IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DEBORAH A. KENSETH,	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 3:08-CV-00001-BBC**
	)	
DEAN HEALTH PLANS, INC.,	)	
Defendant.	)	

BRIEF OF THE SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR AS AMICUS CURIAE

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Amschwand v. Spherion Corp.,
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Bast v. Prudential Ins. Co. of America,
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Brosted v. Unum Life Ins. Co. of America,
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Cromwell v. Equicor-Equitable HCA Corp.,
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Cutter v. American Trust Co.,
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DiFelice v. Aetna U.S. Healthcare,
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Eichorn v. AT&T Corp.,
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Ex Parte Shakeshaft,
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Falk v. Hoffman,
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Gates v. Plainfield Trust Co.,
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Great-West Life & Annuity Ins. Co. v. Knudson,
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Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.,
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Kendall v. DeForest,
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Kenseth v. Dean Health Plan, Inc.,
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Cases -- continued:

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Knieriem v. Group Health Plan, Inc.,
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Lind v. Aetna Health, Inc.,
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Manhattan Bank v. Walker,
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Massachusetts Mut. Life Ins. Co. v. Russell,
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May Dep't Stores Co. v. Federal Ins. Co.,
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Mondry v. American Family Mut. Ins. Co.,
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Mosser v. Darrow,
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Pereira v. Farace,
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Pichoff v. QHG of Springdale, Inc.,
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Cases -- continued:

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Princess Lida of Thurn & Taxis v. Thompson,
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Reich v. Continental Cas. Co.,
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Rogers v. Hartford Life & Accident Ins. Co.,
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Secretary of Labor v. Fitzsimmons,
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Sereboff v. Mid Atl. Med. Servs., Inc.,
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Seymour v. Freer,
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T.J. Moss Tie Co. v. Wabash Ry. Co.,
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Taylor v. Benham,
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Townsend v. Vanderwerker,
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Turner v. Fallon Cmty. Health Plan, Inc.,
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United States v. Mason,
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Varity Corp. v. Howe,
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Williams Elec. Games, Inc. v. Garrity,
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Young v. Verizon's Bell Atl. Cash Balance Plan,
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Statutes:

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Employee Retirement Security Act of 1974, as amended,
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Section 502(a)(5), 29 U.S.C. § 1132(a)(5) 2

Section 510, 29 U.S.C. § 1140 ....23 n.10

Section 515(a), 29 U.S.C. § 1144(a) 24

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Black's Law Dictionary 1579 (9th ed. 2009) 9

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

§ 862 .... 9-10 n.4

§ 867 12-13,17,21

Dan B. Dobbs, Law of Remedies (2d ed. 1993):

Vol. 1 § 4.3(5) 18

Vol. 2 § 11.6(3) 19 n.8

Fed. R. Civ. P. 1 & 1937 Advisory Committee Note 3 7

Randall J. Gingiss, The ERISA Foxtrot: Current Jurisprudence Takes One
Step Forward and One Step Back in Protecting Participants' Rights,
18 Va. Tax Rev. 417 (1998) 24 n.11

William S. Holdsworth, A History of English Law (2d ed. 1937):

Vol. 5, pp.. 215-18 ....10 n.5

Vol. 5, pp. 294-309 ....10 n.5

Miscellaneous -- continued:

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John H. Langbein, What ERISA Means by "Equitable": The Supreme Court's Trail of Errors in Russell, Mertens, and Great-West, 103 Colum. L. Rev. 1317 (2003) 24 n.11

Colleen E. Medill, Resolving the Judicial Paradox of "Equitable" Relief Under ERISA Section 502(a)(3), 39 J. Marshall L. Rev. 827 (2006) 24 n.11

John N. Pomeroy, A Treatise on Equity Jurisprudence (5th ed. 1941):

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Vol. 1 § 181 10

Vol. 4 §§ 1079-1080 17

Restatement (Second) of Trusts (1959):

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§ 198 17

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Restatement (Third) of Trusts (1992):

§ 205 9,20

Austin W. Scott, The Nature of the Rights of the Cestui Que Trust, 17 Colum. L. Rev. 269, 274 (1917) 11, 13

3 Austin W. Scott & William F. Fratcher, The Law of Trusts (4th ed. 1987):

§ 199.3 9,17

Miscellaneous -- continued:

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§ 205 .... 9,10 n.4,21

2 Joseph Story, Commentaries on Equity Jurisprudence (13th ed. 1886):

§ 1256 .... 10 n.5

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Jayne Elizabeth Zanglein, Closing the Gap: Safeguarding Participants' Rights by Expanding the Federal Common Law of ERISA, 72 Wash. U.L.Q. 671 (1994) 24 n.111, 13

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BRIEF OF THE SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR AS AMICUS CURIAE

STATEMENT OF THE ISSUE

Plaintiff Deborah Kenseth, on remand from the Seventh Circuit, must "identify a form of equitable relief that is appropriate to the facts of this case." Kenseth v. Dean Health Plan, Inc., 610 F.3d 452, 483 (7th Cir. 2010). The question presented is: Whether "appropriate equitable relief" available under section 502(a)(3) of the Employee Retirement Security Act ("ERISA"), 29 U.S.C. § 1132(a)(3), to remedy a violation of ERISA section 404, 29 U.S.C. § 1104, includes the make-whole recovery of the expenses and liabilities a plan participant incurred as the direct result of a fiduciary breach, or disgorgement of the wrongdoer's ill-gotten gains, whichever is greater.

