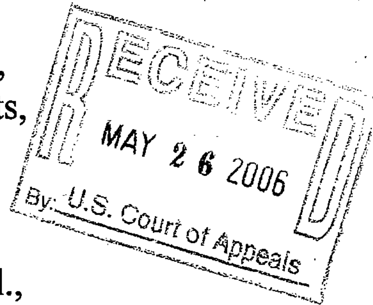
NO. 06-1452

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RACHELLE R. GREEN, et al.,
Plaintiff-Appellants,

v.



EXXONMOBILE CORP., et al.,
Defendants-Appellees.

Appeal From the United States District Court
For the District of Rhode Island

BRIEF OF ELAINE L. CHAO, SECRETARY OF THE
UNITED STATES DEPARTMENT OF LABOR AS AMICUS CURIAE
IN SUPPORT OF APPELLANTS AND REQUESTING REVERSAL

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TABLE OF CONTENTS

Page

Statement of Interest and Issues 1

Statement of the Case 2

Argument 7

I. Recovery Of Monetary Losses From A Fiduciary That Has Breached Its Duty Constitutes "Equitable Relief" Under Section 502(a)(3) 7

A. A Monetary Award Against A Fiduciary to Redress Its Breach Was Typically Available In Equity 8

B. The Court Should Reexamine *Armstrong* In Light Of *Sereboff* and *Great-west* 20

II. If Exxon Breached Its Fiduciary Duty, Then An Award Under Section 502(a)(3) Is "Appropriate" 23

Conclusion 29

TABLE OF CITATIONS

Page

Federal Cases:

Aetna Health Inc. v. Davila,
542 U.S. 200 (2004) 7, 17

Armstrong v. Jefferson Smurfit Corp.,
30 F.3d 11 (1994) 20, 21, 22, 23

Barnes v. Alexander,
232 U.S. 117 (1914) 15

Barrs v. Lockheed Martin Corp.,
287 F.3d 202 (2002) 20

Bowen v. Massachusetts,
487 U.S. 879 (1988) 21

Bowerman v. Wal-Mart Stores, Inc.,
226 F.3d 574 (2000) 18

Calhoon v. Trans World Airlines, Inc.,
400 F.3d 593 (8th Cir. 2005) 19, 23

Callery v. United States Life Ins. Co.,
392 F.3d 401(10th Cir. 2004), cert. denied,
126 S. Ct. 333 (2005) 19

Central States Pension Fund v. Central Transp. Inc.,
472 U.S. 559 (1985) 7

Clews v. Jamieson,
182 U.S. 461 (1901) 10, 12, 13, 14

Devlin v. Empire Blue Cross & Blue Shield,
274 F.3d 76 (2d Cir. 2001), cert. denied,
537 U.S. 1170 (2003) 26

EEOC v. Luce, Forward, Hamilton, & Scripps,
303 F.3d 994 (9th Cir. 2002) 22

Great-West Life & Annuity Ins. Co. v. Knudson,
534 U.S. 204 (2002) . . . . 6 & passim

Green v. ExxonMobil Corp.,
413 F. Supp. 2d 103 (D.R.I. 2006) . . . . 2 & passim

Griggs v. E.I. DuPont De Nemours & Co.,
237 F.3d 371 (4th Cir. 2001) 23

Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.,
530 U.S. 238 (2000) 19

Health Cost Controls of Ill., Inc. v. Washington,
187 F.3d 703 (7th Cir. 1999), cert. denied,
528 U.S. 1136 (2000) 18

Howe v. Varity Corp.,
36 F.3d 746 (8th Cir. 1994) 27

LaRocca v. Borden, Inc.,
276 F.3d 22 (1st Cir. 2002) 27, 28

McDonald v. Household Int'l, Inc.,
425 F.3d 424 (7th Cir. 2005) 18

McFadden v. R&R Engine & Mach. Co.,
102 F. Supp. 2d 458 (N.D. Ohio 2000) 1, 22

Mailman Steam Carpet Cleaning Corp. v. Salem,
196 F.3d 1 (st Cir. 1999), cert. denied sub nom,
LeBlanc v. Salem, 530 U.S. 1230 (2000) 11

Massachusetts Mut. Life Ins. Co. v. Russell,
473 U.S. 134 (1985) 25

Mertens v. Hewitt Assocs.,
508 U.S. 248 (1993) .... 8 & passim

Morrissey v. Curran,
650 F.2d 1267 (2d Cir. 1981) 11

Mosser v. Darrow,
341 U.S. 267 (1951) 11

Nobile v. Pension Comm. of Pension Plan for Employees
of New Rochelle Hosp.,
611 F. Supp. 725 (S.D.N.Y. 1985) 10

Pilot Life Ins. Co. v. Dedeaux,
481 U.S. 41 (1987) 23

Sereboff v. MidAtlantic Med. Servs., Inc.,
No. 05-260, slip op. (U.S. May 15, 2006) .... 8 & passim

Strom v. Goldman, Sachs & Co.,
202 F.3d 138 (2d Cir. 1999), overruled by
Pereira v. Farace, 413 F.3d 330 (2005), cert. denied,
No. 05-731, 2006 WL 1374512 (U.S. May 22, 2006) 18, 19

Tolson v. Avondale Indus.,
141 F.3d 604 (5th Cir. 1998) 26

Turner v. Fallon Community Health Plan, Inc.,
127 F.3d 196 (1st Cir. 1997), cert. denied,
523 U.S. 1072 (1998) 22

Varity Corp. v. Howe,
516 U.S. 489 (1996) . . . . 5 & passim

Vartanian v. Monsanto Co.,
880 F. Supp. 63 (D. Mass. 1995) 10

Watson v. Deaconess Waltham Hosp.,
298 F.3d 102 (1st Cir. 2002) 20

Wilkins v. Baptist Healthcare Sys., Inc.,
150 F.3d 609 (6th Cir. 1998) 26

Williams Elecs. Games, Inc. v. Garrity,
366 F.3d 569 (7th Cir. 2004) 11, 12

Federal Statutes and Rules:

Employee Retirement Income Security Act,
29 U.S.C. § 1001, et seq. 1

Section 404(a)(1)(A) & (B), 29 U.S.C. § 1104(a)(1)(A) & (B) 7

Section 502, 29 U.S.C. § 1132 . . . . 24, 26

Section 502(a)(1), 29 U.S.C. § 1132(a)(1) 5

Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) . . . . 1 & passim

Section 502(a)(2), 29 U.S.C. § 1132(a)(2) 25

Section 502(a)(3), 29 U.S.C. § 1132(a)(3) . . . . 1 & passim

Section 514, 29 U.S.C. § 1144 25

Fed. R. App. P. 29 1

Fed. R. Civ. P. 8(a) & 8(e)(2) 26

State Rule:

1st Circuit Local Rule 29(a) 1

Other Authorities:

Restatement (Second) of Trusts (1959):

§ 2 . . . . 9, 10, 15, 16, 17
§ 74 . . . . 9, 15,16, 17
§ 197 . . . . 9, 11, 12, 17, 19, 20
§ 198 10
§ 199 . . . . 9, 11
§ 205 . . . . 11, 17
§ 205(a) 11, 19
§ 205(b) 17, 19
§ 282 13

Restatement (Third) of Trusts § 205 (1992) 11

Scott, The Law of Trusts (4th ed. 1988):

§ 1 10
§ 2.7 . . . . 10, 16
§ 197 . . . . 9, 10
§ 199 . . . . 10, 11
§ 199.3 . . . . 11, 20
§ 206 11
§ 282.1 13

G. Bogert, The Law of Trusts and Trustees (rev. 2d ed. 1995):

§ 861 . . . . 10, 11
§ 870 9

C. Wright & A. Miller, Federal Practice and Procedure (2d ed. 1990)
§§ 1221, 1282, 1283 26

76 Am. Jur. 2d, Trusts § 667 (2002) 10

1 J. Pomeroy, Equity Jurisprudence § 181 (5th ed. 1941) 13

STATEMENT OF INTEREST AND ISSUES

The Secretary of Labor is the federal officer charged with interpreting and enforcing Title I of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, et seq. As such, the Secretary has an interest in the proper application of ERISA's remedial provisions. This brief addresses the following two significant legal issues: (1) whether recovery from a fiduciary of the direct monetary loss caused by its breach constitutes "appropriate equitable relief" under Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3); and if so, (2) whether ERISA permits a plan beneficiary to simultaneously assert a claim for such relief with a claim for benefits under Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

Both of these issues have significance far beyond the facts of this action. A wide range of injuries will go unredressed if plan beneficiaries cannot recover non-restitutionary monetary relief against fiduciaries who breach their ERISA duties. See, e.g., McFadden v. R & R Eng. & Mach. Co., 102 F. Supp. 2d 458 (N.D. Ohio 2000) (permitting uninsured cancer patient to recover his health expenses from fiduciary-employer who failed to submit premiums to the insurance company). Therefore, in order to ensure proper interpretation of ERISA, the Secretary files this brief as *amicus curiae* as authorized by Rule 29(a) of the rules of this Court and Fed. R. App. P. 29.

STATEMENT OF THE CASE[1]

This case arises from the denial of life insurance benefits to the appellants, the children and heirs of Dr. Robert Renfro. On February 19, 2001, Dr. Renfro began work as a staff physician at ExxonMobil Corporation ("Exxon") in Beaumont, Texas. He filled out several employment-related forms. 413 F. Supp. 2d at 106. These forms were forwarded for processing to Exxon's Benefits Administration Office in Houston ("Houston office"). There, an Exxon employee generated a "benefits packet" for Dr. Renfro containing information about the company's benefit programs. The packet was placed in the Houston office's outgoing mailbox on the morning of February 26, 2001, to be mailed to Dr. Renfro. That same day, Dr. Renfro died from injuries sustained in a car accident. Id. at 106-08.

The benefits packet contained, among other things, enrollment forms for Exxon's life insurance plan. Included in the plan were two optional insurance programs -- the Group Universal Life insurance program and the Voluntary Accidental Death and Dismemberment insurance program ("optional programs" or

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[1]This statement is derived from the district court's decision and includes only those facts relating to the Secretary's arguments. Green v. ExxonMobil Corp., 413 F. Supp. 2d 103 (D.R.I. 2006).

"plan"). Id. at 106.[2] The plan document made an employee eligible to participate on the first day of his employment, but required the employee to complete an election form in order to be covered. Participation was effective once the plan administrator received the completed election form. Id. at 106-07.

The day following Dr. Renfro's death, Houston office personnel, after consulting with a company attorney, made elections for Mr. Renfro under the plan with coverage to begin on February 23, 2001. The elections were based on the assumption that Dr. Renfro would have elected coverage if he had lived. Id. at 107.

On April 11, 2001, Houston personnel sent an "Estimate of Survivor Benefits" ("estimate letter") to the heirs. The estimate included payments of $785,000 and $1,256,000 under the optional life and accident programs respectively. A disclaimer followed the estimate, stating: "'In the event of any inconsistency between the information contained in this statement and the provisions of the plans, the plans, as well as any applicable administrative regulations, will govern.'" Id. at 107-08.

The insurance carrier denied the heirs' claims for benefits because their father had not executed the plan's election forms. Both the Houston employee and the

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[2]Exxon also offered and the heirs received benefits under two "basic" life insurance programs providing for automatic coverage. Id. at 107.

attorney who had advised her testified that they then realized that the posthumous plan election for Dr. Renfro had been a mistake. Id. at 111. Accordingly, the plan administrator, Janet Madigan, decided not to extend plan coverage to Dr. Renfro. She based her decision on legal advice that the Houston personnel lacked the authority to decide whether the plan would have covered Dr. Renfro. Id. at 108.

