Moitoso et al v. FMR LLC et al Doc. 173

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

KEVIN MOITOSO, TIM LEWIS, MARY LEE TORLINE, and SHERYL ARNDT, individually and as representatives of a class of similarly situated persons, and on behalf of the FIDELITY RETIREMENT SAVINGS PLAN,

Plaintiffs,

v.

FMR LLC, FMR LLC FUNDED BENEFITS INVESTMENT COMMITTEE, FMR LLC RETIREMENT COMMITTEE, FIDELITY MANAGEMENT & RESEARCH COMPANY, FMR CO., INC., and FIDELITY INVESTMENTS INSTITUTIONAL OPERATIONS COMPANY, INC.,

Defendants.

CIVIL ACTION
NO. 18-12122-WGY

YOUNG, D.J. October 8, 2019

MEMORANDUM AND ORDER

I. INTRODUCTION

Our civil justice system regularly relies on citizen juries to decide intricate fact issues. Indeed, "[i]n the fact-finding line, anything a judge can do a jury can do better. The best sociological evidence confirms this truth." Marchan v. John Miller Farms, Inc., 352 F. Supp. 3d 938, 947 (D.N.D. 2018)

Dockets.Justia.com

(citing James Surowiecki, The Wisdom of Crowds (2004)). Nevertheless, the Seventh Amendment to the U.S. Constitution does not endow parties with a right to a jury trial in all civil cases but only "[i]n Suits at common law."

Here, the parties present the Court with a close call as to whether their dispute includes a claim best characterized as a suit at common law. The plaintiffs seek a money award on behalf of a plan subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. No. 93-406, 88 Stat. 829 (1974), for the plan fiduciaries' alleged breaches of fiduciary duty. Class Action Compl. 1-2, ECF No. 1. The plan fiduciaries object to a jury trial and insist no such right exists here notwithstanding the principle that "[m]oney damages are, of course, the classic form of legal relief." See Mertens v. Hewitt Assocs., 508 U.S. 248, 255 (1993). After close study of historical practice and ERISA's text, this Court concludes that a money award, if any, that the plaintiffs might win would be an equitable surcharge, not legal damages. As a result, the Court rules that the Seventh Amendment does not require a jury trial in this case.

A. Procedural History

The plaintiffs, Kevin Moitoso, Tim Lewis, Mary Lee Torline, and Sheryl Arndt, individually and as representatives of a class of similarly situated persons, and on behalf of the Fidelity Retirement Savings Plan (collectively, the "Plaintiffs"), filed

this suit against FMR LLC, the FMR LLC Funded Benefits Investment Committee, the FMR LLC Retirement Committee, Fidelity Management & Research Company, FMR Co., Inc., and Fidelity Investments Institutional Operations Company, Inc. (collectively, "Fidelity") on October 10, 2018. Class Action Compl. 1. On October 19, 2018, the Plaintiffs filed a demand for a jury trial. Demand Jury Trial, ECF No. 10. Thereafter, the Plaintiffs amended their complaint thrice, once as of right and twice with leave from the Court. Am. Compl., ECF No. 31; Second Am. Compl., ECF No. 37; Third Am. Compl., ECF No. 56. Five days after filing their second amended complaint, on January 15, 2019, the Plaintiffs again demanded a jury trial. Am. Demand Jury Trial, ECF No. 44. The Plaintiffs reasserted their jury trial demand on April 4, 2019, after filing their third amended complaint. Second Am. Demand Jury Trial ("Operative Demand"), ECF No. 70.

On April 17, 2019, Fidelity, for the first time, moved to strike the Plaintiffs' jury demand. Defs.' Mot. Strike Pls.' Demand Jury Trial, ECF No. 72; Defs.' Mem. Supp. Mot. Strike Pls.' Demand Jury Trial ("Defs.' Mem."), ECF No. 73. The Plaintiffs opposed the motion to strike on May 1, 2019. Br. Opp'n Mot. Strike Jury Demand ("Opp'n"), ECF No. 75. On May 2, 2019, the Plaintiffs filed their fourth amended complaint, with Fidelity's agreement. Fourth Am. Compl. ("Operative Compl."),

ECF No. 77. The day before the hearing on May 7, 2019, Fidelity filed a reply, ECF No. 82.[1]

The Operative Demand requests a trial by jury on counts one through four and count six of the Operative Complaint, which seek an award of losses for Fidelity's alleged breaches of fiduciary duty. Id. at 1. In the alternative, the Plaintiffs request an advisory jury. Id. at 2.

