

1 **UNITED STATES COURT OF APPEALS**  
2 **FOR THE SECOND CIRCUIT**

3  
4 August Term, 2014

5  
6 (Argued: December 15, 2014  
7 Final Submission: February 20, 2015  
8 Decided: August 20, 2015)

9  
10 Docket No. 14-20-cv  
11  
12

13 NEW YORK STATE PSYCHIATRIC ASSOCIATION, INC., in a  
14 representational capacity on behalf of its members and their patients,  
15 MICHAEL A. KAMINS, on his own behalf and on behalf of his beneficiary  
16 son, and on behalf of all other similarly situated health insurance subscribers,  
17 JONATHAN DENBO, on his own behalf and on behalf of all other similarly  
18 situated health insurance subscribers, SHELLY MENOLASCINO, M.D., on  
19 her own behalf and in a representational capacity on behalf of her beneficiary  
20 patients and on behalf of all other similarly situated providers and their  
21 patients,

22  
23 *Plaintiffs-Appellants,*

24  
25 v.

26  
27 UNITEDHEALTH GROUP, UHC INSURANCE COMPANY, UNITED  
28 HEALTHCARE INSURANCE COMPANY OF NEW YORK, UNITED  
29 BEHAVIORAL HEALTH,  
30

31 *Defendants-Appellees.\**  
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\* The Clerk of the Court is directed to amend the caption of this case as set forth above.

1 Before:

2  
3 JACOBS, LIVINGSTON, and LOHIER, *Circuit Judges*.

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5 Plaintiffs New York State Psychiatric Association, Inc. ("NYSPA"),  
6 Jonathan Denbo, and Dr. Shelly Menolascino sued Defendants UnitedHealth  
7 Group, UHC Insurance Company, United Healthcare Insurance Company of  
8 New York, and United Behavioral Health (collectively, "United"). Relying on  
9 §§ 502(a)(1)(B) and 502(a)(3) of the Employee Retirement Income Security Act  
10 of 1974 (ERISA), the plaintiffs claimed that United violated the Mental Health  
11 Parity and Addiction Equity Act of 2008 (the Parity Act), United's fiduciary  
12 duties under ERISA, and the terms of ERISA-governed health insurance plans  
13 administered by United. The United States District Court for the Southern  
14 District of New York (McMahon, J.) dismissed the plaintiffs' amended  
15 complaint, holding principally that NYSPA lacked associational standing to  
16 sue on behalf of its members; as a claims administrator, United could not be  
17 sued under § 502(a)(3) for alleged violations of the Parity Act or under  
18 § 502(a)(1)(B); and relief under § 502(a)(3) would not be "appropriate"  
19 because the plaintiffs' alleged injuries could be remedied under § 502(a)(1)(B).  
20 We **AFFIRM** in part and **VACATE** in part and **REMAND**.

21 D. BRIAN HUFFORD, Zuckerman Spaeder LLP, New  
22 York, NY (Jason S. Cowart, Zuckerman Spaeder LLP,  
23 New York, NY; Conor B. O'Croinin, Zuckerman  
24 Spaeder LLP, Baltimore, MD; Meiram Bendat, Psych-  
25 Appeal, Inc., West Hollywood, CA; Anthony F.  
26 Maul, The Maul Firm, Brooklyn, NY, *on the brief*), *for*  
27 *Plaintiffs-Appellants*.

28  
29 CATHERINE E. STETSON, Hogan Lovells US LLP,  
30 Washington, DC (Mary Helen Wimberly, Hogan  
31 Lovells US LLP, Washington, DC; Richard H.  
32 Silberberg, Dorsey & Whitney LLP, New York, NY;  
33 Steven P. Lucke, Andrew Holly, Dorsey & Whitney  
34 LLP, Minneapolis, MN, *on the brief*), *for Defendants-*  
35 *Appellees*.