After the plan denied the heirs' appeal, they brought an ERISA action in the United States District Court for Rhode Island against Exxon, Madigan and the plan (collectively "Exxon"). Count I of their complaint asserts a claim under Section 502(a)(1)(B), which allows participants and beneficiaries to sue for plan benefits. The heirs allege that their father was a participant in the plan (and hence, they were beneficiaries) on one of two grounds. First, they argue that he became a participant on the date on which the plan documents made him eligible to participate -- here, his first day of work. Second, they allege that the Houston personnel's election to cover Dr. Renfro along with the estimate letter constituted an irrevocable decision by Exxon. Id. at 110.

In Count II, the heirs sue for equitable relief to remedy Exxon's alleged breach of fiduciary duty under Section 502(a)(3). They assert that Exxon violated its fiduciary obligation by failing to provide Dr. Renfro with the plan's election form by the first day of his eligibility to participate -- his first day on the job. Id. at 117.

The heirs lost both counts after a bench trial. First, the district court denied their Section 502(a)(1)(B) claim, finding that Dr. Renfro was never entitled to benefits because he did not make an election as the plan required. Id. at 112. Second, the court declined to bind the company to the attempts by the Houston personnel to cover Dr. Renfro, concluding that the plan did not authorize them to do so. Id. Additionally, the court found that the disclaimer prevented the heirs from reasonably relying on the estimate letter. Therefore, the court refused to reject as arbitrary and capricious the decision of the plan administrator, who had discretionary authority to interpret the plan, to exclude Dr. Renfro from coverage. Id. at 110-14.

Next, the court rejected the heirs' Section 502(a)(3) claim for equitable relief to remedy a fiduciary breach on two grounds. First, the court reasoned that Varity Corp. v. Howe, 516 U.S. 489 (1996), barred the Section 502(a)(3) claim because the heirs are "beneficiaries under the ExxonMobil plan and, consequently, have a cause of action pursuant to § 502(a)(1)." 413 F. Supp. 2d at 115. Thus, the Court stated, they cannot seek the "same remedy" under an alternate section. Id.

Second, the court concluded that Exxon had not breached its fiduciary duties under ERISA. Had Dr. Renfro lived, he would have received the plan's election forms by his second week on the job -- a time frame that the court did not

find "egregiously lethargic or inefficient." Id. at 118. Additionally, the court stated that the heirs failed to show that their father would have elected to participate in the plan if he had been given the opportunity. Id.

The court also discussed, but did not rely on, a third line of reasoning for its rejection of the Section 502(a)(3) claim. The court stated that Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002), required the heirs to show that they sought "equitable restitution." The court stated that "it appears" that the heirs had failed to do so, and, therefore, instead sought legal, not equitable, relief. 413 F. Supp. at 106-07. However, the court stopped short of ruling that Great West barred the heirs' requested relief, and instead rejected their Section 502(a)(3) claim because it found no fiduciary breach. Id. at 116-17.

The Secretary's *amicus* participation is based solely on the two legal issues set forth above in the "Statement of Interest and Issues." The Secretary takes no position on the question of whether Exxon breached its fiduciary duties. Nevertheless, the facts, as presented by the district court, leave the Secretary extremely skeptical as to a finding that a breach occurred. The plan conditioned participation on the administrator's receipt of the election form, and only a week had elapsed between Dr. Renfro's first day of work and the plan's mailing of the benefit package. Id. at 106-07. Despite the Secretary's reservations about the

merits of the heirs' claims, however, the Secretary files this brief to address the important legal issues this case raises concerning the scope and availability of ERISA remedies.

ARGUMENT

Section 502(a)(3) permits participants and beneficiaries to recover monetary relief from a breaching fiduciary because it is both "appropriate" and "equitable." Moreover, ERISA allows participants to assert simultaneously alternative claims for plan benefits under Section 502(a)(1)(B) and for relief from a fiduciary breach under Section 502(a)(3).

I. RECOVERY OF MONETARY LOSSES FROM A FIDUCIARY THAT HAS BREACHED ITS DUTY CONSTITUTES "EQUITABLE RELIEF" UNDER SECTION 502(a)(3).

ERISA, modeled on trust law, obligates fiduciaries of employee benefit plans to act prudently and with loyalty toward plan beneficiaries. 29 U.S.C. Section 1104(a)(1)(A) & (B); Central States Pension Fund v. Central Transp. Inc., 472 U.S. 559, 570 (1985). When fiduciaries violate these duties, Section 502(a)(3) entitles beneficiaries to sue for redress. 29 U.S.C. § 1132(a)(3); Varity, 516 U.S. at 515; see Aetna Health Inc. v. Davila, 542 U.S. 200, 224 (2004) (Ginsberg, J., concurring)("Congress ... intended ERISA to replicate the core principles of trust

remedy law, including the make-whole standard of relief.")(internal quotation marks and citation omitted).

Section 502(a)(3) expressly limits recovery to appropriate "equitable relief." ERISA does not define "equitable relief," but the Supreme Court has clearly articulated the test for determining whether relief sought under Section 502(a)(3) is equitable. Relief under Section 502(a)(3) is equitable if it falls within a category of relief "*typically* available in equity" in the days when the bench was divided between law and equity courts. Sereboff v. MidAtlantic Med. Servs., Inc., No. 05-260, slip op. at 6 (U.S. May 15, 2006) (clarifying the test originally set forth in Mertens v. Hewitt, 508 U.S. 248, 256 (1993)); Great-West, 534 U.S. at 219 (same).

A. A Monetary Award Against a Fiduciary to Redress Its Breach Was Typically Available in Equity.

The Supreme Court instructs courts to assess what categories of relief were "typically available in equity" according to the historical practices in the days of the divided bench. Great-West, 534 U.S. at 217. To determine these historical practices, the Court has looked to both standard works, such as the Restatements, and to case law from the days of the divided bench. See id.; Sereboff, slip op. at 4 & 6. The Court has emphasized that a remedy's equitable nature depends not upon the label appended to it, such as "restitution" or "injunction," but on "'the basis for

the plaintiff's claim and the nature of the underlying remedies sought." Sereboff, slip op. at 6 (quoting Great-West, 534 U.S. at 213).