B. Factual Background

The Plaintiffs are former Fidelity employees who participated in the Fidelity Retirement Savings Plan (the "Plan"). Operative Compl. ¶¶ 18-20. They allege that Fidelity breached its fiduciary duties in managing the Plan. Id. ¶¶ 127-154. The Plaintiffs request, among other things, that Fidelity restore to the Plan the losses that the Plan suffered as a consequence of Fidelity's alleged breaches of fiduciary duty. Id. at 64. The Plaintiffs state that, because they are former employees, they immediately may withdraw a proportional share of the loss award from the Plan if and when the Court enters judgment in their favor. Opp'n 15.

[1] Fidelity filed a Notice of Supplemental Authority on August 9, 2019, ECF No. 112, referring the Court to Judge Gorton's decision in Tracey v. Massachusetts Institute of Technology, Civ. A. No. 16-11620-NMG, 2019 WL 3755948 (D. Mass. Aug. 8, 2019). The Plaintiffs responded on August 21, 2019, ECF No. 113.

II. LEGAL FRAMEWORK

If a party demands a jury trial on any issue under Rule 38 of the Federal Rules of Civil Procedure, then the Court puts any such issue to the jury unless the Court "on motion or on its own, finds that on some or all of those issues there is no federal right to a jury trial." Fed. R. Civ. P. 39(a). Even if no jury trial right exists in a case, the Court may still empanel an advisory jury. Fed. R. Civ. P. 39(c)(1).

Regardless of the existence of a jury right, the Court intends to empanel an advisory jury here. See Fed. R. Civ. P. 39(c); see also Marchan, 352 F. Supp. 3d at 947-49 (explaining that juries can calculate monetary relief even better than judges). The Court endeavors to explain below why it concludes that the Seventh Amendment does not require a jury to resolve the factual issues that the Plaintiffs raise in counts one through four and count six of the operative complaint.

The Seventh Amendment Jury Trial Clause guarantees that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of jury trial shall be preserved." "[A]t common law" refers to legal, as opposed to equitable, claims. Curtis v. Loether, 415 U.S. 189, 193 (1974) (quoting Parson v. Bedford, 28 U.S. (3 Pet.) 433, 446-47 (1830)). Further, the Jury Trial Clause requires a jury to resolve discrete claims to which a jury trial historically

attached even if the complaint also contains nonjury claims. Ross v. Bernhard, 396 U.S. 531, 538-40 (1970).

This Court weighs two factors to determine whether this suit involves legal or equitable issues. See Full Spectrum Software, Inc, v. Forte Automation Sys., Inc., 858 F.3d 666, 675 (1st Cir. 2017). First, this Court resolves "whether the current action is 'analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century.'" Id. (quoting Braunstein v. McCabe, 571 F.3d 108, 118 (1st Cir. 2009)). Second, and "more important," the Court decides whether the requested remedy is legal or equitable. Id. (quoting Granfianciera, S.A. v. Nordberg, 492 U.S. 33, 42 (1989)).[2] If, on balance, these two factors indicate that the complaint presents only equitable issues, then the jury trial right does not attach. Cf. Braunstein, 571 F.3d at 122 (analyzing second issue even after ruling that the first disfavored a jury trial).

[2] In some cases, the Court must resolve a third question, too. If the first two factors favor the jury trial right and Congress provided for a non-Article III adjudicator for the claim, the Court must decide if the issue implicates public or private rights. Full Spectrum, 858 F.3d at 675. Here, Congress vested jurisdiction in the federal district courts, thereby obviating that inquiry. See 29 U.S.C. § 1132(a)(2)-(3), (e)(2).