36  
37 LOHIER, *Circuit Judge*:

38  
39 Plaintiffs New York State Psychiatric Association, Inc. ("NYSPA"),

40 Jonathan Denbo, and Dr. Shelly Menolascino sued UnitedHealth Group, UHC

1 Insurance Company, United Healthcare Insurance Company of New York,  
2 and United Behavioral Health (collectively, "United").<sup>1</sup> Relying on  
3 §§ 502(a)(1)(B) and 502(a)(3) of the Employee Retirement Income Security Act  
4 of 1974 (ERISA), 29 U.S.C. §§ 1132(a)(1)(B), (a)(3), the plaintiffs claimed that  
5 United had violated its fiduciary duties under ERISA, the terms of ERISA-  
6 governed health insurance plans administered by United, and the Mental  
7 Health Parity and Addiction Equity Act of 2008 (the Parity Act),<sup>2</sup> which  
8 requires group health plans and health insurance issuers to ensure that the  
9 financial requirements (deductibles, copays, etc.) and treatment limitations  
10 applied to mental health benefits be no more restrictive than the predominant  
11 financial requirements and treatment limitations applied to substantially all  
12 medical and surgical benefits covered by the plan or insurance, see 29 U.S.C.

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<sup>1</sup> A fourth plaintiff, Michael A. Kamins, brought claims against United pursuant to New York and California State law. Kamins has abandoned his challenge to the District Court's refusal to exercise supplemental jurisdiction over his claims.

<sup>2</sup> Although Count I of the amended complaint cites only to the Parity Act, we agree with the District Court that the plaintiffs brought Count I pursuant to § 502(a)(3).

1 § 1185a(a)(3)(A). NYSPA also brought three additional counts under New  
2 York State law.<sup>3</sup>

3 United moved to dismiss the amended complaint, arguing that NYSPA  
4 did not have associational standing to sue on behalf of its members, that  
5 United could not be sued under § 502(a)(3) for alleged violations of the Parity  
6 Act or under § 502(a)(1)(B), and that in any event it would not be  
7 “appropriate” for the plaintiffs to obtain relief under § 502(a)(3) if  
8 § 502(a)(1)(B) offered an adequate remedy. The United States District Court  
9 for the Southern District of New York (McMahon, J.) granted United’s motion  
10 to dismiss. Because we conclude that NYSPA has standing at this stage of the  
11 litigation and that Denbo’s claims, but not Dr. Menolascino’s claims, should  
12 be permitted to proceed, we affirm in part and vacate in part and remand.

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<sup>3</sup> The plaintiffs have abandoned their appeal of the dismissal of Counts IV and V of the amended complaint. Although the plaintiffs’ reply brief addresses Count IV in a footnote, “[w]e do not consider an argument mentioned only in a footnote to be adequately raised or preserved for appellate review.” Dow Jones & Co. v. Int’l Sec. Exch., Inc., 451 F.3d 295, 301 n.7 (2d Cir. 2006).

1 **BACKGROUND**

2 1. The Plaintiffs

3 In describing each plaintiff, we draw the following facts from the  
4 allegations in the plaintiffs' amended complaint and documents incorporated  
5 by reference therein. See Eades v. Kennedy, PC Law Offices, No. 14-104-cv,  
6 2015 WL 3498784, at \*1 (2d Cir. June 4, 2015).

7 a. NYSPA

8 NYSPA is a professional organization of psychiatrists practicing in New  
9 York State. It alleges that United unlawfully imposed financial requirements  
10 and treatment limitations on mental health benefits for patients of NYSPA  
11 members. That said, NYSPA's only specific allegations relate to an insurance  
12 plan that is not subject to ERISA, and its other allegations are generalized  
13 recitations of its members' complaints about United.