The heirs base their claim on the trust-based duties owed by an ERISA fiduciary to a plan beneficiary. The Restatement of Trusts makes clear that monetary relief sought by a beneficiary against a trustee-fiduciary to redress its breach was typically available in equity. See Restatement (Second) of Trusts ("Restatement") § 197 cmt. a, at 433 (1959); see also id. § 199, at 437 (beneficiary's suit to compel fiduciary to redress a breach of trust seeks an "equitable remedy."). In fact, such relief was exclusively available in equity courts. Id. § 197 cmt. a, at 433; see also id. § 199, at 437.

Trust relationships "are, and have been since they were first enforced, within the peculiar province of courts of equity." III Scott, The Law of Trusts ("Scott ") § 197, at 188 (4th ed. 1988); see G. Bogert, The Law of Trusts and Trustees ("Bogert ") § 870, at 123 (1995). In fact, during the days of the divided bench, the beneficiary had no title to the trust property and therefore, no legal interest in the trust, only an equitable one. Restatement § 2, at 9 & § 74, at 192; III Scott § 197, at 188. Lacking any title or legal interest, the beneficiary could not obtain relief in a court of law, but rather could only find relief in the equity court. III Scott § 197, at

188; I Scott § 1, at 1. In turn, the trustee owed the beneficiary only equitable duties, likewise enforceable solely in equity courts. I Scott § 2.7, at 48-49.[3]

In the days of the divided bench, the equity court, unlike the law court, had the flexibility to compel the trustee to act according to its fiduciary duties of prudence and loyalty and to compensate the beneficiary for harm caused when those equitable duties were breached. III Scott § 197, at 188 & § 199, at 203; see also Clews v. Jamieson, 182 U.S. 461, 479-80 (1901).[4] As a leading treatise explains: "Equity is primarily responsible for the protection of rights arising under trusts, and will provide the beneficiary with *whatever remedy is necessary* to protect him and recompense him for loss ...." Bogert § 861, at 3-4 (emphasis

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[3]An exception allowed the beneficiary to bring a suit at law against a trustee who has a duty to pay money "immediately and unconditionally" to the beneficiary. That exception applies only where the trustee's obligation to pay is unconditionally established by the trust instrument, which is not the case with a breach of fiduciary duty under ERISA. See Mertens, 508 U.S. at 256 n.6; see Restatement § 198, at 434-35 and illustrations. Here, the duty to pay is conditioned on the equitable determination of whether or not Exxon engaged in a fiduciary breach. See Nobile v. Pension Comm. of Pension Plan for Employees of New Rochelle Hosp., 611 F. Supp. 725, 728-29 (S.D.N.Y. 1985); see also Vartanian v. Monsanto Co., 880 F. Supp. 63, 72 (D. Mass. 1995); 76 Am. Jur. 2d, Trusts § 667 (2002) (beneficiary's relief, even if only monetary, against a trustee for breach of trust is exclusively equitable).

[4]See III Scott §§ 197, at 188 & 199, at 203; Restatement § 2 cmt. f, at 9 (chancellor's flexibility to protect beneficiary's interest includes application of "principles of justice" and "enforcing personal duties rather than securing property interests").

added). Thus, as the Restatement unequivocally sets forth, "the remedies of the beneficiary against the trustee [for a breach of duty] are *exclusively equitable*." Restatement § 197, at 433 (emphasis added).[5]

The recovery of monetary losses from a breaching fiduciary was a specific category of relief in equity sometimes called "surcharge." Surcharge required the trustee to pay "the amount necessary to compensate fully for the consequences of the breach." Restatement (Third) of Trusts § 205 & cmt. a, at 233 (1992); see Mailman Steam Carpet Cleaning Corp. v. Salem, 196 F.3d 1, 7 (1st Cir. 1999), cert. denied sub nom, LeBlanc v. Salem, 530 U.S. 1230 (2000); Williams Elecs. Games, Inc. v. Garrity, 366 F.3d 569, 577 (7th Cir. 2004); Morrissey v. Curran, 650 F.2d 1267, 1282 (2d Cir. 1981); see also Mosser v. Darrow, 341 U.S. 267, 268, 274 (1951) (remanding for a determination of whether to surcharge a breaching trustee and noting that "trusteeship is serious business" and "[t]he most effective sanction for good administration is personal liability for the consequences of forbidden acts"). As a monetary remedy designed to redress a breach of trust, surcharge was

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[5]See Restatement § 205(a), at 458 & § 205 cmts. a & c and illustrations, at 458-59; III Scott § 199.3, at 206; see also Restatement § 197, at 433; id. § 199, at 437 (setting forth "equitable remedies of beneficiary"); Bogert § 861, at 3-4; see also III Scott § 199, at 203-04 & 206 at 250 (enumerating money payment designed to redress fiduciary breach as one of the "equitable remedies" available to a beneficiary).

typically, and indeed exclusively, granted by courts of equity. See Restatement (Second) of Trusts § 197; see also Williams Elecs., 366 F.3d at 577.

Thus, the fact that the equity court redressed the fiduciary breach through a monetary award did not alter its character as an "equitable" remedy. As Supreme Court case law "from the days of the divided bench" confirms:

> All possible trusts, whether express or implied, are with the jurisdiction of the chancellor....The fact that the relief demanded is a recovery of money only is not important in deciding the question as to the jurisdiction of equity. The remedies which such a court may give "depend upon the nature and object of the trust; sometimes they are specific in their character, and of a kind which the law courts cannot administer, but often they are of the same general kind as those obtained in legal actions, being mere recoveries of money. A court of equity will always, by its decree, declare the rights, interest, or estate of the *cestui que trust* [beneficiary], and will compel the trustee to do all the specific acts required of him by the terms of the trust. It often happens that the *final* relief, to be obtained by the *cestui que trust* consists in the recovery of money."

Clews, 182 U.S. at 479-80 (quoting 1 Pomeroy, Equity Jurisdiction § 158) (emphasis in original).