STATEMENT OF INTEREST

The Secretary of Labor ("Secretary") has primary regulatory and enforcement authority for Title I of ERISA. Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 692-93 (7th Cir. 1986) (en banc). The Secretary has a strong interest in the proper resolution of the important and recurring remedial issue in this case, as set forth above, both with

regard to private cases, and in her own litigation brought under a parallel provision of ERISA, 29 U.S.C. § 1132(a)(5), that allows the Secretary to sue for "appropriate equitable relief." The Secretary's longstanding position is that "appropriate equitable relief" includes the same type of make-whole monetary recovery, as well as disgorgement of ill-gotten gains, that has always been available against fiduciaries in equity under the law of trusts. As argued below, this position is also the law of the Seventh Circuit. In explaining why affording Ms. Kenseth such remedy in the circumstances of this case is both good law and good policy, the Secretary, as amicus curiae, seeks to assure that ERISA continues to provide remedies commensurate with the rights it confers on plan participants who have been wronged by a plan fiduciary's breach of fiduciary duty.[1]

STATEMENT OF THE CASE

This case is on remand from the Seventh Circuit, which held that Deborah Kenseth has established that Dean Health Plan ("Dean") breached its fiduciary duties to Ms. Kenseth, a participant in this ERISA-covered plan. Ms Kenseth was covered by health insurance issued by Dean through her employer's ERISA covered employee benefit plan since 1996, and she maintained continuous health coverage prior to that at least as far back as 1987. In May 1987 while covered by other health insurance, Ms. Kenseth underwent a procedure that reduced the size of her stomach to treat morbid obesity. In 2001, Ms. Kenseth began suffering from severe acid reflux and other

[1] The Secretary has consistently argued the positions expressed in this brief. See, e.g., DOL Am. Br., McCravy v. Metropolitan Life Ins. Co. (4th Cir.), available at http://www.dol.gov/sol/media/briefs/mccravy(A)-04-28-2010.htm; Callery v. United States Life Ins. Co. (10th Cir.), available at http://www.dol.gov/sol/media/briefs/callery-08-20-2003.htm; Nauman v. Abbott Labs. (N.D. Ill.), available at http://www.dol.gov/sol/media/briefs/nauman(A)-12-17-2009.htm.

symptoms commonly suffered after a number of years by patients who have undergone that procedure, and Ms. Kenseth began receiving treatment through Dean. At first, Dean treated the gastric outlet obstruction with medication and balloon dilation. By 2005, Ms. Kenseth was continuing to have problems and Dean's physicians recommended that a more invasive and costly gastric bypass procedure (Roux-en-y) be performed. Kenseth, 610 F.3d at 456-60; Second Amended Complaint at ¶¶ 3-21.

Because Dean Health Systems is an integrated health service provider, Dean's patients typically are treated by Dean Health Systems' own physicians (who often are also employee-owners of Dean Health Systems) in facilities owned by Dean Health Systems or by other companies financially affiliated with it. Dean Health Plan itself appears to be a wholly-owned subsidiary of Dean Health Systems. Kenseth, 610 F.3d at 456-57; Second Amended Complaint at ¶¶ 39-47. See http://www.deancare.com/about-dean/overview.aspx (as viewed on November 5, 2010) (the Dean group is "one of the largest integrated healthcare delivery systems in the country").

As summarized by the court of appeals in this case, Dean breached its fiduciary duty to Ms. Kenseth by inducing her to agree to an expensive medical procedure that Dean, through its customer service representative, said would be covered (subject to a $300 copayment), when in fact it was not covered at all.[2] Kenseth, 610 F.3d at 456, 480-

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[2] More fully, the court found:

> The facts support a finding that Dean breached its fiduciary duty to Kenseth by providing her with a summary of her insurance benefits that was less than clear as to coverage for her surgery, by inviting her to call its customer service representative with questions about coverage but failing to inform her that whatever the customer service representative told her did not bind Dean, and by failing to advise her what alternative channel she could pursue in order to obtain a definitive determination of coverage in advance of her surgery.

81. Coverage was denied based on a provision in the health plan "deeming surgery and hospitalization for morbid obesity to be non-covered, along with any services or supplies related to such non-covered treatment." Id. at 456 (emphasis in original). But for the fiduciary breach, Ms. Kenseth might have continued receiving the less expensive treatments she had been getting already or might have found a lower cost option elsewhere. Id. at 481. The denial of coverage after-the-fact left Ms. Kenseth liable for over $77,000 in medical expenses, id. at 456, 461, most of which was owed to providers who were affiliated in some way with Dean Health Systems, the parent company of Dean. Id. at 456-59, 477 (describing providers' affiliations with Dean); Second Amended Complaint at ¶¶ 35, 39-44, 47. Ms. Kenseth, as an "uninsured" patient, may owe these Dean providers substantially more money than these providers would have been paid had this particular gastric bypass procedure been a covered procedure. Second Amended Complaint at ¶ 45.

Ms. Kenseth brought this suit against Dean for fiduciary breach under ERISA on the above-stated facts. This Court, however, granted summary judgment to Dean. Kenseth v. Dean Health Plan, Inc., 568 F. Supp. 2d 1013 (W.D. Wis. 2008). On appeal, the Seventh Circuit reversed on the fiduciary breach issue and remanded for a "determination as to whether Kenseth is seeking any form of equitable relief that is authorized by 29 U.S.C. § 1132(a)(3)." Kenseth, 610 F.3d at 483. This brief addresses the equitable monetary relief for which Dean is liable under section 502(a)(3) to remedy the harm it caused Ms. Kenseth by inducing her to incur medical costs that Dean misrepresented as being covered under her employee health plan.

Kenseth, 610 F.3d at 456. See also id. at 464-81.

SUMMARY OF ARGUMENT

Seventh Circuit case law holds that make-whole relief is available against fiduciary defendants, even though it is not available against non-fiduciary defendants. Following Seventh Circuit precedent, Ms. Kenseth is entitled to the make-whole relief traditionally available in equity against fiduciaries who breached their fiduciary duties. Dean must make Ms. Kenseth whole, without regard to whether Dean was unjustly enriched.