III. ANALYSIS

Considering the two factors above, this Court GRANTS Fidelity's motion to strike the Plaintiffs' jury demand. First, the chancery courts of old traditionally heard claims for breach of fiduciary duty, which militates against a jury trial right. Second, ERISA's drafters provided for the equitable remedy of surcharge, not the legal remedy of damages, for breach of fiduciary duty. The damages question is a close one, however, because the Court must reconcile apparently contradictory Supreme Court pronouncements and ERISA's express invocation of equitable remedies with the absence of an explicit grant of discretion to the presiding judge in awarding monetary relief. Ultimately, this Court concludes that these apparent contradictions are not contradictions at all because ERISA's drafters meant to incorporate the equity-based doctrines of trust law for actions that beneficiaries bring against fiduciaries. Consequently, the jury trial right does not attach to the Plaintiffs' claims.

A. Equity Courts Traditionally Heard Breach of Fiduciary Duty Claims

This Court construes the Plaintiffs' suit as most closely analogous to a trust beneficiary's cause of action against a trustee for breach of fiduciary duty. ERISA fiduciary duty claims draw directly from trust law and thus fall within "the

bailiwick of the courts of equity." CIGNA Corp. v. Amara, 563 U.S. 421, 439-40 (2011) (quoting 4 Austin Wakeman Scott et al., Scott and Ascher on Trusts § 24.1, at 1654 (5th ed. 2007)). Though this tradition admitted of at least one exception, the Plaintiffs fail to fit their claims into the exception that they identify. See Opp'n 7-9.

Congress defined the scope of ERISA fiduciaries' duties using the common law of trusts. Central States, Se. & Sw. Areas Pension Fund v. Central Transp., Inc., 472 U.S. 559, 570 (1985). The Supreme Court has observed that "action[s] by a trust beneficiary against a trustee for breach of fiduciary duty . . . were within the exclusive jurisdiction of courts of equity." Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 567 (1990) (citing 2 Joseph Story, Commentaries on Equity Jurisprudence § 960 (13th ed. 1886); Restatement (Second) of Trusts § 199(c) (1959)). Moreover, this Court has commented previously that an "action to charge . . . [ERISA] trustees historically sounds in equity and has significant differences from the usual statutory tort claim." Brotherston v. Putnam Invs., LLC, Civ. A. No. 15-13825-WGY, 2017 WL 2634361, at *2 n.3 (D. Mass. June 19, 2017), aff'd in part, vacated in part, remanded, 907 F.3d 17 (1st Cir. 2018), petition for cert. filed, No. 18-926 (Jan. 16, 2019). Therefore, "[t]he most thorough scholarship confirms that no constitutional right to a jury

trial attaches under the Seventh Amendment." Id. (citing Note, The Right to Jury Trial in Enforcement Actions Under Section 502(a)(1)(B) of ERISA, 96 Harv. L. Rev. 737, 750-56 (1983); Denise Drake Clemow & Lisa Hund Lattan, ERISA Section 510 Claims: No Right to a Jury Trial Can Be Found, 73 Neb. L. Rev. 756, 774-78 (1994); David M. Cook & Karen M. Wahle, Procedural Aspects of Litigating ERISA Claims 53-56 (Am. Bar Ass'n 2000)).[3]

Conversely, the Plaintiffs contend that law courts did entertain fiduciary duty claims where plaintiffs asserted an entitlement to immediate and unconditional payment (the "Immediate and Unconditional Payment Exception"). Opp'n 7. The Plaintiffs point to the first and third Restatements of Trusts, which recognize that "a beneficiary [may] proceed against a

[3] The Plaintiffs correctly observe that this footnote was dicta, but then err in construing the discussion as a suggestion that they file a jury demand. See Opp'n 15. This Court intended no such thing. It merely observed the following:

> This parallelism and the extraordinary money damages sought by the Plaintiffs' counsel on behalf of the class leads one to wonder why they did not demand jury in this case where they assert a plan-wide ERISA fiduciary breach claim for money damages. See Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 210 (2002). As will be seen, however, this action to charge the trustees historically sounds in equity and has significant differences from the usual statutory tort claim.