The Secretary does not argue, as the plaintiffs did in Mertens, that all relief that a court of equity *could have* granted meets the "typically available in equity" test. See Mertens, 508 U.S. at 255-56. Equity sometimes granted legal relief in trust cases. Id., 508 U.S. at 256; see Clews, 182 U.S. at 481. However, that legal relief did not arise from beneficiary claims against the trustee for breach of fiduciary

duty -- a purely equitable duty. Instead, legal relief granted by equity courts arose solely from violations of *legal duties*, such as contractual obligations or the duties of a non-fiduciary relating to the trust. See Mertens, 508 U.S. at 256 (equity courts could sometimes "'establish purely legal rights and grant legal remedies'" that would otherwise be beyond its scope)(quoting 1 J. Pomeroy, Equity Jurisprudence § 181, p. 257 (5th ed. 1941)); see e.g., Clews, 182 U.S. at 481 (contract relief available in equity against non-fiduciary in breach of trust case).

For example, when both a fiduciary and a non-fiduciary harmed the trust in the same transaction, the equity court did not force the beneficiary to bring two separate actions -- one in equity to enforce his equitable rights against the fiduciary and one at law to enforce his legal rights against the non-fiduciary. See IV Scott § 282.1, at 30; see also Clews, 182 U.S. at 481 (preventing "the necessity of an action at law" for beneficiary's contract-based claim against non-fiduciaries by asserting equity jurisdiction over both the legal contract claim and the beneficiary's claim in equity against trustee for fiduciary breach); Restatement § 282 cmt. e, at 45. Instead, the beneficiary could avoid multiple suits by suing both parties in the equity court. See IV Scott § 282.1, at 30; Clews, 182 U.S. at 481. Thus, the equity court had the power to grant all relief, even legal relief based on legal duties,

in connection with a breach of trust. See Mertens, 508 U.S. at 257; see e.g., Clews, 182 U.S. at 481.

The mere fact, however, that the equity court had the power to occasionally grant this legal relief did not make it "equitable." To demonstrate, the Supreme Court in Mertens denied a money award sought under Section 502(a)(3) to remedy the legal duty of the non-fiduciary defendant, finding it merely *legal* relief that the equity court was empowered to grant. 508 U.S. at 256; see also Great-West, 534 U.S. at 219, 209 & 210 (finding "special equity-court power" to grant both legal and equitable relief in trust cases inapposite to a contract-based Section 502(a)(3) claim). The Court reasoned that it would effectively read the "equitable" limitation out of Section 502(a)(3) if it expanded the scope of available relief to include these legal remedies that courts of equity sometimes awarded. Mertens, 508 U.S. at 256; Great-West, 534 U.S. at 210.

Money relief against a *fiduciary* for breach of trust, however, did not derive from any "special" power of the equity court. As explained above, such relief from a fiduciary was not something that equity courts granted "sometimes," "occasionally" or "to avoid multiple suits," as was the relief against the non-fiduciary in Mertens. Instead, it was a category of relief not only typically, but exclusively available in equity. It arose from equitable rights, redressed equitable

duties, and was within the equity court's typical, ordinary power to grant it. See *supra* Section I.A; Restatement § 2, at 9 & 10; § 74, at 192 (trustee's duties and beneficiary's interests are "equitable").

In fact, equity's recognition of the defendant as a "trustee" underpins the monetary award upheld under Section 502(a)(3) in the Supreme Court's Sereboff decision. The Court upheld a health plan's Section 502(a)(3) claim for breach of a plan provision requiring the beneficiary to reimburse the plan from his personal injury settlement. After looking to "case law from the days of the divided bench," the court found that the relief sought -- an "equitable lien by agreement" -- was within a category typically available in equity. Slip op. at 4-7; see *supra* n.7. The court noted that such a lien derives from the "familiar rule of equity that a contract to convey a specific object even before it is acquired will make the contractor *a trustee* as soon as he gets a title to the thing." Id. at 6 (quoting Barnes v. Alexander, 232 U.S. 117(1914))(emphasis added). The relief requested in Sereboff met this rule because the plan sought to enforce its equitable interest in specific property (settlement funds) to which the beneficiaries held legal title. The beneficiaries had, therefore, become "trustees" of the pursued property. Slip op. at 6 & 9.

In contrast, in Great-West, a health plan sought reimbursement from a beneficiary under the plan contract, but the beneficiary no longer held her settlement funds which were instead in a special needs trust. Nevertheless, the plan argued that it sought "equitable restitution," a remedy in which equity imposed a constructive trust or equitable lien on "particular funds or property in the defendant's possession." 534 U.S. at 213. Because the funds were not in the possession of the defendant in Great-West, no trust relationship existed. Therefore, the plan in Great-West could not establish that the relief it sought from its non-fiduciary defendant, who owed only a legal contract duty to reimburse the plan, was typically available in equity. Thus, the Court held that it was not seeking "equitable relief " as required by Section 502(a)(3). Id. at 210.[6]

Unlike the remedies sought in Mertens and Great-West, the monetary remedies against a fiduciary, such as surcharge, upheld the *equitable* interests of the beneficiaries and redressed the *equitable* duties of the fiduciary, both of which were developed and enforceable entirely in courts of equity. I Scott § 2.7, at 48-49; see Restatement § 2, cmts. e & f, at 8-9 (beneficiary has only an "equitable interest"

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[6]See also Restatement § 74 cmt. a, at 191 (distinguishing contract rights, which are ordinarily enforceable in courts of law, from beneficiary's rights against trustee, which are ordinarily exclusively equitable).

in the trust) & § 74, at 192 (same); id. § 2 cmt. h, at 10 (trustee owes "equitable duties" to beneficiary).[7] As established above, these monetary remedies against the fiduciary were typically, and in fact, exclusively, available in equity. Therefore, they fit precisely into the test for equitable relief set forth by the Supreme Court in Sereboff, Great-West and Mertens.