The relevant Seventh Circuit precedents are supported by binding Supreme Court case law, which makes clear in its pre-ERISA jurisprudence that equitable monetary relief includes make-whole (or surcharge) relief against breaching fiduciaries. Later Supreme Court cases holding that legal damages are unavailable under ERISA section 502(a)(3) are inapposite, because those cases involved non-fiduciary defendants. In holding that "equitable relief" available under section 502(a)(3) encompasses only relief that was "typically" available in equity in the days of the divided bench, the Court did not depart from traditional equity practice as embodied in its precedents and standard treatises, nor carve out a special rule for ERISA. Significantly, therefore, in the days of the divided bench, the courts of equity treated fiduciaries and non-fiduciaries very differently. Equity courts awarded equitable make-whole monetary relief against trustees and other fiduciaries. However, equity courts could not award make-whole relief against non-fiduciaries as an equitable remedy. Only if the court had concurrent jurisdiction over a legal claim against a non-fiduciary could it award such relief, but the relief was considered to be legal and not "typical" equitable relief. Indeed, the Court in Mertens v. Hewitt Associates, 508 U.S. 248, 262 (1993), stated that ERISA does not provide an

equitable monetary recovery against non-fiduciaries precisely because it includes a broad definition of "fiduciary" and makes fiduciaries exclusively liable for "appropriate equitable relief." The only rational explanation for acknowledging this distinction is that the Court expected "typical" equitable relief, which included make-whole monetary relief, to fully apply to breaching fiduciaries.

In addition to make-whole relief, disgorgement of a fiduciary's ill-gotten gains was also typically available in equity. Ms Kenseth, therefore, may opt for an equitable recovery measured by Dean's unjust enrichments, if it is advantageous to her. This would allow her to recover the financial gain Dean obtained from its own breach of duty. At least part of Dean's breach made Kenseth financially liable to persons and entities owned by or affiliated with the Dean Health Systems group, and Dean is liable in equity for conferring that benefit on itself and on persons and entities affiliated with Dean.

ARGUMENT

APPROPRIATE EQUITABLE RELIEF UNDER ERISA FOR FIDUCIARY BREACHES INCLUDES MAKE-WHOLE MONETARY PAYMENTS AND DISGORGEMENT OF PROFITS

A. Statutory Background

ERISA was designed to protect the interests of participants and beneficiaries of employee benefit plans by establishing standards of conduct, responsibility, and obligations for fiduciaries, 29 U.S.C. § 1001(b), "invok[ing] the common law of trusts to define the general scope of" these duties. Central States, Southeast & Southwest Areas Pension Fund v. Central Transp. Inc., 472 U.S. 559, 570 (1985) (citations omitted). At the core of ERlSA's fiduciary obligations are the familiar trust-law duties of loyalty and

prudence, which are among the "highest known to the law." Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir. 1982) (citation omitted).

ERISA enforces these fiduciary requirements through "carefully integrated" remedial provisions. Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146 (1985). This case concerns one of those provisions, ERISA section 502(a)(3), which allows a participant, beneficiary, or fiduciary to sue "to enjoin any act or practice which violates" ERISA or "to obtain other appropriate equitable relief . . . to redress such violations." That provision is designed as a "catchall" that "act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." Varity Corp. v. Howe, 516 U.S. 489, 512 (1996).

B. Breaching Fiduciaries Have Always Been Liable In Equity for Make-Whole Monetary Recoveries And Disgorgement Of Ill-gotten Gains

The remedial scope of section 502(a)(3), as construed by the Supreme Court, incorporates the common law of equity, requiring courts to determine what courts exercising equity jurisdiction did before the merger of law and equity.[3] In Mertens v. Hewitt Associates, 508 U.S. 248 (1993), the Court held that "equitable relief" means relief that was "typically" available in equity in the days of the divided bench. See also Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 210 (2002). The Court thus directed courts to look to traditional equity jurisprudence, as found in the Court's own case law (and older equity cases it relies on) and "standard" treatises, Great-West, 534 U.S. at 217 (citations omitted), to determine the scope of "equitable relief" within the meaning of section 502(a)(3). Rather than being a departure from the common law as it

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[3] In the federal system, law and equity merged in 1938, with the adoption of the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 1 & 1937 Advisory Committee Note 3.

existed before the merger of law and equity, this directive makes the equitable remedies available under ERISA 502(a)(3) co-extensive with pre-merger equitable remedies. Therefore, whether make-whole and other monetary recoveries are available against fiduciaries in a 502(a)(3) ERISA action is determined by whether, as a rule, they were available in a common-law equity action against a trustee or other fiduciary at a time when law and equity represented distinct legal regimes administered by different courts.

Equitable remedies have always – and therefore "typically" – included "make whole" monetary relief against breaching fiduciaries. Notably, equity courts had exclusive jurisdiction over actions involving trusts. See Duvall v. Craig, 15 U.S. (2 Wheat.) 45, 56 (1817) ("[a] trustee, merely as such, is, in general, only suable in equity"); Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 676 (1819) (charitable trusts "subject to the general superintending power of the court of chancery . . . possessing a general jurisdiction, in all cases of an abuse of trust, to redress grievances and suppress frauds"); Manhattan Bank v. Walker, 130 U.S. 267, 271 (1889) ("[t]he suit is plainly one of equitable cognizance, the bill being filed to charge the defendant, as a trustee, for a breach of trust"); Frye v. Community Chest of Birmingham and Jefferson County, 4 So.2d 140, 148 (Ala. 1941) ("[t]he court of equity has inherent power under the law of trusts to make such orders touching properties within its jurisdiction as will protect all interests"); Cutter v. American Trust Co., 197 S.E. 542, 549 (N.C. 1938) ("'[t]he regulation and enforcement of trusts is one of the original and inherent powers of a court of equity'") (quoting 21 C.J. 116); T.J. Moss Tie Co. v. Wabash Ry. Co., 11 F. Supp. 277, 284 (S.D.N.Y. 1935) ("trusts are creatures of courts of

equity" which exercise "general administrative power in connection with its trust creations").