14 b. Denbo

15 Denbo, an employee of the CBS Sports Network, has health insurance  
16 benefits through the CBS Medical Plan (the "CBS Plan"), which incorporates  
17 the requirements of ERISA and the Parity Act. As the claims administrator  
18 for the CBS Plan, United administers claims for behavioral health benefits,

1 such as mental health benefits, and for medical health benefits. Under the  
2 terms of the CBS Plan, United has “exclusive authority and sole and absolute  
3 discretion to interpret and to apply the rules of the Plan to determine claims  
4 for Plan benefits.” Joint App’x 181. As required by ERISA, the CBS Plan has  
5 an appeals process for adverse benefits determinations, pursuant to which  
6 United decides any appeals of its benefits determinations. United’s appeal  
7 “decision[s] [are] final and binding, and no further appeal is available.”<sup>4</sup> Joint  
8 App’x 65. The CBS Plan also describes what plan participants must do to file  
9 suit against United and how to serve United with legal process.

10 Denbo, who suffers from dysthymic disorder and generalized anxiety  
11 disorder, submitted benefits claims to United for his weekly and, later,  
12 semiweekly outpatient psychotherapy sessions with an out-of-network  
13 psychologist. Although United initially granted Denbo’s claims, it conducted  
14 a concurrent medical necessity review while Denbo was still undergoing  
15 treatment but after he submitted claims for twelve sessions within six weeks.  
16 As a result of that review, in May 2012 United told Denbo that his treatment

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<sup>4</sup> After a participant exhausts the appeals process, an optional “external review program” is available for certain types of claim denials.

1 plan was not medically necessary and that United would no longer provide  
2 benefits for his psychotherapy sessions. United upheld its decision on appeal.

3 In the amended complaint, Denbo alleges that United improperly  
4 administered the CBS Plan by treating claims submitted for routine,  
5 outpatient, out-of-network medical/surgical care (“medical claims”) more  
6 favorably than claims for ongoing, routine, outpatient, out-of-network  
7 psychotherapy sessions (“mental health claims”), in violation of the Parity  
8 Act. For example, United subjected the mental health claims, but not the  
9 medical claims, of CBS Plan participants to preauthorization requirements or  
10 concurrent review. In determining the medical necessity of Denbo’s  
11 psychotherapy sessions, moreover, United applied review standards that  
12 were more restrictive than both generally accepted mental health standards  
13 and the standards United applied to medical claims under the CBS Plan.

14 Denbo also claimed that United contravened the terms of the CBS Plan itself.

15 Among other things, Denbo alleges, the CBS Plan expressly permits  
16 retrospective review of submitted mental health claims for sessions lasting  
17 less than fifty minutes, but does not appear to sanction either  
18 preauthorization or concurrent review of such claims. And Denbo claimed

1 that some of United's conduct in administering the CBS Plan violated both the  
2 Parity Act and the terms of the plan – for example, conducting a concurrent  
3 review of mental health claims based solely on the frequency of mental health  
4 office visits is, Denbo claimed, neither endorsed by the CBS Plan nor done  
5 with medical claims.

6 c. Dr. Menolascino

7 Dr. Menolascino, a psychiatrist, provides psychopharmacology  
8 “evaluation and management” services to United plan beneficiaries, who in  
9 turn assign their plan benefits to her. United denied or reduced benefits to  
10 Dr. Menolascino for these services. But the amended complaint does not  
11 specify how United treated “evaluation and management” services for  
12 medical/surgical care. Nor does it identify the health insurance plans of Dr.  
13 Menolascino's patients (or even the terms of those plans).

14 2. Procedural History

15 On December 4, 2013, the District Court granted United's motion to  
16 dismiss the amended complaint in its entirety, holding principally that  
17 NYSPA lacked associational standing to sue on behalf of its members; as a  
18 claims administrator, United could not be sued under § 502(a)(3) for alleged



1 violations of the Parity Act or under § 502(a)(1)(B); and relief under § 502(a)(3)  
2 would not be “appropriate” because the plaintiffs’ alleged injuries could be  
3 fully remedied under § 502(a)(1)(B). This appeal followed.

