No. 14-3189

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

LYDIA MALLON, on behalf of herself
and all others similarly situated,

Plaintiff-Appellant,

v.

TROVER SOLUTIONS, INC., d/b/a HEALTHCARE
RECOVERIES, INC., INDEPENDENCE BLUE CROSS, and
QCC INSURANCE CO.,

Defendants-Appellees.

On appeal from the United States District Court
for the Eastern District of Pennsylvania
Hon. R. Barclay Surrick
No. 2:11-cv-00326-RBS

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Under the settled law of this Court, a plaintiff need not exhaust administrative remedies before filing a suit to remedy violations of statutory duties imposed by ERISA. Applied to this case, that rule gives rise to the inescapable conclusion that the district court's dismissal of Ms. Mallon's SAC on the grounds that Plaintiff had failed to exhaust administrative remedies was improper.

In her SAC, Ms. Mallon alleged facts that easily satisfy the requirement of stating a plausible claim for relief for statutory violations of ERISA. Indeed, the allegations support legal theories arising under 29 U.S.C. § 1104(a)(1)(A) and 29 U.S.C. § 1104(a)(1)(D), and such claims are entirely distinct from a "claim for benefits due." As such, it was error for the district court to conclude that Ms. Mallon's claims were barred by an administrative exhaustion requirement. The district court doubly erred when it failed to realize that even if an exhaustion requirement were applicable in this case, it was satisfied by Ms. Mallon as a result of Defendants' failure to (1) meet ERISA's notice requirements and (2) establish an administrative process or remedy to resolve subrogation disputes.

As discussed below, the cacophony of arguments presented by Defendants in the opposition are unpersuasive. This Court should reverse the order of the district court and allow Ms. Mallon's case to proceed to the merits.

ARGUMENT

I. Ms. Mallon was not required to exhaust administrative remedies because she seeks relief for violations of ERISA, not to enforce the terms of the Plan.

Defendants' exhaustion arguments ignore Ms. Mallon's opening brief. As Ms. Mallon has already explained at length, she was not required to exhaust administrative remedies because she seeks relief for independent violations of ERISA and not to enforce the terms of her Plan. *See generally* Br. at 23-24, 33-38. Defendants offer three unresponsive, and unpersuasive, counterarguments.

First, Defendants insist that Ms. Mallon is procedurally barred from advancing the arguments in her opening brief because those arguments did not appear in the SAC and are inconsistent with its allegations. Defendants are confused. To be sure: Plaintiffs may not rely on new factual allegations introduced on appeal. *See, e.g.*, *Henthorn v. Dep't of Navy*, 29 F.3d 682, 688 (D.C. Cir. 1994) ("[T]he sparse case law addressing the effect of factual allegations in briefs or in memoranda of law suggests that such matters may never be considered when deciding a 12(b)(6) motion, and most certainly may not be considered when the facts they contain contradict those alleged in the complaint."); *Frederico v. Home Depot*, 507 F.3d 188, 201 (3d Cir. 2007) (ignoring "after-the-fact allegation[]" about time that plaintiff returned to a vehicle). But there are no new factual

allegations in the opening brief.[1] Instead, as the opening brief amply demonstrates, Ms. Mallon's SAC contains factual allegations supporting a plausible claim that Defendants violated their statutorily-imposed fiduciary duties under § 1104(a)(1)(A) and § 1104(a)(1)(D). As Defendants' own authorities make clear, at this stage courts consider the merits of *any* theory of relief that finds "support in the allegations set forth in the complaint." *Pennsylvania ex rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173, 181 (3d Cir. 1988); *see also Hayes v. Whitman*, 264 F.3d 1017, 1025 (10th Cir. 2001). And it is beyond dispute that § 502(a)(3) permits a participant to seek declaratory, injunctive, and equitable relief to remedy fiduciary breaches and to preclude the enforcement of plan terms that violate ERISA. *See* 29 U.S.C. § 1132(a)(3).

Defendants make much of the fact that Ms. Mallon's SAC referenced § 1132(a)(1)(B). *See, e.g.*, Opp. at 23 (SAC "unambiguously asserts a claim under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), for which exhaustion of administrative remedies is required."). It is true that out of an abundance of caution, Ms. Mallon's trial counsel initially requested declaratory relief pursuant to

[1] There are no new legal theories, either. *Compare* Opp. at 25-26 (claiming that Ms. Mallon's argument on appeal that she seeks to preclude enforcement of the Plan is new) *with* Dkt. No. 29, at 1-2 (arguing before district court, "Plaintiff does not seek to enforce any term of the benefit plan. Indeed, she seeks declaratory and injunctive relief under section 502(a)(3) to preclude the enforcement of the subrogation clause against her . . . .").

§ 1132(a)(1)(B). App. 66; Br. at 42. But this is irrelevant for three reasons: (1) Ms. Mallon was not required to cite specific statutory provisions in her SAC, *see Johnson v. City of Shelby*, 135 S. Ct. 346 (2014); (2) a citation to § 502(a)(1)(B) is not inconsistent with a citation to § 502(a)(3); and (3) even if such a citation were, inconsistency is *expressly permitted* by Fed. R. Civ. P. 8(d). Moreover, as both trial counsel and appellate counsel have since repeatedly explained, "the relief sought by Plaintiff is *only* available under Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3)." Br. at 23 (citing *infra* pages 31-36); *see also* Br. at 24 (citing, *inter alia*, Plaintiff's Sur-Reply, Dkt. No. 27, at 2).