The Supreme Court has not yet addressed the scope of equitable remedies available against a breaching fiduciary under Section 502(a)(3). Justice Ginsberg recently suggested, however, that ERISA "may 'allo[w] at least some forms of 'make-whole' relief against a breaching *fiduciary* in light of the general availability of such relief in equity at the time of the divided bench.'" Aetna Health Inc. v. Davila, 542 U.S. at 223 (Ginsberg, J., concurring) (quoting United States' *Amicus Curiae* Brief filed in Davila, at 27-28, n.13)(emphasis added by Justice Ginsberg)); see also

[7]The Restatement gives several examples of the types of monetary awards fiduciaries must pay to redress their breaches. For instance, Illustration 1 § 205 of the Restatement explains: "A is trustee of $10,000 in cash. As a result of his negligence the money is stolen. A is liable for $10,000." § 205 cmt. c, at 459. Illustration 3 notes: "A is trustee of a claim against B for $1,000. B is solvent and A can collect the claim in full. A negligently fails to take steps to collect the claim until B becomes insolvent with the result that he is able to collect only $400 of the money owed by B. A is liable for $600." Id. The Restatement makes it plain that all of these remedies are "equitable," and typically available in equity courts. See Restatement § 197 & cmt. a, at 433. The Restatement goes on to explain that, if a fiduciary wrongly possesses trust property, a beneficiary can additionally recover unjust enrichment as a separate category of relief. See id. § 205(b) at 458.

McDonald v. Household Int'l, Inc., 425 F.3d 424, 430 (7th Cir. 2005)(noting Justice Ginsburg's concurring opinion in Davila in ERISA preemption case).

The Seventh Circuit recognized the equitable nature of a monetary award against a breaching fiduciary in Bowerman v. Wal-Mart Stores, Inc., 226 F.3d 574 (7th Cir. 2000). Ms. Bowerman sued the plan fiduciary under Section 502(a)(3) for her uncovered medical expenses to redress the fiduciary's breach which caused her to lose her health insurance. The Court upheld Ms. Bowerman's claim for monetary relief under Section 502(a)(3) specifically because it rested on a violation of fiduciary duty. The Court recognized that Section 502(a)(3) excludes legal damages. The Court then proceeded to explain, "[h]owever, 'when sought as a remedy for breach of fiduciary duty [this kind of relief, which the Court called restitution] is properly regarded as an equitable remedy because the fiduciary concept is equitable.'" 226 F.3d at 592 (quoting Health Cost Controls of Ill., Inc. v. Washington, 187 F.3d 703, 710 (7th Cir. 1999), cert. denied, 528 U.S. 1136 (2000)).[8]

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[8]The Bowerman court also cited Strom v. Goldman, Sachs & Co., 202 F.3d 138, 144 (2d Cir. 1999), which upheld monetary relief against a fiduciary under Section 502(a)(3). The Second Circuit overruled Strom in Pereira v. Farace, 413 F.3d 330 (2005), cert. denied, No. 05-731, 2006 WL 1374512 (U.S. May 22, 2006), a non-ERISA case involving the right to a jury trial. In Pereira, the court misinterpreted Great-West as limiting equitable monetary awards to unjust

Just like Ms. Bowerman, the heirs seek to recover the direct economic loss caused by the plan fiduciaries' alleged breach. According to standard works, such as the Restatement, Scott and Bogert, under the divided bench, fiduciaries such as Exxon, if in breach, had an *equitable* duty to restore beneficiaries to the place they would have occupied absent the breach.

Contrary to the district court's statement, the Supreme Court does not require Section 502(a)(3) plaintiffs to demonstrate that they seek equitable restitution or that the defendant was unjustly enriched. To prove their relief equitable, plaintiffs need only show that they seek a category of relief that was typically available in equity courts. Sereboff, slip op. at 6-8; Great-West, 534 U.S. at 210-14. Unjust enrichment-based equitable restitution is but one of those categories.[9] Monetary awards paid by a trust fiduciary to a beneficiary to redress

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enrichment-based restitution claims. 413 F.3d at 340; see also Callery v. United States Life Ins. Co., 392 F.3d 401 (10th Cir. 2004), cert. denied, 126 S. Ct. 333 (2005)(same); Calhoon v. Trans World Airlines, Inc., 400 F.3d 593, 598 (8th Cir. 2005)(rejecting Strom's "make-whole" remedial scheme). But see Sereboff, slip op. at 7-8 (confirming that monetary relief under Section 502(a)(3) is not limited to equitable restitution).

[9]See Sereboff, slip op. at 7-8; Great-West, 534 U.S. at 210-214; see also Harris Trust & Sav. Bank v. Solomon Smith Barney, Inc., 530 U.S. 238, 251 (2000). Contrast Restatement § 205(b), at 458 (unjust enrichment-based claims against fiduciary) against § 205(a) & cmt. c. and illustrations, at 459 (monetary awards for breach of fiduciary duty absent unjust enrichment) – both categories being exclusively available in equity. Id. § 197 & cmt. a, at 433; see also III Scott §

its breach is another. See Restatement § 197 & cmt. a, at 433; see *supra* Section I.A. Regardless of how courts label such monetary awards -- "monetary relief," "restitution," "surcharge" or even "damages" -- the duty to make them arises in equity from the fiduciary relationship itself, and not unjust enrichment.

B. This Court Should Reexamine *Armstrong* in Light of *Sereboff* and *Great-West.*

Before Sereboff and Great-West were issued, this Court rejected the argument that the defendant's fiduciary status affected the equitable nature of the monetary relief requested under Section 502(a)(3). Armstrong v. Jefferson Smurfit Corp., 30 F.3d 11, 13 (1994).[10] Not having had the benefit of Sereboff and Great-West at the time, this Court in Armstrong did not apply the "typically available in equity test" or engage in the historical analysis that it mandates. Id. Since it issued Armstrong, this Court has noted the uncertainty surrounding at least some types of monetary claims under Section 502(a)(3) in light of Great-West. See Watson v. Deaconess Waltham Hosp., 298 F.3d 102, 110 n.8 (1st Cir. 2002) (acknowledging that Great-West requires courts to assess historical status of money relief requested, but declining to rule on equitable status of relief due to lack

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199.3, at 206.