## 4 DISCUSSION

### 5 1. NYSPA’s Standing

6 We first consider whether NYSPA has properly pleaded associational  
7 standing. An association has standing to bring suit on behalf of its members  
8 when “(a) its members would otherwise have standing to sue in their own  
9 right; (b) the interests it seeks to protect are germane to the organization’s  
10 purpose; and (c) neither the claim asserted nor the relief requested requires  
11 the participation of individual members in the lawsuit.” Hunt v. Wash. State  
12 Apple Advert. Comm’n, 432 U.S. 333, 343 (1977). By contrast, an association  
13 “lacks standing to assert claims of injunctive relief on behalf of its members  
14 where the fact and extent of the injury that gives rise to the claims for  
15 injunctive relief would require individualized proof.” All. for Open Soc’y  
16 Int’l, Inc. v. U.S. Agency for Int’l Dev., 651 F.3d 218, 229-30 (2d Cir. 2011),  
17 aff’d, 133 S. Ct. 2321 (2013). This is not to say that the participation of a  
18 limited number of individual members will negate standing: the association

1 will maintain standing if “the nature of the claim and of the relief sought does  
2 not make the individual participation of each injured party indispensable to  
3 proper resolution of the cause.” United Food & Commercial Workers Union  
4 Local 751 v. Brown Grp., Inc., 517 U.S. 544, 552 (1996); see also N.Y. State Nat’l  
5 Org. for Women v. Terry, 886 F.2d 1339, 1349 (2d Cir. 1989).

6 NYSPA alleges, and there is no serious dispute on appeal, that its  
7 members have standing to sue United in their own right, both as assignees of  
8 ERISA benefits and to prevent interference with their provision of mental  
9 health treatment. There is also no serious dispute that this action implicates  
10 interests germane to NYSPA’s purpose. The parties dispute only whether at  
11 the motion to dismiss stage NYSPA has plausibly alleged that its claims do  
12 not require individualized proof. It has. NYSPA challenges United’s  
13 systemic policies and practices insofar as they violate ERISA and the Parity  
14 Act, and it seeks only injunctive and declaratory relief. See All. for Open  
15 Soc’y Int’l, 651 F.3d at 229. At this stage in the litigation, it remains plausible  
16 that the participation of a limited number of NYSPA members will allow  
17 NYSPA to prove that United’s practices violate the relevant statutes. If at  
18 summary judgment or at trial NYSPA’s claims require significant individual

1 participation or proof, the District Court may dismiss NYSPA for lack of  
2 standing at that point. See Borrero v. United HealthCare of N.Y., Inc., 610  
3 F.3d 1296, 1306 n.3 (11th Cir. 2010); Pa. Psychiatric Soc'y v. Green Spring  
4 Health Servs., Inc., 280 F.3d 278, 286-87 (3d Cir. 2002).

5 Having dismissed NYSPA on standing grounds, the District Court did  
6 not consider whether NYSPA alleged facts sufficient to state a plausible claim  
7 for relief. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). We vacate  
8 the District Court's dismissal of NYSPA's claims and remand for it to consider  
9 in the first instance whether NYSPA's pleadings can survive the pleading  
10 standard set forth in Twombly. See Nat'l Org. for Marriage, Inc. v. Walsh, 714  
11 F.3d 682, 692 (2d Cir. 2013). Of course, nothing in this opinion precludes  
12 NYSPA, on remand, from moving for leave to amend the complaint. But we  
13 leave resolution of any such motion to the discretion of the District Court.

14 2. Denbo's Claims Under §§ 502(a)(1)(B) and 502(a)(3)

15 As we have previously described, Denbo claims that United breached  
16 the terms of the CBS Plan and violated its fiduciary duty to Denbo by, first,  
17 applying preauthorization and concurrent review policies to mental health  
18 claims but not to medical claims, and, second, determining the medical

1 necessity of mental health care using guidelines that were more restrictive  
2 than those used by either the mental health community or United when it  
3 determined the medical necessity of medical claims. See Kendall v. Emps.  
4 Ret. Plan of Avon Prods., 561 F.3d 112, 120 (2d Cir. 2009) (“There is no doubt  
5 that ERISA imposes on plan fiduciaries a duty to act ‘in accordance with the  
6 documents and instruments governing the plan insofar as such documents  
7 and instruments are consistent with the provisions of [ERISA].’ 29 U.S.C.  
8 § 1104(a)(1)(D). The statute . . . impose[s] a general fiduciary duty to comply  
9 with ERISA.” (first alteration in original)). There is no serious dispute that  
10 Denbo’s claims are both adequately and plausibly alleged in the amended  
11 complaint. The only question as to these claims is whether United may be  
12 held liable under §§ 502(a)(1)(B) or 502(a)(3) in its capacity as an ERISA claims  
13 administrator.