Binding Supreme Court precedent and reference to the "standard current works," Great-West, 534 U.S. at 217 (citations omitted), uniformly reflect that a common equitable remedy was "to compel" the trustee to redress the breach, including by "the payment of money." Restatement (Second) of Trusts § 199, at 435 (1959) (Second Restatement); 3 Austin W. Scott & William F. Fratcher, The Law of Trusts § 199.3, at 206 (4th ed. 1987) (Scott). Accord Oliver v. Piatt, 44 U.S. (3 How.) 333, 401 (1845); 1 John N. Pomeroy, A Treatise on Equity Jurisprudence § 158, at 214-15 (5th ed. 1941) (Pomeroy); 2 Joseph Story, Commentaries on Equity Jurisprudence §§ 1262-1278, at 609-21 (13th ed. 1886) (Story). Depending on the circumstances the beneficiary could, among other remedies, "charge the trustee with any loss that resulted from the breach of trust, or with any profit made through the breach of trust." 3 Scott § 205, at 237; see Second Restatement § 205, at 458. That payment, sometimes called "surcharge," required the breaching fiduciary to pay an "amount necessary to compensate fully for the consequences of the breach" by, for example, "restoring the values of the trust . . . to what they would have been if the trust had been properly administered." Restatement (Third) of Trusts § 205 & cmt. a, at 223 (1992) (Third Restatement); see United States v. Mason, 412 U.S. 391, 398 (1973); Mosser v. Darrow, 341 U.S. 267, 270-273 (1951); Princess Lida of Thurn & Taxis v. Thompson, 305 U.S. 456, 458, 463-464 (1939); 3 Scott § 205, at 238-39; Black's Law Dictionary 1579 (9th ed. 2009) (defining "surcharge").[4]

[4] Liability for a breach of trust could be imposed "either in a suit brought for that purpose or on an accounting where the trustee [was] surcharged beyond the amount of his admitted liability," George G. Bogert & George T. Bogert, The Law of Trusts and

This monetary relief was strictly equitable, insofar as only equity courts had jurisdiction over cases against trustees and all such cases were equitable in character.[5]

In contrast, throughout the days of the divided bench, the make-whole monetary relief available against fiduciaries was not typically available in equity against a non-fiduciary. Suits for damages against non-fiduciaries were brought as legal actions, over which equity courts had concurrent jurisdiction only as a "clean up" or ancillary matter to an action for fiduciary breach. Mertens, 508 U.S. at 256 ("equity court could 'establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority'") (quoting 1 Pomeroy, § 181, at 257) (discussing equity's concurrent jurisdiction over legal claims against non-fiduciaries); accord Great-West, 534 U.S. at 209-10, 219 (referring to "legal remedies" otherwise beyond equity court's authority and to "special equity-court powers"). Other than legal actions within an equity court's

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Trustees (Bogert) § 862, at 36, and the monetary recovery could be paid to the beneficiary rather than to the trust itself. See, e.g., Gates v. Plainfield Trust Co., 194 A. 65 (N.J. 1937) (per curiam); Kendall v. DeForest, 101 F. 167, 170 (2d Cir. 1900). An award of monetary relief equal to the benefits lost because of a breach of fiduciary duty is one type of surcharge equity courts typically issued. See, e.g., Marriott v. Kinnersley, 48 Eng. Rep. 187, 188 (High Ct. Ch. 1830) (trustee charged with losses resulting from failure to pay premium on life insurance policy); see also Appeal of the Harrisburg Nat'l Bank, 84 Pa. 380, 383 (1877) (court of equity may surcharge administrator of estate with life insurance policy proceeds that the administrator negligently lost). Moreover, depending on the circumstances, the beneficiary could "charge the trustee with any loss that resulted from the breach of trust, or with any profit made through the breach of trust, or with any profit that would have accrued if there had been no breach of trust." 3 Scott § 205, at 237; see Second Restatement § 205, at 458. Accordingly, the remedy encompassed, but was not limited to, unjust enrichment.

[5] As an historical matter, the "surcharge" remedy was of ancient origin and predated the development of similar damage remedies in the law courts. See May v. LeClaire, 78 U.S. (11 Wall.) 217, 236 (1870) (discussing the legal remedies of trover, which holds the wrongdoer liable for appropriate damages, and noting that "[t]here are kindred principles in equity jurisprudence, whence, indeed, these rules of the common law seem to have been derived"); 5 William S. Holdsworth, A History of English Law 215-18, 294-309 (2d ed. 1937) (Holdsworth); 2 Story § 1256, at 605-06.

concurrent jurisdiction, strictly equitable actions against a non-fiduciary generally involved cases in which the non-fiduciary controlled an identifiable res or fund. Austin W. Scott, The Nature of the Rights of the Cestui Que Trust, 17 Colum. L. Rev. 269, 274 (1917) ("It is true, therefore, that the cestui que trust has not merely rights in personam against his trustee, but also rights in rem, rights which may be asserted against the world). Equitable relief in that limited range of cases included recovering money or other tangible assets traceable to such res or fund. Oliver, 44 U.S. (3 How.) at 401 (monetary relief available against fiduciary, but beneficiary may also follow assets in the hands of either a fiduciary or non-fiduciary). Typically, however, in personam monetary remedies against non-fiduciaries were considered legal remedies because the underlying action was an action at law. Mertens, 508 U.S. at 256.