Second – and related to their failure to acknowledge that Ms. Mallon has alleged sufficient facts to support plausible claims under § 502(a)(3) – Defendants argue that Ms. Mallon's claims "all depend on a threshold determination that the Plan's subrogation lien was invalid," which rests invariably upon Plan interpretation. Opp. at 24. Again, as Ms. Mallon's opening brief explains in painstaking detail, her claims are *statutory*—they rest invariably upon interpretation of ERISA. *See* Br. at 31-46. For example, the SAC alleges that Defendants breached their fiduciary duties under 29 U.S.C. § 1104(a)(1)(A) by misrepresenting the funding status of the Plan, refusing to provide timely proof of its funding status, and improperly contacting her directly, among other misconduct. Br. at 35-36. Defendants' abusive collection practices have nothing to do with the

validity of the asserted debt. As Ms. Mallon has explained, even if she "*conceded* that the Plan contains a valid reimbursement provision, she would be entitled to repayment of the $4,078.42 . . . because defendants obtained those funds through a breach of duty." Br. at 37. These claims do not require the type of plan interpretation that implicates the expertise of plan administrators. Nor are they benefits claims in disguise. Rather, they are statutory claims that are not subject to an exhaustion requirement in this Court.

Finally, Defendants argue that "well-settled Third Circuit law classif[ies] subrogation disputes as benefits claims." Opp. at 23; *see also* Opp. at 29. To be sure: the Third Circuit has twice in dicta characterized challenges to reimbursement provisions as claims for benefits due. *See* Br. at 42-45 (discussing *Wirth v. Aetna U.S. Healthcare*, 469 F.3d 305 (3d Cir. 2006) and *Levine v. United Healthcare Corp.*, 402 F.3d 156 (3d Cir. 2005)); *see also In re Friedman's Inc.*, 739 F.3d 547 (3d Cir. 2013) (three-part test was non-binding dicta even though later described as "holding"). As the opening brief makes clear, however, the Third Circuit has never decided or even considered whether such claims are properly asserted under § 1132(a)(1)(B) or under § 1132(a)(3).[2] Br. at 43, 45. Nor has it

[2] That is because the outcome in both *Wirth* and *Levine* depended on a different question: whether the plaintiffs' state-law claims were remediable under ERISA at all. *See* Br. at 44-45.

considered that subrogation disputes may not all be alike.[3] Br. at 31-32. In short, this Court has never even been made aware of the existence of the issues in this case, much less "settled" them.

II. Ms. Mallon is deemed to have exhausted her administrative remedies because Defendants provided both inadequate notice and inadequate procedures.

Defendants do not seriously defend the adequacy of the "notice" they gave Ms. Mallon of the Plan's appellate procedures. Instead, they assert that Mr. Gillman's legal representation of Ms. Mallon relieved them of ERISA's notice requirement altogether. *See* Opp. at 43 ("Plaintiffs must pursue administrative remedies even without a formal invitation from the Plan to exhaust. This is especially so where, as here, they are represented by counsel."); *id.* at 43-44 (citing *Gatti v. Western Pennsylvania Teamsters & Employers Welfare Fund*, No. 07-1178, 2008 WL 794516 (W.D. Pa. Mar. 24, 2008)). Defendants also ask this Court to excuse their admittedly inadequate notice on the grounds of "substantial compliance." *Id.* at 45.

Not surprisingly, Defendants offer no support for their extraordinary contention that a Plan participant forfeits her notice rights under ERISA when she

[3] Contrary to Defendants' suggestion, the Supreme Court's decision in *US Airways, Inc. McCutchen*, 133 S. Ct. 1537 (2013) ("*McCutchen*"), does not "confirm[] that subrogation disputes are disputes over plan terms." Opp. at 23. In *McCutchen,* the Supreme Court made the commonsense observation that the scope of a contractual subrogation provision depends on its terms. 133 S. Ct. at 1551.

retains counsel.[4] Their reliance on *Gatti* is misplaced. *Cf.* Opp. at 44. In *Gatti*, the plaintiff withdrew her administrative appeal, then claimed that defendants were estopped from arguing that she had failed to exhaust because defense counsel had told her, "there are no exhaustion of remedies issues." *Gatti*, No. 07-1178, 2008 WL 794516, at *4. The court reasoned that a represented plaintiff could not rely on opposing counsel's misstatement of legal doctrine. *Id.* at *4 n.2. Defendants in this case never told Ms. Mallon that an administrative appeal was available at all, much less in the detail required by 29 C.F.R. §§ 2560.503-1(g)(i)-(iv).[5] *See* Br. at 48. Ms. Mallon did not rely on an opponent's mistaken legal advice; she relied on the factual misrepresentations of her own Plan.