14 a. Section 502(a)(1)(B)

15 We ultimately reject United’s argument that it cannot be sued under  
16 § 502(a)(1)(B) in its capacity as a claims administrator. By its plain terms,  
17 § 502(a)(1)(B) does not preclude suits against claims administrators. It simply  
18 states that “[a] civil action may be brought . . . by a participant or

1 beneficiary . . . to recover benefits due to him under the terms of his plan, to  
2 enforce his rights under the terms of the plan, or to clarify his rights to future  
3 benefits under the terms of the plan.” 29 U.S.C. § 1132(a)(1)(B). Indeed, when  
4 a claims administrator exercises total control over claims for benefits under  
5 the terms of the plan, that administrator is a logical defendant in the type of  
6 suit contemplated by § 502(a)(1)(B)—a suit “to recover benefits,” “to enforce  
7 . . . rights,” “or to clarify . . . rights to future benefits under the terms of the  
8 plan.” *Id.*; see Cyr v. Reliance Standard Life Ins. Co., 642 F.3d 1202, 1205-07  
9 (9th Cir. 2011) (en banc). Even if the statutory text were ambiguous, United  
10 fails to point us to any legislative history or agency interpretation that refutes  
11 our understanding of the statute as it applies to claims administrators who  
12 exercise total control over the benefits claims process.

13 Here, United appears to have exercised total control over the CBS  
14 Plan’s benefits denial process. It enjoyed “sole and absolute discretion” to  
15 deny benefits and make “final and binding” decisions as to appeals of those  
16 denials. Joint App’x 65, 181. And assuming that United’s actions violated  
17 Denbo’s rights under ERISA, United is the only entity capable of providing  
18 direct relief to Denbo. We therefore hold that where the claims administrator

1 has “sole and absolute discretion” to deny benefits and makes “final and  
2 binding” decisions as to appeals of those denials, the claims administrator  
3 exercises total control over claims for benefits and is an appropriate defendant  
4 in a § 502(a)(1)(B) action for benefits.<sup>5</sup> United is such an administrator and is  
5 accordingly an appropriate defendant for Denbo’s claim under § 502(a)(1)(B).

6 Our holding is in accord with six of our sister circuits, which have held  
7 that claims administrators may be sued as defendants under § 502(a)(1)(B).  
8 See Larson v. United Healthcare Ins. Co., 723 F.3d 905, 913-16 (7th Cir. 2013);  
9 LifeCare Mgmt. Servs. LLC v. Ins. Mgmt. Adm’rs Inc., 703 F.3d 835, 843-46  
10 (5th Cir. 2013); Cyr, 642 F.3d at 1205-07; Brown v. J.B. Hunt Transp. Servs.,  
11 Inc., 586 F.3d 1079, 1081, 1088 (8th Cir. 2009); Moore v. Lafayette Life Ins. Co.,  
12 458 F.3d 416, 438 (6th Cir. 2006); Heffner v. Blue Cross & Blue Shield of Ala.,  
13 Inc., 443 F.3d 1330, 1333-34 (11th Cir. 2006). Our holding also follows from  
14 the Supreme Court’s holding in Harris Trust & Savings Bank v. Salomon  
15 Smith Barney Inc., 530 U.S. 238 (2000), that non-plan defendants may be sued  
16 under § 502(a)(3). That holding was premised in part on the observation that

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<sup>5</sup> We need not and do not decide whether a claims administrator that exercises less than total control over the benefits denial process is an appropriate defendant under § 502(a)(1)(B).