Brotherston, 2017 WL 2634361, at *2 n.3. In particular, Great-West dealt with an action for reimbursement by a plan fiduciary against a beneficiary, not an action for breach of fiduciary duties by a beneficiary against a fiduciary, as is the case here and in Brotherston. See Great-West, 534 U.S. at 207-10.

trustee at law to enforce a right to a chattel or money if the trustee has violated an immediate, unconditional duty to transfer the chattel or pay the money to the beneficiary," Restatement (Third) of Trusts § 95 cmt. a (2012). See Opp'n 7 (citing Third Restatement and quoting Restatement (First) of Trusts § 198(1) (1935) ("If the trustee is under a duty to pay money immediately and unconditionally to the beneficiary, the beneficiary can maintain an action at law against the trustee to enforce payment.")). Despite the fact that they technically brought the complaint on behalf of the Plan, the Plaintiffs insist that they have an immediate and unconditional right to relief because they can withdraw funds on demand. See Opp'n 8 (citing Evans v. Akers, 534 F.3d 65, 74 (1st Cir. 2008)).

Although the Plaintiffs' argument has superficial appeal, historical practice undermines it. The authorities that the Plaintiffs cite reveal that beneficiaries invoked the Immediate and Unconditional Payment Exception where they sought a readily identifiable sum from the trustee, whom the law courts treated as something like a debtor. As a leading trusts treatise explains:

> Even before the merger of law and equity, the courts had concluded that when a trustee was under a duty immediately and unconditionally to pay money to a beneficiary, the beneficiary could maintain an action of debt, general assumpsit, or a modern-day equivalent. In such a case, the trustee was treated for procedural

> purposes as being indebted to the beneficiary in a fixed amount.

4 Scott, supra, § 24.2.1, at 1660 (emphasis added) (citing Restatement (Second) of Trusts § 198 cmt. b (1959)). The Third Restatement cites Scott and observes that "traditional principles allow a beneficiary to proceed against a trustee at law to enforce a right to a chattel or money if the trustee has violated an immediate, unconditional duty to transfer the chattel or pay the money to the beneficiary." Restatement (Third) of Trusts § 95 cmt. a & rptr's n. (citing 4 Scott, supra, §§ 24.1-24.3.5, 24.9.2, at 1654-67, 1700). The reporter's notes to the Third Restatement make clear that the Third Restatement is "consistent in principle" with the Second Restatement's approach, which illustrates this concept with cases where the trustee refused to make required income payments from the trust corpus to the beneficiary. See Restatement (Second) of Trusts § 198 cmt. b; Restatement (First) of Trusts § 198 cmt. b.

In contrast, the Plaintiffs' claims do not depend on Fidelity's failure to turn over a set amount of money but on an assertion that Fidelity's breach of fiduciary duty caused the Plan's income to diminish. Operative Compl. ¶ 3; see also Jo Ann Howard & Assocs., P.C. v. Cassity, 868 F.3d 637, 648 (8th Cir. 2017) ("So long as 'there has been a final settlement of

accounts and nothing remains on the part of the trustee but to pay over the amount found to be due,' the beneficiary has a legal clam to recover a specific sum of money. But when there has been no accounting made and no settlement due, 'the only remedy of the [beneficiary is] by a bill in equity and not by an action at law.'" (alteration in original) (quoting Howard's Estate v. Howe, 131 S.W.2d 517, 520 (Mo. 1939))). At least one leading contemporary scholarly text reveals that this approach persists. See 4 Scott, supra, § 24.2, at 1659 ("Although the beneficiary's remedies against the trustee are ordinarily equitable there are certain situations in which a legal remedy has been permitted. In these situations, the trustee's liability is definite and clear, and no accounting is necessary to establish it.").

The Plaintiffs urge the Court to follow the lead of Dixon v. Northwestern National Bank of Minneapolis and adopt a wider reading of the Immediate and Unconditional Payment Exception. See 297 F. Supp. 485, 489 (D. Minn. 1969); Opp'n 8. There, the United States District Court for the District of Minnesota ordered a jury trial on trust beneficiaries' claim against a trustee who allegedly breached his fiduciary duties by investing trust funds into worthless stock. Dixon, 297 F. Supp. at 489; see also Jefferson Nat'l Bank of Miami Beach v. Central Nat'l Bank in Chi., 700 F.2d 1143, 1150 (7th Cir. 1983) (quoting Dixon

and reaching similar result). As the United States District Court for the Southern District of New York in Nobile v. Pension Committee noted, however, both the Dixon and Jefferson National Bank decisions erred in relying solely on the complaint's request for money to rule that law courts could have heard them. 611 F. Supp. 725, 728-29 (S.D.N.Y. 1985) (rejecting application of exception because complaint did not allege that "the trustee failed to perform a ministerial act"); see also Jo Ann Howard & Assocs., P.C., 868 F.3d at 648 (distinguishing Dixon and Jefferson National Bank and citing Nobile).