[10]The district court here did not discuss Armstrong even though that case denied relief to plan participants suing a fiduciary for breach. Id. at 13.

of an underlying fiduciary breach); see also Barrs v. Lockheed Martin Corp., 287 F.3d 202, 206 (1st Cir. 2002)(declining to rule on equitable nature of relief due to lack of fiduciary breach).

If this Court reaches the remedies issues in this case, it should re-examine its holding in Armstrong because that decision erroneously relied on language in Mertens suggesting that all compensatory monetary relief to remedy a fiduciary breach constitutes legal damages. 30 F.3d at 13. As explained above, Mertens was a lawsuit against a non-fiduciary that owed legal duties to the plan, not a suit against a fiduciary owing equitable duties to the beneficiaries. As the Supreme Court in Sereboff re-affirmed, whether a remedy sought is legal or equitable depends on the basis for the plaintiff's claim as well as the nature of the underlying remedies sought. Sereboff, slip op. at 6. Great-West clarified that legal "money damages" arise from breach of a *legal* duty (like that owed by the non-fiduciary in Mertens or by contract in Great-West). See Great-West, 534 U.S. at 210 (relying on Bowen v. Massachusetts, 487 U.S. 879, 913 (1988) (Scalia, J., dissenting) ("the term 'damages' refers to money awarded as reparation for injury resulting from breach of *legal* duty.")(emphasis added). In contrast, in cases where the plaintiff bases its claim on an *equitable* duty (such as that owed by the constructive "trustee" in Sereboff), the remedies sought are "equitable remedies." Sereboff, slip op. at 9-10.

Because the nature of the claim against a fiduciary is based on equitable duties, it is consistent with Mertens, Great-West, and Sereboff to hold that a monetary award against a fiduciary is an "equitable remedy." See *supra* Section I.A (explaining that fiduciary owes equitable duty to beneficiary). Because Sereboff and Great-West have "directly undermined" the reasoning of Armstrong, this Court may reconsider and limit or, if necessary, overrule it. See EEOC v. Luce, Forward, Hamilton, & Scripps, 303 F.3d 994, 1002 (9th Cir. 2002).[11]

Moreover, Armstrong's holding that "equitable relief" does not include make-whole relief against a breaching fiduciary would allow fiduciaries to commit serious violations of ERISA consequence-free. See e.g., McFadden, 102 F. Supp. 2d at 458 (employer-fiduciary's failure to forward premiums caused cancer-stricken

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[11]Dicta in the pre-Great-West decision, Turner v. Fallon Community Health Plan, Inc., 127 F.3d 196, 198 (1st Cir. 1997), cert. denied, 523 U.S. 1072 (1998), also addresses monetary relief under Section 502(a)(3). There, a plan participant sought personal injury-type relief associated with the death of his wife after his health plan refused to pay for a medical procedure clearly excluded by the plan contract. The participant apparently did not claim that he sought equitable relief under Section 502(a)(3), and this Court stated that "equitable relief is not being sought in this case." 127 F.3d at 198. The Court rejected his claim as a grievance for denial of benefits under the plan (as provided by Section 502(a)(1)(B)). Id.; see Varity, 516 U.S. at 515. Finding no fiduciary breach, this Court never mentioned, much less applied, Mertens or the "typically available in equity" test later clarified in Great-West and Sereboff. 127 F.3d at 200. To the extent, however, that Turner is construed to preclude the heirs' relief, the Secretary likewise requests that the Court reexamine it in light of those two cases.

employee to lose health coverage); Calhoon, 400 F.3d at 595 (employee's severely injured child lost health coverage due to plan administrator's alleged misconduct); Strom, 202 F.3d at 144 (employee's family lost life insurance benefits due to employer-fiduciary's negligent handling of application); Griggs v. E.I. DuPont De Nemours & Co., 237 F.3d 371, 385 (4th Cir. 2001)(employer had informed participant that his lump sum early retirement payout would be tax deferred when it knew that it was not).[12]

Leaving these wrongs with no remedy is neither consistent with ERISA's remedial purposes nor compelled by Supreme Court precedent. To the contrary, as the Supreme Court stated in Varity, "it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy." 516 U.S. at 513. Importing Armstrong's interpretation of Section 502(a)(3) into this case would do just that.

II. IF EXXON BREACHED ITS FIDUCIARY DUTY, THEN AN AWARD UNDER SECTION 502(a)(3) IS "APPROPRIATE."

The district court's ruling that the heirs' Section 502(a)(3) claim was not "appropriate" because the heirs also sought benefits under Section 502(a)(1)(B)

[12]ERISA would pre-empt any state law claims that these plaintiffs may have had. See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45-48 (1987).

was in error. An award fully compensating the heirs for losses suffered from Exxon's alleged fiduciary breach is appropriate under Section 502(a)(3) because no other part of Section 502 redresses their injury.

The Supreme Court set forth what constitutes "appropriate" relief under Section 502(a)(3) in Varity. 516 U.S. at 489. There, a fiduciary allegedly tricked its employees into withdrawing from one benefit plan and enrolling in an insolvent plan. The Supreme Court upheld the employees' right to seek individual relief for fiduciary breach under Section 502(a)(3). The Court explained that Section 502(a)(3) serves as a "catchall" providing a "safety net" that offers "appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." 516 U.S. at 512. The Court held that, because Section 502 provided no other remedy for the plaintiffs in that case, individual relief was "appropriate" under Section 502(a)(3). Id. at 515.

Like the plaintiffs in Varity, Section 502(a)(3) may be the only source of relief to Dr. Renfro's heirs. Although they have filed a claim, in the alternative, for plan benefits under Section 502(a)(1)(B), that claim is likely to fail because Dr. Refro was unable to complete the necessary paperwork before he died.[13] The heirs

[13]If this Court ultimately grants relief under Section 502(a)(1)(B), then an additional grant of Section 502(a)(3) relief for the amount of the plan benefit likely

have no claim under Section 502(a)(2) because that section provides relief only to the plan itself. See Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 144 (1985). Moreover, ERISA expressly preempts any state law claims that the heirs may have. See 29 U.S.C. § 1144.