1 “§ 502(a)(3) makes no mention at all of which parties may be proper  
2 defendants—the focus, instead, is on redressing the ‘act or practice which  
3 violates [ERISA].’” Harris Tr. & Sav. Bank, 530 U.S. at 246.  
4 Leonelli v. Pennwalt Corp., 887 F.2d 1195 (2d Cir. 1989), which United  
5 cites in support of its position, is not to the contrary. True, in Leonelli we  
6 stated that “only the plan and the administrators and trustees of the plan in  
7 their capacity as such may be held liable” under § 502(a)(1)(B). Leonelli, 887  
8 F.2d at 1199. But we never specifically addressed or considered whether a  
9 claims administrator that exercises total control over the plan claims process  
10 may be sued pursuant to § 502(a)(1)(B). Id. And since Leonelli, we have not  
11 held or even suggested that a claims administrator is an improper defendant  
12 under § 502(a)(1)(B). Because United, as claims administrator, exercised total  
13 control over the CBS Plan’s claims process, we hold that it is a proper  
14 defendant under § 502(a)(1)(B).

15 b. Section 502(a)(3)

16 We turn, then, to § 502(a)(3). United first argues that it cannot be held  
17 liable under § 502(a)(3) for violations of the Parity Act because it is the claims  
18 administrator of a self-funded plan. The Parity Act provides as follows:

1 In the case of a group health plan (or health insurance coverage  
2 offered in connection with such a plan) that provides both  
3 medical and surgical benefits and mental health . . . benefits, such  
4 plan or coverage shall ensure that . . . the financial requirements  
5 [and treatment limitations] applicable to such mental  
6 health . . . benefits are no more restrictive than the predominant  
7 financial requirements [and treatment limitations] applied to  
8 substantially all medical and surgical benefits covered by the  
9 plan (or coverage), and there are no separate cost sharing  
10 requirements [or treatment limitations] that are applicable only  
11 with respect to mental health . . . benefits.

12  
13 29 U.S.C. § 1185a(a)(3)(A). Based on this language, United argues that the  
14 Parity Act does not apply directly to it, because it is not a “group health plan”  
15 and did not offer health insurance coverage to Denbo. Denbo responds that  
16 United’s Parity Act obligation is imposed on it not by the Parity Act itself, but  
17 rather by § 502(a)(3). Denbo’s argument is based on Harris Trust, in which  
18 the Supreme Court interpreted § 502(a)(3) as “itself impos[ing] certain duties”  
19 that are not otherwise imposed by statute, such that “liability under that  
20 provision does not depend on whether ERISA’s substantive provisions  
21 impose a specific duty on the party being sued.” Harris Tr. & Sav. Bank, 530  
22 U.S. at 245. In contrast to “[o]ther provisions of ERISA” that “do expressly  
23 address who may be a defendant,” the Court explained that “§ 502(a)(3)  
24 makes no mention at all of which parties may be proper defendants,” but



1 rather allows a plaintiff to bring suit based on the “the act or practice which  
2 violates any provision of ERISA Title I.” Id. at 246 (quotation marks omitted).  
3 The Court’s interpretation of ERISA “refutes the notion that § 502(a)(3)  
4 . . . liability hinges on whether the particular defendant labors under a duty  
5 expressly imposed by the substantive provisions” of that statute. Id. at 249.  
6 In light of that interpretation, § 502(a)(3) may impose a fiduciary duty arising  
7 indirectly from the Parity Act even if the Parity Act does not directly impose  
8 such a duty. For that reason, and because “§ 502(a)(3) admits of no limit  
9 . . . on the universe of possible defendants,” id. at 246, we hold that United is a  
10 proper defendant for Denbo’s Parity Act claim under § 502(a)(3).