Defendants' plea of "substantial compliance" is equally baseless. Defendants rely exclusively on the fact that Trover eventually mailed a copy of the Plan to Mr. Gillman. *See* Opp. at 45. But this Court has long since held that "[t]he

[4] The text of ERISA undermines Defendants' position. As the district court correctly stated, "'ERISA requires that every employee benefit plan 'provide adequate notice in writing to *any participant* . . . whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial . . . .'" App. 14-15 (quoting *Brown v. First Reliance Standard Life Ins. Co.*, No. 10-486, 2011 WL 1044664, at *8 (W.D. Pa. Mar. 18, 2011) (quoting 29 U.S.C. § 1331(1)) (emphasis added).

[5] For the reasons discussed below, the Plan did not actually have an administrative appeal available for a participant in Ms. Mallon's circumstances. *See infra* pages 8-9. At the very least, it was reasonable for Mr. Gillman not to suspect based on the information he received that such an appeal process existed.

fact that [a participant's] attorney had a copy of the Plan, and thus the means to ascertain the proper steps for requesting review, in no way excuses [a plan's] failure to comply with the Department of Labor's regulations." *Epright v. Environmental Res. Mgmt., Inc. Health & Welfare Plan*, 81 F.3d 335, 342 (3d Cir. 1996). There is no dispute that Defendants failed to describe "any additional material or information necessary for [Ms. Mallon] to perfect the claim," as required by 29 C.F.R. § 2560.503-1(g)(iii), or "the review procedures and the time limits applicable to such procedures," as required by 29 C.F.R. § 2560.503-1(g)(iv). Ms. Mallon should be deemed to have exhausted the remedies that Defendants never told her she had. 29 C.F.R. § 2560.503-1(1); *Conley v. Pitney Bowes*, 34 F.3d 714 (8th Cir. 1994) (notice is condition precedent to defense of failure to exhaust).

Perhaps more to the point, there were no administrative remedies available to Ms. Mallon. Defendants' new position that she could have lodged a "complaint" does not hold up to cursory inspection; disputing a collection letter is not an "expression of dissatisfaction." *Cf.* Opp. at 46. Nor could Ms. Mallon have pursued an "administrative appeal," which the Plan limits to "unresolved disputes or objections regarding *coverage terms* such as contract exclusions and non-covered benefits." App. 211 (emphasis added). Defendants urge this Court to interpret "disputes . . . regarding coverage terms" broadly, *see* Opp. at 46-47, but

they do not explain how *any* construction could extend to a dispute in which all parties agree that the benefits are "covered." *See* Br. at 51.

III. Public policy considerations weigh against requiring Ms. Mallon to exhaust.

Defendants' public policy arguments are unpersuasive. The opposition brief recites the theoretical benefits of the exhaustion doctrine without explaining how they apply to this case. *See* Opp. at 28-29; *id.* at 48 (listing purposes of exhaustion doctrine per *Metropolitan Life Ins. Co. v. Price*, 501 F.3d 271, 278-79 (3d Cir. 2007)). For example, Defendants note that exhaustion in general serves to prevent premature judicial interference with plan fiduciaries' expert and efficient plan management. Opp. at 28. But the issues here involve the application of legal doctrines that "plan fiduciaries have no expertise in interpreting." *Zipf v. Tel. & Tel. Co.*, 799 F.2d 889, 893 (3d Cir. 1986); *see also* Br. at 41 (legal questions include preemption and disclaimer of common-fund doctrine). And as this Court explained in *Zipf*, whether Defendants violated their statutory duty of loyalty is a question within the "peculiar expertise" of the courts. 799 F. 2d at 893.

Defendants also misunderstand what they call Ms. Mallon's "theoretical dichotomy" in which participants but not fiduciaries must exhaust administrative remedies. Opp. at 48. Defendants rightly think it would be odd to require fiduciaries to seek administrative review before making a benefits decision. *Id.* But no one has suggested such a requirement. Instead, Ms. Mallon pointed out in

the opening brief that it would be odd to impose an administrative hurdle to a participant's § 1132(a)(3) action challenging reimbursement, given that no such hurdle exists to a fiduciary's § 1132(a)(3) action seeking reimbursement. *See* Br. at 40-41.

Finally, Defendants describe Ms. Mallon as "the least appropriate candidate to complain" about the exhaustion requirement because she "had ample opportunity to pursue administrative remedies and would not have been prejudiced in the least had she done so." Opp. at 49. That suggestion is both immaterial and untrue, see *infra* pages 6-9 (Section II).

CONCLUSION

The order of the district court should be reversed.

Respectfully submitted,

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COMBINED CERTIFICATIONS

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2. Word Count, Typeface, and Type Style: I certify that I certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief (as indicated by my word processing program, Microsoft Word) contains 2,371 words, excluding those portions excluded under Rule 32(a)(7)(B)(iii). I also certify that this brief complies with the typeface requirements of Rule 32(a)(5) and type style requirements of Rule 32(a)(6) because this brief has been prepared in the proportionally spaced typeface of 14-point Times New Roman.

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Dated: November 24, 2014

/s/ Peter K. Stris
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