Therefore, the "catchall" relief of Section 502(a)(3) may provide the only means under federal or state law to redress Exxon's alleged breach. Given the lack of relief elsewhere, a court order for individual relief to the heirs to redress a fiduciary's breach is "appropriate" under the circumstances. See Varity, 516 U.S. at 515.

Contrary to the district court's opinion, Varity does not prohibit simultaneous claims under Sections 502(a)(1)(B) and 502(a)(3). Instead, the Court in Varity sought only to disallow plaintiffs from repackaging their benefits claim as a Section 502(a)(3) fiduciary breach claim in order to circumvent the normal process for the administration and review of benefit claims, including the standard for the review of discretionary benefit determinations. See Varity, 516 U.S. at 514-16. Varity merely prevents ERISA plaintiffs from using Section 502(a)(3) to

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would not be appropriate. See Varity, 516 U.S. at 515.

double-dip into relief sought under another section of 502 that adequately remedies their loss. Varity does not wipe out long established rules of civil procedure which permit joinder of alternative -- and even inconsistent -- claims in a single action. See Fed. R. Civ. P. 8(a), 8(e)(2); C. Wright & A. Miller, Federal Practice and Procedure §§1221, 1282, 1283 (2d ed. 1990).

The district court erroneously ignored these long established rules permitting alternate pleading and found that an ERISA plaintiff must choose between *suing* for benefits under Section 502(a)(1)(B) and *suing* for fiduciary breach under Section 502(a)(3).[14] Varity forces no such choice. Instead, the Supreme Court's opinion in Varity allows plaintiffs to assert claims under both sections, but holds that Section 502(a)(3)'s "appropriateness" requirement may force courts to choose between an *award* under Section 502(a)(1)(B) and an *award* under Section 502(a)(3). See Devlin v. Empire Blue Cross & Blue Shield, 274 F.3d 76 (2d Cir. 2001), cert. denied, 537 U.S. 1170 (2003). In fact, the Varity plaintiffs themselves sued under both Sections 502(a)(1)(B) and 502(a)(3). See Howe v. Varity Corp., 36 F.3d 746, 750-51 (8th Cir. 1994). Nevertheless, the Supreme Court upheld the

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[14]Some circuit courts have similarly misconstrued Varity. See e.g., Tolson v. Avondale Indus., 141 F.3d 604, 610 (5th Cir. 1998); Wilkins v. Baptist Healthcare Sys., Inc., 150 F.3d 609, 615-16 (6th Cir. 1998).

appropriateness of their Section 502(a)(3) claim because, as in the current case, the plaintiffs' Section 502(a)(1)(B) claim had failed.

The district court likewise misconstrues the First Circuit's opinion in LaRocca v. Borden, Inc., 276 F.3d 22 (1st Cir. 2002). There, an employer-fiduciary wrongly terminated its employees from its own health plan, which was funded by joint premiums from both the employer and employees. The district court ordered the employer to reinstate the employees into the plan and to pay for the medical expenses that the employees had incurred. This Court refused to allow the employees, who had by then been made whole, to pursue further relief under Section 502(a)(3) for disgorgement of the medical premiums the employer had saved during their absence from the plan. Once the employees were reinstated to the plan, the Court held that Section 502(a)(1)(B) exclusively governed their claims according to the plan's terms. 276 F.3d at 29.

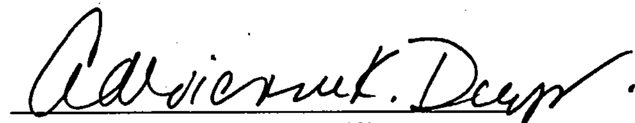
Distinguishing, but not rejecting, cases that have permitted simultaneous claims under Section 502(a)(1)(B) and (a)(3), the Court in LaRocca pointed out that the plaintiffs in those cases "were permanently ineligible for a remedy pursuant to Section (a)(1)[B]" because their plans were defunct. 276 F.3d at 29. Like the plaintiffs in those cases, and unlike the plaintiffs in LaRocca, the heirs here are claiming that they are permanently ineligible for benefits under Section 502(a)(1)(B),

because Exxon breached its fiduciary duties. Therefore, LaRocca supports, rather than hinders, the heirs' claim under Section 502(a)(3) -- the only section under which they can find relief.[15]

CONCLUSION

If this Court reaches the legal issues discussed above, the Secretary respectfully requests that the Court hold that a monetary award for the heirs' losses constitutes "appropriate equitable relief" under Section 502(a)(3).

Respectfully Submitted,



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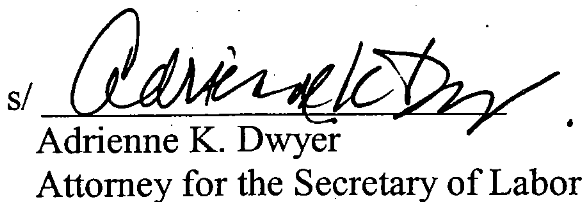
[15] As noted above, the Secretary is extremely skeptical that any fiduciary breach occurred here. This Court's ruling on this issue, however, will have an impact on the ability of other participants and beneficiaries to obtain meaningful relief when fiduciary breaches have foreclosed them from obtaining the benefits to which they would otherwise be entitled.

CERTIFICATE OF COMPLIANCE

The Brief of Elaine L. Chao, Secretary of the United States Department of Labor as Amicus Curiae in Support of Appellants and Requesting Reversal contains 6,826 words and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Corel WordPerfect 8 in Times New Roman 14 point.



s/ ____________________

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Dated: May 25, 2006

CERTIFICATE OF SERVICE

I certify that on this 25th day of May 2006, copies of the Brief of Elaine L. Chao, Secretary of the United States Department of Labor as Amicus Curiae in Support of Appellants and Requesting Reversal, along with a copy of the brief on a diskette, were sent to counsel listed below

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