Moreover, notwithstanding the Plaintiffs' right to withdraw their funds from the Plan on demand, "recovery for a violation of § 409 inures to the benefit of the plan as a whole." Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 140 (1985). Although all the Plaintiffs are vested, see Operative Compl. ¶ 3, any money award will go to the Plan first. See Massachusetts Mut., 473 U.S. at 140. This pit-stop in the Plan's coffers buttresses the conclusion that there would still be some accounting to do, and thus the Plaintiffs cannot claim a definite sum of money. The First Circuit's Evans decision does not point in a different direction; there, the First Circuit shot down an argument that ERISA beneficiaries did not have constitutional standing to sue on behalf of the plan. See 534 F.3d at 74-75. If the Plaintiffs prevail on these claims,

Fidelity ought "strive to allocate any recovery to the affected participants in relation to the impact the fiduciary breaches had on their particular accounts." See id. That does not change the fact that the Plaintiffs do not allege a direct right to payment of sum certain.

Therefore, the Plaintiffs' claims are of the type that equity, not law, courts traditionally heard.

B. Losses Under ERISA Section 409(a) Amount to the Equitable Remedy of Surcharge

The Court views the Plaintiffs' monetary remedy request as one for surcharge, not damages. The Supreme Court has described the surcharge remedy thusly:

> Equity courts possessed the power to provide relief in the form of monetary "compensation" for a loss resulting from a trustee's breach of duty, or to prevent the trustee's unjust enrichment. Indeed, prior to the merger of law and equity this kind of monetary remedy against a trustee, sometimes called a "surcharge," was exclusively equitable. The surcharge remedy extended to a breach of trust committed by a fiduciary encompassing any violation of a duty imposed upon that fiduciary.

Amara, 563 U.S. at 441-42 (citations and internal quotations omitted). Surcharge "is most fittingly defined as 'the imposition of personal liability on a fiduciary for wilful or negligent misconduct in the administration of his fiduciary duties.'" LeBlanc v. Salem (In re Mailman Steam Carpet Cleaning Corp.), 196 F.3d 1, 7 (1st Cir. 1999) (alteration omitted)

(citing Black's Law Dictionary 1441 (6th ed. 1990)). That is precisely the remedy that the Plaintiffs seek, and ERISA allows.

The Plaintiffs argue that ERISA section 409(a), which describes the "liability for breach of fiduciary duty" under ERISA, does not give courts the authority to surcharge fiduciaries. Opp'n 9-10. That statute reads:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

29 U.S.C. § 1109(a). The Plaintiffs contend that four characteristics of section 409 support a ruling that it authorizes legal damages, not surcharge: (1) employing the word "losses"; (2) using the mandatory word "shall"; (3) rendering fiduciaries "personally liable"; and (4) authorizing "such other equitable or remedial relief as the court may deem appropriate." Opp'n 9-12, 16-17.

The Plaintiffs' statutory arguments miss the forest for the trees and elide the nature of the surcharge remedy. First, the focus on the word "losses" foists too much weight on a Supreme Court case, Mertens v. Hewitt Associates, which decided only

that a money award in an action between nonfiduciaries constitutes legal damages, not equitable relief, for the purposes of ERISA section 502(a)(3). 508 U.S. at 257-59; Opp'n 10-12. As relevant there, section 502(a)(3) permits plaintiffs "to obtain other appropriate equitable relief." See 29 U.S.C. § 1132(a)(3). The Supreme Court in Mertens took pains to emphasize that the plaintiffs sought relief only under that subsection. Id. at 256-57, 261-62. As a result, Mertens does not control the description of the remedy that the Plaintiffs demand here.

