declined to make an election under the Lump Sum Window.

With respect to any distribution under this Section, to the extent that such payment is at least $200, the Member may elect, at the time and in the manner prescribed, to have any portion of such lump sum retirement benefit paid directly to an "eligible retirement plan" pursuant to the provisions of Article XII, Section 1. If such person does not elect a direct rollover, then the taxable portion of the distribution will be subject to the mandatory Federal income tax withholding described in Section 3405 of the Code and applicable mandatory state income tax withholding.

2. An immediate monthly annuity, which shall be equal to an Actuarial Equivalent of the lump sum value of the remaining monthly benefits payable. The payment of any remaining Supplemental Allowance and/or Temporary Benefit, any Special Age 65 Benefit and any redetermination of any noncontributory benefits at Age 62 and One Month, not included in the new immediate annuity, will continue as in effect as of the Lump Sum Window Retiree's original annuity starting date.

The optional forms of the immediate annuity shall include the following:

(i) an immediate single life annuity, if single;

(ii) if married, an immediate 65% joint and survivor annuity; and

(iii) if married, an immediate 75% joint and survivor annuity.

The immediate 65% joint and survivor annuity will not change during the Lump Sum Retiree's lifetime on the death of the Spouse because the value of the potential restoration was included in determining the immediate annuity.

The immediate annuity shall be calculated on the following basis:

(iii) The mortality table as defined under Code Section 417(e)(3)(B); and

(iv) The annual rate of interest as defined under Code Section 417(e)(3)(C), determined for the third calendar month preceding the first day of the year which includes the date on which the distribution is paid from the Trust, or such other rate of interest as may be prescribed by law.

**E. Effect of Lump Sum Retirement Benefit**

Payment of a lump sum retirement benefit will represent full settlement of all rights of such Lump Sum

Window Retiree under the Plan related to the underlying benefits included in the lump sum.

### F. Miscellaneous

This Section 1 shall be interpreted and applied by the Committee in a consistent and nondiscriminatory manner in accordance with the purposes of this Appendix L and of the Plan as a whole.

**[Ford Motor Company General Retirement Plan]**

## Article XIII [Excerpt]
## Retirement Committee

### Section 1 – Establishment and Procedure

Ford Motor Company shall appoint a Retirement Committee of not less than three nor more than five persons who shall serve at the pleasure of Ford Motor Company. Each member of the Committee shall have an alternate appointed in the same way. In the event a member of the Committee is absent from a meeting, the member's alternate may attend and, when in attendance, shall exercise the powers and perform the duties of such member. Vacancies in the Committee membership arising by resignation, death, removal or otherwise, shall be filled by Ford Motor Company. The Committee shall appoint a Secretary who shall keep minutes of its proceedings.

The Committee may act by a majority of its appointed members, and such action may be taken from time to time by vote at a meeting, or in writing without a meeting. The Committee may authorize any one or more of its members or its Secretary to execute any document on its behalf.

### Section 2 – Powers

The Committee shall have discretionary authority to administer the benefit structure of the Plan, and to this end may construe and interpret the Plan, and may correct any defect or supply any omission or reconcile

any inconsistency in such manner and to such extent as it shall deem expedient to carry out the purpose of the Plan. It shall not, however, take any action not uniformly applicable to all employees similarly situated.

The Committee shall adopt from time to time tables for use in all actuarial calculations required in connection with its administration of the Plan, and shall establish from time to time the rate or rates of interest which, compounded annually, shall be used in all interest or actuarial calculations required in connection with its administration of the Plan.

Benefits under this Plan will be paid only if the Committee decides in its discretion that the claimant is entitled to them. Any action of the Committee (within the scope of its functions) shall be final and conclusive upon any Member and upon every other person entitled to or claiming benefits or membership under the Plan, unless arbitrary and capricious. A member of the Committee who is also a member of the Plan shall not vote or act as a member of the Committee upon any matter relating solely to himself or herself.

* * *