11 United next urges us to affirm the dismissal of Denbo’s § 502(a)(3)  
12 claims on the ground that adequate relief is available under § 502(a)(1)(B).  
13 We disagree with that ground for dismissal, but only because we think that  
14 the District Court’s dismissal on this basis was premature. Section 502(a)(3)  
15 states:

16 A civil action may be brought . . . by a participant, beneficiary, or  
17 fiduciary (A) to enjoin any act or practice which violates any  
18 provision of this subchapter or the terms of the plan, or (B) to  
19 obtain other appropriate equitable relief (i) to redress such

1           violations or (ii) to enforce any provisions of this subchapter or  
2           the terms of the plan.  
3  
4           29 U.S.C. § 1132(a)(3). As the Supreme Court explained in Varity Corp. v.  
5           Howe, 516 U.S. 489 (1996), this “catchall” provision “act[s] as a safety net,  
6           offering appropriate equitable relief for injuries caused by violations that  
7           § 502 does not elsewhere adequately remedy.” Varity Corp., 516 U.S. at 512.  
8           So “where Congress elsewhere provided adequate relief for a beneficiary’s  
9           injury, there will likely be no need for further equitable relief, in which case  
10          such relief normally would not be ‘appropriate.’” Id. at 515. But it is  
11          important to distinguish between a cause of action and a remedy under  
12          § 502(a)(3). “Varity Corp. did not eliminate a private cause of action for  
13          breach of fiduciary duty when another potential remedy is available.” Devlin  
14          v. Empire Blue Cross & Blue Shield, 274 F.3d 76, 89 (2d Cir. 2001) (emphasis  
15          added). Instead, we have instructed, if a plaintiff “succeed[s] on both  
16          claims . . . the district court’s remedy is limited to such equitable relief as is  
17          considered appropriate.” Id. at 89-90 (emphasis added). Thus in Frommert v.  
18          Conkright, 433 F.3d 254 (2d Cir. 2006), we vacated the district court’s  
19          dismissal of the plaintiffs’ § 502(a)(3) breach of fiduciary duty claim on the

1 basis that dismissal was premature, and we affirmed the dismissal of the  
2 plaintiffs' other § 502(a)(3) claim only after holding that the defendants had  
3 violated ERISA, that most plaintiffs were therefore entitled to relief under  
4 § 502(a)(1)(B), and that the remaining plaintiffs' § 502(a)(3) claim failed on the  
5 merits. Frommert, 433 F.3d at 268-70, 272.

6 Here, Denbo's § 502(a)(3) claims are for breach of fiduciary duty, he has  
7 not yet succeeded on his § 502(a)(1)(B) claim, and it is not clear at the motion-  
8 to-dismiss stage of the litigation that monetary benefits under § 502(a)(1)(B)  
9 alone will provide him a sufficient remedy. In other words, it is too early to  
10 tell if his claims under § 502(a)(3) are in effect repackaged claims under  
11 § 502(a)(1)(B). We therefore hold that the District Court prematurely  
12 dismissed Denbo's claims under § 502(a)(3) on the ground that § 502(a)(1)(B)  
13 provides Denbo with adequate relief. See Varsity Corp., 516 U.S. at 515  
14 (granting a remedy where no other remedy is available "is consistent with the  
15 literal language of [ERISA], [ERISA's] purposes, and pre-existing trust law");  
16 Devlin, 274 F.3d at 89 ("Varsity Corp. evidences a clear intention to avoid  
17 construing ERISA in a manner that would leave beneficiaries without any  
18 remedy at all." (quotation marks omitted)). If, on remand, Denbo prevails on

1 his claims under both § 502(a)(1)(B) and § 502(a)(3), the District Court should  
2 then determine whether equitable relief under § 502(a)(3) is appropriate. See  
3 Devlin, 274 F.3d at 89-90.