Instead of focusing on the holding of the case, the Plaintiffs instead resort to exhorting the Court to pay attention to a passing discussion, not necessary to the decision, in which the Supreme Court summarizes section 409:

> Section 409(a), 29 U.S.C. § 1109(a), makes fiduciaries liable for breach of these duties, and specifies the remedies available against them: The fiduciary is personally liable for damages ("to make good to [the] plan any losses to the plan resulting from each such breach"), restitution ("to restore to [the plan] any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary"), and for "such other equitable or remedial relief as the court may deem appropriate," including removal of the fiduciary.

Id. at 252.

While such a declaration, even if in dicta, ordinarily would move the Court, the Supreme Court clarified Mertens in Amara, 563 U.S. at 439-42. There, the Supreme Court held that

an "award of make-whole [monetary] relief" constituted an equitable surcharge because "the defendant in this case, unlike the defendant in Mertens, is analogous to a trustee[, which] makes a critical difference." Id. at 442. Although the Supreme Court in Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan reaffirmed Mertens' holding that legal remedies that an equity court could award when a nonfiduciary appears before it in an ancillary matter are not equitable remedies, it also did not repudiate Amara's distinction. See 136 S. Ct. 651, 660 & n.3 (2016).

The Plaintiffs also rely on Maz Partners, LP v. Shear (In re PHC, Inc. S'holder Litig.), 894 F.3d 419, 425, 435-36 (1st Cir. 2018), cert. denied sub nom. Shear v. MAZ Partners, LP, 139 S. Ct. 489 (2018), to support the proposition that fiduciary breach claims may have legal and equitable dimensions. Opp'n 2, 12-13. The First Circuit ruled as much in the context of observing that courts may "order appropriate equitable relief" for fiduciary breach under Massachusetts law "even when a remedy at law is also available." See 894 F.3d at 435 (citing Allison v. Eriksson, 479 Mass. 626, 638 (2018); Demoulas v. Demoulas Super Markets, Inc., 424 Mass. 501, 527 n.32 (1997)). The Plaintiffs' argument thus assumes its own conclusion: that a remedy at law is available under ERISA. That Massachusetts allows victims of a fiduciary breach to recover damages --

despite damages as such not constituting an element of the cause of action -- does not affect this Court's statutory analysis here. See Shear, 894 F.3d at 435-36.

Moreover, the First Circuit recently has incorporated the Third Restatement of Trusts' definition of losses into ERISA section 409(a). See Brotherston v. Putnam Investments, LLC, 907 F.3d 17, 31 (1st Cir. 2018). This definition of losses characterizes the losses remedy as a "surcharge." See id. (quoting Restatement (Third) of Trusts § 100 cmt. b(1)). Therefore, the Court follows the Supreme Court's recent pronouncement in Amara that losses that a court assesses against a trustee constitute part of a surcharge, not damages.[4] See

[4] Ironically, Amara's reading of the word "losses" to provide for equitable relief against a trustee may redound to the Plaintiffs' benefit, for it permits the Court to "look forward" in putting the Plaintiffs in "the rightful position" were it to find that Fidelity breached its fiduciary duty as opposed to "restor[ing them] to the position [they] were in." See Samuel L. Bray, Fiduciary Remedies, in Oxford Handbook of Fiduciary Law 449, 456 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019) (discussing "[e]quitable compensation[, which] is a remedy that looks like damages," and observing that courts refer to that remedy in the trusts context as surcharge); see also Restatement (Third) of Trusts § 100 cmt. b(1) ("If a breach of trust causes a loss, including any failure to realize income, capital gain, or appreciation that would have resulted from proper administration of the trust, the trustee is liable for the amount necessary to compensate fully for the breach."); id. § 95 & cmt. b ("If a breach of trust causes a loss, including any failure to realize income, capital gain, or appreciation that would have resulted from proper administration, the beneficiaries are entitled to restitution and may have the trustee surcharged for the amount necessary to compensate fully for the consequences of the breach.").

Perez v. Silva, 185 F. Supp. 3d 698, 702-05 (D. Md. 2016) (reaching similar conclusion with respect to action brought by Secretary of Labor on behalf of plan beneficiaries against plan fiduciary).