Equitable monetary remedies against fiduciaries under the exclusive jurisdiction of the equity court were thus distinctly different from legal damages under the concurrent jurisdiction. Cf. Mertens, 508 U.S. at 257 ("equitable relief" must be different from "all relief"). Trust remedies, including "surcharge," developed under policies consistent with the equity courts' ultimate supervisory authority over trusts. This administrative authority over trusts gave equity courts broad in personam powers to order fiduciaries to pay money and perform other actions, powers equity courts did not have over non-fiduciaries who were not parties to the trust relationship. Consequently, litigants could expect dramatically different recoveries, depending on whether a case was heard in law or equity.

This difference in treatment was demonstrated repeatedly in cases where plaintiffs had both legal claims and equitable trust claims. In Seymour v. Freer, 75 U.S. (8 Wall.)

202, 215 (1868), the plaintiff had both contract and trust law claims against the same defendant, and the Court held that the beneficiary need not be satisfied with legal damages, but could instead seek the distinctly "better" equitable monetary remedy. Accord Townsend v. Vanderwerker, 160 U.S. 171, 178-79, 182-83 (1895); Falk v. Hoffman, 233 N.Y. 199, 201, 135 N.E. 243, 244 (1922) (Cardozo, J.) ("Some remedy at law there is. It is not so complete or effective as the remedy in equity" which would allow plaintiff to receive a larger monetary award.) (citation omitted). To this day, therefore, where appropriate, plaintiffs may plead in the alternative for legal and equitable relief and be awarded whichever recovery results in the larger monetary amount. Williams Elec. Games, Inc. v. Garrity, 366 F.3d 569, 577-78 (7th Cir. 2004) (plaintiff was entitled to argue alternatively for both legal damages and equitable remedy of accounting or restitution, and the award would be for the remedy offering the larger monetary recovery).

Thus, make-whole or "surcharge" relief was exclusive to actions against fiduciaries and always equitable, while restitution against a non-fiduciary was typically a legal remedy. See Great-West, 534 U.S. at 212 ("[N]ot all relief falling under the rubric of restitution is available in equity. In the days of the divided bench, restitution was available in certain cases at law, and in certain others in equity."); accord Reich v. Continental Cas. Co., 33 F.3d 754, 756 (7th Cir. 1994). The make-whole relief awarded in equity against breaching fiduciaries was different from legal damages in that it centered on trust administration and how the breach affected the beneficial purposes of the trust, rather than the broader relief available at law, such as pain and emotional distress. See generally George G. Bogert & George T. Bogert, The Law of Trusts and

Trustees § 867, at 48-50 & n.33 (rev. 2d ed. 1995) (Bogert) (consequential relief generally was limited to consequences relating to the beneficial purposes of the trust); cf. Austin W. Scott, 17 Colum. L. Rev. at 269 ("The creation of a use or trust has always been regarded as a legal transaction quite different from the creation of a contract."); 2 Story § 1278, at 534 (purpose of remedy is "to compensate the cestui que trust"); 5 William S. Holdsworth, A History of English Law 315-16 (2d ed. 1937) (Holdsworth) (equity better suited to administration of assets). Another uniquely equitable remedy available against breaching fiduciaries was the disgorgement of profits. "The trustee is accountable for any profit made by him through or arising out of the administration of the trust, although the profit does not result from a breach of trust." Second Restatement, § 203, at 455. But whether greater or lesser than what was available at law, typical equitable relief against fiduciaries liable for a breach of trust was never confined to strictly non-monetary recoveries.

C. Mertens And Its Progeny Concern Non-Fiduciaries But Do Not Limit Monetary Relief in Equity Against Fiduciaries

This background provides the proper context in which to understand the Supreme Court decisions construing the remedial scope of ERISA section 502(a)(3). Importantly, those decisions have, with one notable exception, only involved cases seeking "appropriate equitable relief" from non-fiduciaries, against whom, as stated above, most equitable remedies traditionally did not apply. Mertens held that section 502(a)(3) does not permit an ERISA suit seeking money damages from such a non-fiduciary. 508 U.S. at 256-63. The Court further held in Great-West that the money sought from a non-fiduciary was not equitable restitution if the monetary recovery would be paid from general assets, and not identifiable trust funds held by the non-fiduciary. 534 U.S. at 210;

compare Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 250-53 (2000) (non-fiduciary recipient of prohibited transaction proceeds liable for restitution under 502(a)(3), while emphasizing that "the common law of trusts sets limits on restitution actions against defendants other than [the fiduciary,] the principal 'wrongdoer'"). Finally, in Sereboff v. Mid Atlantic Medical Services, Inc., 547 U.S. 356, 362-68 (2006), the Court, distinguishing Great-West, held that Section 502(a)(3) did support a monetary recovery where the non-fiduciary held the disputed funds, which constituted an identifiable res to which the plaintiff was entitled under a preexisting agreement.

Neither Mertens nor Great-West, however, afforded the Court any reason to address the distinct question, applicable here, of the scope of equitable relief that typically was available against fiduciaries. Instead, these decisions single-mindedly focused on the relief available against non-fiduciaries alleged to have participated in a fiduciary breach. This focus is evidenced by the discussion in Mertens and Great-West on the concurrent jurisdiction of the equity courts, which only concerned claims against non-fiduciaries insofar as equity courts had exclusive jurisdiction over fiduciaries. In adopting equity's traditional limitations on relief against non-fiduciaries, excluding general money damages while also permitting asset tracing (Mertens and Great-West), the Court said nothing about equity's corresponding rules allowing make-whole monetary relief and disgorgement of profits against fiduciaries. Oliver, 44 U.S. (3 How.) at 401. It cannot be supposed, however, that the Court in Mertens and Great-West implicitly overturned Oliver and similar well-established precedents. Cf. Agostini v. Felton, 521 U.S. 203, 237 (1997) (courts should not presume the Supreme Court has implicitly

overruled its own precedent, "leaving to this Court the prerogative of overruling its own decisions") (citation omitted).