4 We add that where, as here, a plan participant brings suit against a  
5 “plan fiduciary (whom ERISA typically treats as a trustee)” for breach of  
6 fiduciary duty relating to the terms of a plan, any resulting injunction coupled  
7 with “surcharge” — “monetary ‘compensation’ for a loss resulting from a  
8 [fiduciary’s] breach of duty, or to prevent the [fiduciary’s] unjust  
9 enrichment” — constitutes equitable relief under § 502(a)(3). CIGNA Corp. v.  
10 Amara, 131 S. Ct. 1866, 1879-80 (2011). Every sister circuit that has considered  
11 the issue is in accord. See Gabriel v. Alaska Elec. Pension Fund, 773 F.3d 945,  
12 963 (9th Cir. 2014); Silva v. Metro. Life Ins. Co., 762 F.3d 711, 724-25 (8th Cir.  
13 2014); Kenseth v. Dean Health Plan, Inc., 722 F.3d 869, 882 (7th Cir. 2013);  
14 Gearlds v. Entergy Servs., Inc., 709 F.3d 448, 452 (5th Cir. 2013); McCrary v.  
15 Metro. Life Ins. Co., 690 F.3d 176, 181-82 (4th Cir. 2012). And so we hold that  
16 to the extent Denbo seeks redress for United’s past breaches of fiduciary duty  
17 or seeks to enjoin United from committing future breaches, the relief sought  
18 would count as “equitable relief” under § 502(a)(3). Amara, 131 S. Ct. at 1879-

1 80. As such, it is to be distinguished from the relief sought in Nechis v.  
2 Oxford Health Plans, Inc., 421 F.3d 96 (2d Cir. 2005), where we affirmed a  
3 dismissal of the plaintiff's § 502(a)(3) claims because it was clear that "any  
4 harm to [the plaintiff could] be compensated by money damages" entirely  
5 and she "[could not] satisfy the conditions required for injunctive relief."  
6 Nechis, 421 F.3d at 103.

7       Based on our review of the amended complaint, Denbo appears to  
8 request monetary compensation for any losses resulting from United's  
9 violations of the Parity Act and ERISA, and declaratory and injunctive relief  
10 prohibiting United from violating the Parity Act and ERISA in the future.  
11 These forms of relief "closely resemble[]" the traditional equitable remedies of  
12 injunctive relief and surcharge. Amara, 131 S. Ct. at 1879. But the amended  
13 complaint is not altogether clear about the source of Denbo's monetary losses.  
14 If Denbo seeks true equitable relief—such as losses flowing from United's  
15 breach of fiduciary duty—the relief sought would "resemble[]" the remedy of  
16 surcharge, and would therefore be available to him under § 502(a)(3), ERISA's  
17 provision for equitable remedies. See id. at 1880. If, on the other hand, the  
18 relief Denbo seeks is merely monetary compensation resembling legal

1 damages—such as compensation that would neither redress a loss flowing  
2 from United’s breach of fiduciary duty nor prevent United’s unjust  
3 enrichment—the relief sought would be unavailable as an equitable remedy  
4 under § 502(a)(3). Of course, the availability of injunctive relief and surcharge  
5 does not mean they are necessarily appropriate, and we leave the fashioning  
6 of appropriate remedies, if any, to the District Court. See, e.g., Kenseth, 722  
7 F.3d at 883.

8 For these reasons, we vacate the District Court’s dismissal of Denbo’s  
9 claims and remand.

10 3. Dr. Menolascino’s Claims

11 By contrast, we affirm the District Court’s dismissal of Dr.  
12 Menolascino’s claims because the amended complaint’s allegations relating to  
13 those claims fail to satisfy the Twombly pleading standard. See Twombly, 550  
14 U.S. at 570. In particular, as to Dr. Menolascino’s claims, the amended  
15 complaint fails specifically to allege how United treated “evaluation and  
16 management” services for medical/surgical care, fails plausibly to allege that  
17 United’s treatment of such services for mental health care violated the Parity  
18 Act, fails to identify her patients’ plans or the terms of their plans, and fails to

1 allege facts making it plausible that United reduced or denied benefits for  
2 medically necessary services “without any basis” under the terms of those  
3 plans. Joint App’x 157. Faced with such inadequate pleading, the District  
4 Court did not err in dismissing Dr. Menolascino’s claims.

5 **CONCLUSION**

6 We have considered the parties’ remaining arguments and conclude  
7 that they are without merit. For the foregoing reasons, we AFFIRM in part  
8 and VACATE in part and REMAND for further proceedings consistent with  
9 this opinion.