Second, the Plaintiffs' semantic arguments about the word "shall" reach too far. They cite the commentary to section 95 of the Third Restatement of Trusts for the proposition that whether to issue surcharge lies in the Court's discretion. Opp'n 16-17. Comment d to that section provides that if a court concludes that "it would be unfair or unduly harsh to require the trustee to pay, or pay in full, the liability that would normally result from a breach of trust, the court has equitable authority to excuse the trustee in whole or in part from having to pay that liability."

Yet the phrase "shall be personally liable" applies not only to "any losses" but also to "restore to such plan any profits of such fiduciary which have been made through use of assets of the plan." 29 U.S.C. § 1109(a). Congress must have thought at least one of these remedies was "equitable" because after listing them it provided that fiduciaries "shall be subject to such other equitable or remedial relief." See id. (emphasis added); Terry, 494 U.S. at 572 (observing that Congress's characterization of a statutory remedy as equitable constitutes a factor counseling in favor of calling a remedy

equitable for Seventh Amendment purposes). What's more, the ability to recoup secret profits exemplifies an equitable remedy. See Terry, 494 U.S. at 570 ("[W]e have characterized damages as equitable where they are restitutionary, such as in 'action[s] for disgorgement of improper profits.'" (quoting Tull v. United States, 481 U.S. 412, 424 (1987) (alteration in original))); cf. Curtis, 415 U.S. at 197 (holding that monetary remedy was legal damages in part because the factfinder lacked discretion and award could not be viewed as disgorgement).

Three factors thus lead the Court to the conclusion that "shall" does not mean that section 409(a) "losses" qualify as legal damages. First, Congress said that it created equitable remedies in section 409(a). See Terry, 494 U.S. at 572.

Second, the Third Restatement contemplates that courts ought use their discretion to excuse a breach of trust only in "special circumstances." Restatement (Third) of Trusts § 95 cmt. d.

Third, not all courts recognized that an equity court could refuse to surcharge a defendant who had breached a trust, see 4 Scott, supra, § 24.9.2, at 1700, and, indeed, only six states appear to have adopted the uniform act that the reporter's notes to comment d of the Restatement cites, Christina Bogdanski, Note, The Uniform Trust Code and the Common Law: An Analysis of Three Sections of the Code That Deviate from the Common Law and

Why the Drafters Changed the Law, 37 Cardozo L. Rev. 1907, 1912 n.31 (2016). And when the American colonies split from England, England had not yet enacted its statute empowering courts to excuse breaches of trust. See generally Michael Haley, Section 61 of the Trustee Act 1925: A Judicious Breach of Trust? 76 Cambridge L.J. 537 (2017) (explaining that England began limiting trustee liability for breach of trust by statute after experiencing a "trustee chill" in the late nineteenth century). That fact ultimately persuades the Court, since the 18th-century common law of England is paramount in the Seventh Amendment analysis. Butler v. Bateman (In re Bateman), 601 B.R. 700, 705 n.3 (D. Mass. 2019) (quoting United States v. Wonson, 1 Gall. 5, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (Case No. 16,750) (Story, J., sitting as Circuit Justice)). Therefore, although Congress's choice to grant discretion counsels in favor of deeming equitable a monetary remedy, its refusal to grant discretion does not necessarily resolve the Seventh Amendment question one way or the other. See Curtis, 415 U.S. at 197.

The Plaintiffs' remaining two arguments -- that section 409(a) must authorize a legal remedy because it provides that fiduciaries are "personally liable" and allows "such other equitable or remedial relief" -- falter for similar reasons. Surcharge, disgorgement of profits, and other forms of equitable compensation cause a defendant to become personally liable for

amounts of money. See Bray, supra, at 456. Those remedies thus constitute exceptions to the "general rule" that courts direct equitable remedies "against some specific thing; they give or enforce a right to or over some particular thing . . . rather than a right to recover a sum of money generally out of the defendant's assets." See Montanile, 136 S. Ct. at 658–59 (quoting 4 Spencer W. Symons, Pomeroy's Equity Jurisprudence § 1234, at 694 (5th ed. 1941) (omission in original)).[5]

Furthermore, reading section 409(a) to authorize surcharge would not eviscerate any relevant distinction between "equitable" and "remedial" relief, as the Plaintiffs suggest. See Opp'n 10 (citing Mertens, 508 U.S. at 252, 256-59). As discussed above, Mertens and Amara stand for the notion that the nature of a remedy is specific to the nature of parties to the claim and the claim itself. Mertens limited the meaning of "equitable" to the core of equity jurisdiction because to do otherwise would render that word superfluous. Mertens, 508 U.S.