To the contrary, as Mertens recognized in explaining the rationale for its holding, ERISA "allocates liability for plan-related misdeeds in reasonable proportion to respective actors' power to control and prevent the misdeeds." 508 U.S. at 262; see also Harris Trust, 530 U.S. at 251 (emphasizing that "the common law of trusts sets limits on restitution actions against defendants other than [the fiduciary,] the principal 'wrongdoer'"). Thus, ERISA provides only limited relief against non-fiduciaries ("persons who had no real power to control what the plan did"). Mertens, 508 U.S. at 262. In contrast, fiduciaries, who are allocated primary responsibility for the administration and control of benefit plans, assume "the common law's joint and several liability" for losses to the plan and other "appropriate equitable relief." Id. Accordingly, in expanding the definition of fiduciary beyond the trust law definition, the resulting trade-off was to relieve those entities that Congress chose not to make fiduciaries from "all direct and consequential damages suffered by the plan," id. (emphasis in original), but not to otherwise restrict traditional remedies that beneficiaries could obtain against fiduciaries. Mertens' stated rationale for its decision, therefore, clearly signaled the Court's understanding that ERISA provides broader equitable remedies against plan fiduciaries than against non-fiduciary providers of services to plans.

This conclusion is consistent with Varity Corp. v. Howe, the only Supreme Court remedies case decided under section 502(a)(3) that involves a suit against a fiduciary rather than a non-fiduciary. In Varity the plaintiff employees, claiming that a plan administrator tricked them into withdrawing from the plan and forfeiting their benefits,

sought to be reinstated as participants into the employer's ERISA plan so as to be eligible for benefits they would have been owed under that plan. 516 U.S. at 492, 494. Decided only two years after Mertens, the Court held that individual relief was "appropriate" against the fiduciary under section 502(a)(3)'s "catch-all" provision. Cf. Great-West, 534 U.S. at 221 n.5 (in Varity, "it was undisputed that respondents were seeking equitable relief") (emphasis in original). The Court reasoned that "it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy." Varity, 516 U.S. at 513. On this reasoning, the Court then affirmed the remedy imposed by the courts below, awarding the participants reinstatement into the plan, which had the necessary effect of imposing significant monetary liability on the plan fiduciaries responsible for funding the plan. [6] Cf. Bowerman v. Wal-Mart Stores, Inc., 226 F.3d 574, 591-92 (7th Cir. 2000) (relying on Varity to order equitable relief in the form of retroactive reinstatement to the employer's plan, resulting in the fiduciary of the self-funded plan having to pay medical expenses for which it had previously denied coverage).

Accordingly, consistent with the Mertens line of decisions, a plan participant suing for fiduciary breach may seek a loss recovery from the breaching fiduciary. Such action satisfies the Mertens "typically equitable" requirement, because in the days of the divided bench, this was precisely the remedy available against a trustee for monetary

[6] In Great-West, the plaintiffs relied on Varity for the proposition that "§ 502(a)(3) is a catchall provision that authorizes all relief that is consistent with ERISA's purposes and is not explicitly provided elsewhere." 534 U.S. at 221 n.5 (emphasis in original). The Court rejected that argument because "the plain language of the statute . . . provides fiduciaries with only equitable relief," id., but did not question that the remedy afforded in Varity – requiring plan fiduciaries to reinstate the plaintiffs to a plan that would give them the benefits they lost as a result of the fiduciaries' breach – was equitable.

redress of a breach of trust. Both the basis for the claim – breach of trust – and the requested monetary relief – make-whole relief – were typically available in courts of equity. Second Restatement § 197, at 433; id. § 198, at 434; 4 Pomeroy §§ 1079-1080, at 227-30; 2 Story §§ 1262-1278, at 609-21; 6 Holdworth 657 (trust concept and equity court power over asset administration provided equity with power "both of supervising accounts, and of enforcing liability for fraudulent or negligent conduct disclosed by those accounts."). Under the equity court's exclusive jurisdiction, it was "universally held that the beneficiary has the election of taking a money judgment against the wrongdoing trustee or of tracing the trust property, where the entire trust property which was affected by the breach can be identified in the hands of the trustee or his successor (who is not a bona fide purchaser)." Bogert § 867, at 97 (emphasis added); see Oliver, 44 U.S. (3 How.) at 401. Exactly the same remedies apply to ERISA cases. Thus, courts are authorized in ERISA suits to follow the settled rule, as held in Oliver, 44 U.S. (3 How.) at 401, and numerous other cases, that the available equitable remedies afforded by equity courts include "compel[ling]" the trustee to redress the breach with "the payment of money." Second Restatement § 199, at 435; 3 Scott § 199.3, at 206.

D. Seventh Circuit Precedents Properly Recognize The Difference Between Fiduciaries And Non-Fiduciaries Respecting Equitable Remedies

Significantly, following Mertens, which first equated "appropriate" equitable relief with "typical" equitable relief, the Seventh Circuit has carefully distinguished between what relief may be appropriate or typical in a case against a non-fiduciary as

opposed to a case against a fiduciary.[7] Thus, in Continental Casualty Co., the court stated:

> Whether [restitution] is equitable depends merely on whether it is being sought in an equity suit. If the beneficiary of a trust sought an accounting of the profits of a defalcating trustee - a form of restitutionary relief - the accounting if ordered would be ordered in a suit in equity, and the remedy thus would be equitable, while a suit seeking the identical relief against a nonfiduciary would normally be a suit at law and the relief sought therefore legal.

33 F.3d at 756 (citing 1 Dan B. Dobbs, Law of Remedies § 4.3(5), at 608-14 (2d ed. 1993) (Dobbs)). See also May Dep't Stores Co. v. Federal Ins. Co., 305 F.3d 597, 603 (7th Cir. 2002) ("wrongful withholding of benefits due can entitle the beneficiary to impose a constructive trust on interest on the withheld benefits, an equitable remedy that results in a money payment to the plaintiff"); Bowerman, 226 F.3d at 592 (holding that the proper relief for a fiduciary breach was putting the participant back into the position she would have been but for the breach); Clair v. Harris Trust & Savings Bank, 190 F.3d 495, 498 (7th Cir. 1999) ("restitution is equitable when sought by a person complaining of a breach of trust"); Health Cost Controls, Inc. v. Washington, 187 F.3d 703, 710 (7th Cir. 1999) ("when sought as a remedy for breach of fiduciary duty restitution is properly regarded as an equitable remedy because the fiduciary concept is equitable"); see

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[7] Unfortunately, the majority of courts outside the Seventh Circuit have failed to make this distinction, based, in our view, on a misreading of Mertens and Great-West. See, e.g., Rogers v. Hartford Life & Accident Ins. Co., 167 F.3d 933, 944 (5th Cir. 1999); Fraser v. Lintas: Campbell-Ewald, 56 F.3d 722, 725 (6th Cir. 1995); Armstrong v. Jefferson Smurfit Corp., 30 F.3d 11, 13 (1st Cir. 1994) (frequently cited early case, which erroneously stated that Mertens "answered, in the negative," the question whether fiduciary status of defendant affected question of monetary relief, even though Mertens was at worst silent on that question and the discussion of ERISA's broad definition of "fiduciary" shows that the Court considered fiduciary status as entailing broader liability than non-fiduciary status). In any event, this Court is bound by Seventh Circuit precedent.

generally Brosted v. Unum Life Ins. Co. of America, 421 F.3d 459, 466 (7th Cir. 2005) (reiterating prior circuit case law that "if [the plaintiff] successfully makes out a claim for restitution, admittedly an equitable action, it may be entitled to monetary relief").

. Moreover, the Seventh Circuit recently reaffirmed its longstanding position, in a fiduciary breach case, that a section 502(a)(3) claim for "'restitution is equitable when it is sought by a person complaining of a breach of trust.'"[8] Mondry v. American Family Mut. Ins. Co., 557 F.3d 781, 806 (7th Cir.) (citations omitted), cert. denied, 130 S. Ct. 200 (2009). In Mondry, the plaintiff alleged breaches of the section 404 duty of loyalty for the plan administrator's misrepresentations regarding information necessary to prosecute her benefits claim. Id. at 804. The court held that if section 404 was breached, then "the door remains open" for equitable restitution against the breaching fiduciary to "force [the fiduciary] to disgorge the gain it enjoyed from the delay that its breach of trust helped to bring about." Id. at 806-07 (referring to interest-free use of money that participant should have been paid "much sooner than it was").

Under the Seventh Circuit's analysis of Mertens and Great-West, Ms. Kenseth's claims against Dean to recover monetary losses caused by its alleged breach of fiduciary duty are claims for types of "appropriate equitable relief" available in a section 502(a)(3) fiduciary breach case. It is therefore settled law in the Seventh Circuit that this Court can

[8] In the same vein, in Young v. Verizon's Bell Atlantic Cash Balance Plan, 615 F.3d 808, 819 (7th Cir. 2010), the Seventh Circuit, on a counter-claim to a fiduciary breach suit, concluded that "ERISA § 502(a)(3) authorizes equitable reformation of a plan that is shown, by clear and convincing evidence, to contain a scrivener's error that does not reflect participants' reasonable expectations of benefits," stating that the "'appropriate equitable relief' authorized by § 502(a)(3) allows a court to reform an ERISA plan to avoid such an unfair result." Cf. 2 Dobbs § 11.6(3), at 751 ("[r]eformation is historically an equitable remedy, not a legal one").

award equitable restitution pursuant to section 502(a)(3) for the plan fiduciary's breach of its section 404 fiduciary duty.

E. As A Matter Of Law And Policy, Ms. Kenseth Is Entitled, At Her Election, To A Make-Whole Or Disgorgement Remedy

Consequently, under abundant Seventh Circuit precedent, consistent with Mertens and its progeny as well as traditional trust law extending back to the earliest days of equity practice, Ms. Kenseth is entitled to an appropriate equitable remedy in this case. An equity court in the day of the divided bench would have imposed an appropriate make-whole remedy on the fiduciary, duly tailored to fully redress the harm to Ms. Kenseth. While courts of equity had wide discretion in fashioning such remedies, the remedy most suited for this case should require Dean, as the breaching fiduciary, to pay an "amount necessary to compensate fully for the consequences of the breach, by, for example," "restor[ing] the values of the trust estate and trust distributions to what they would have been if the trust had been properly administered." Third Restatement § 205 & cmt. a, at 223; see supra, at p. 9 & n.4.

In this context, Ms. Kenseth should be compensated for the out-of-pocket expenses and liabilities she incurred as a result of being pre-approved for gastric bypass surgery only to be told post-surgery that the Dean plan did not cover the operation. The remedy could be in the form of an injunction requiring Dean to assume responsibility for any monetary liability that Ms. Kenseth may have incurred or will continue to incur as a result of Dean's breach. This would fully redress Ms. Kenseth's harm, while giving Dean the flexibility of choosing the appropriate course of action it should take to extinguish Ms. Kenseth's liability, including reaching an accommodation with the medical providers, the payment of money, or some combination of both. Cf. Ex Parte Shakeshaft, 3 Bro.