[5] Montanile decided only that a money remedy for breach of an equitable lien on specific property did not retain its equitable character after the defendant "dissipated" the subject of the lien. 136 S. Ct. at 658–59. In such a case, the claim loses its equitable character because there is no longer a specific item that the plaintiff is entitled to possess, and the plaintiff seeks only to be put back in his previous condition. See Bray, supra, at 456. Here, in contrast, surcharge permits a plaintiff to receive monetary relief that might place him in a better place than where he started because of surcharge's forward-looking nature. See id.

at 257–58. It does not follow that actions and remedies in the core of equity jurisdiction, such as equitable surcharge, fall out of section 409(a)'s scope. See 29 U.S.C. § 1109(a). Similarly, Congress used the word "remedial," not "legal" in section 409(a). Interpreting "remedial" to mean "legal" (or "equitable") would elide the apparent distinction that Congress made in other sections of ERISA.[6] See Mertens, 508 U.S. at 257–58 & n.8. The Court thus considers that the word "remedial" might permit the Court to experiment in fashioning just relief that may not squarely fall into the traditional categories of equitable or legal relief. Cf. 15 U.S.C. § 3608(d) (commanding courts to "exercise its authority to grant remedial relief as necessary" upon ruling a lease unconscionable and providing that "[s]uch relief may include, but shall not be limited to

---

[6] Where Congress chose to use the word "legal," it might have done so in order to effect its intent to "provide the full range of legal and equitable remedies available in both state and federal courts." Cf. Opp'n 10 (citing H.R. Rep. No. 93-533, reprinted in 1974 U.S.C.C.A.N. 4639, 4655; S. Rep. No. 93-127, reprinted in 1974 U.S.C.C.A.N. 4838, 4871); see also Mertens, 508 U.S. at 258–59 (mentioning ERISA's distinction between equitable and legal relief in 29 U.S.C. §§ 1024(a)(5)(C), 1132(g)(2)(E), 1303(e)(1), 1451(a)(1)). Congress did not do so in section 409(a), perhaps because it recognized that successful plaintiffs in fiduciary breach cases receive equitable remedies. See In re Evangelist, 760 F.2d 27, 29-31 (1st Cir. 1985) (Breyer, J.) (reasoning that because Congress was aware that "[a]ctions for breach of fiduciary duty, historically speaking, are almost uniformly actions 'in equity' -- carrying with them no right to trial by jury," id. at 29, Congress's use of the word "damages" in a securities statute did not convert the statute's accounting remedy into legal damages).

rescission, reformation, restitution, the award of damages and reasonable attorney fees and court costs”).

In any event, in this case the Court has no need to define “remedial” in the context of section 409(a) and, aside from the preceding musings on the matter, does not do so. As the Court explains above, section 409(a)’s losses remedy is equivalent to a surcharge. Because the Plaintiffs base their jury trial right on that provision alone, Opp’n 10-12, the possibility that some hypothetical “remedial relief” might be more analogous to a legal, rather than equitable, remedy does not affect the Plaintiffs’ jury trial right in this case.

Therefore, this Court rejects the Plaintiffs’ attempt to label as legal the losses remedy that section 409(a) authorizes.

IV. CONCLUSION

For the foregoing reasons, this Court GRANTS Fidelity’s motion to strike the Plaintiffs’ jury demand, ECF No. 72. Nonetheless, because citizen juries play a vital role in our democracy and so as to preserve the Plaintiffs’ rights, this Court shall empanel an advisory jury.

SO ORDERED.

/s/ William G. Young
WILLIAM G. YOUNG
DISTRICT JUDGE