C.C. 197, 198, 29 Eng. Rep. 487, 487-88 (1791) (fiduciary who argued that another fiduciary was primarily liable was nonetheless required to make beneficiary whole, and "the question between the two estates of [the two fiduciaries] must be settled hereafter on a bill.")

As the precedents make abundantly clear, the make-whole "surcharge" remedy does not require a showing of unjust enrichment against the breaching fiduciary. Taylor v. Benham, 46 U.S. (5 How.) 233, 275 (1847) (if trustee injures beneficiary by misconduct, breach of trust, or negligence, "he is liable, whether he himself gains by his misbehavior or not") (citations omitted); see 3 Scott § 205, at 237 (the beneficiary could "charge the trustee with any loss that resulted from the breach of trust, . . . or with any profit that would have accrued if there had been no breach of trust"; additionally, the beneficiary could "charge the trustee . . . with any profit made through the breach of trust"). Where there was unjust enrichment (i.e., "any profit made through the breach of trust"), however, equity permitted the beneficiary to elect a disgorgement remedy if that would result in a greater recovery. See Bogert § 867, at 97 (stating the "universal[]" rule that the beneficiary may elect to take "a money judgment against the wrongdoing trustee" or recover "the entire trust property" affected by the breach if it can be traced and identified "in the hands of the trustee or his successor (who is not a bona fide purchaser)"); Oliver, 44 U.S. (3 How.) at 401 (beneficiary may elect either to trace proceeds from transfer of trust assets to third party knowing participant or to hold the trustee personally liable for losses resulting from his breach of trust); see also Seymour, 75 U.S. (8 Wall.) at 215; Williams Elec. Games, Inc., 366 F.3d at 577-78.

In this case, because there was unjust enrichment to the extent that Dean's fiduciary breach enriched affiliated persons and companies, the Court must give Ms. Kenseth the option of electing the remedy of disgorgement of profits if it would lead to a larger recovery than a make-whole remedy. Dean's breach made Ms. Kenseth financially liable to persons and entities owned by or affiliated with the Dean group. Thus, in breaching its duty to Ms. Kenseth by assuring her that Dean would cover the costs of her surgery when, in fact, it would not, Dean indirectly enriched itself by enriching its owners and affiliates. See Mosser, 341 U.S. at 272 ("the transactions were as forbidden by others as they would have been on behalf of the trustee himself"). Although make-whole relief measured by the medical expenses and liabilities resulting from the breach for which Ms. Kenseth is now financially responsible is likely to be greater than a disgorgement remedy, the Court should permit Ms. Kenseth to elect disgorgement of unjust enrichment by holding Dean financially responsible for making restitution of the amounts by which its employees or affiliates profited from the breach, either directly to Ms. Kenseth or by requiring Dean to hold such amounts in trust for the purpose of extinguishing Ms. Kenseth's liability.[9] But however the Court chooses to fashion the appropriate relief, the "cardinal principle" under ERISA, as under traditional equitable principles in trust law, "is that the wrong-doer shall derive no benefit from his wrong. The entire profits belong to the *cestui que trust*, and equity will so mould and apply the remedy as to give them to him." May v. LeClaire, 78 U.S. (11 Wall.) 217, 236 (1870);

[9] Traceability and profit-calculation problems could make this less desirable, and therefore less "appropriate," a remedy than make-whole relief.

see Mosser, 341 U.S. at 271 (trust law's "strict prohibition would serve little purpose if the trustee were free to authorize others to do what he is forbidden").

Not least, providing make-whole or other appropriate equitable relief ensures that ERISA's stringent fiduciary duties actually achieve the statute's goal of protecting plan participants. The narrower interpretation of section 502(a)(3) adopted by some courts outside the Seventh Circuit illogically results in a set of fiduciary duties enforceable through that section but without any meaningful remedy, even to the extent of allowing breaching fiduciaries to retain ill-gotten gains in egregious cases where those profits are reaped from violations of law or even from the death of a plan participant or beneficiary allegedly caused by the breach.[10]

Congress could not have intended such an unjust result when it was drafting a statute whose express purpose was "protect[ing] . . . the interests of participants in employee plans and their beneficiaries" through providing, inter alia, "ready access to the

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[10] See, e.g., Alexander v. Bosch Auto. Sys., Inc., 232 Fed. Appx. 491, 494, 499-502 (6th Cir. 2007) (employer conceded discrimination violating ERISA Sec. 510 but nonetheless was allowed to keep the savings it garnered by admittedly violating the law); Knieriem v. Group Health Plan, Inc., 434 F.3d 1058, 1061-64 (8th Cir. 2006) (relying on Mertens, court dismissed case because, even assuming a breach of fiduciary duty and financial gain where participant died after denial of coverage for stem cell transplant treatment for lymphoma, restitution and surcharge are not available remedies under ERISA); Bast v. Prudential Ins. Co. of America, 150 F.3d 1003, 1011 (9th Cir. 1998) (insurer delayed granting costly cancer treatment claim until patient became too ill to be treated, and court construed Mertens to bar disgorgement of the financial windfall the insurer realized from its own breach and the participant’s consequent decline and death); Cannon v. Group Health Serv., Inc., 77 F.3d 1270, 1271-72, 1276-77 (10th Cir. 1996) (no remedy even though insurer allegedly "benefit[ed] from [its] unreasonable conduct" due to the consequent death of participant); cf. Turner v. Fallon Cmty. Health Plan, Inc., 127 F.3d 196, 199 (1st Cir. 1997) (court refuses to consider monetary remedy for benefits withheld from deceased patient notwithstanding argument that this "provides a cruel incentive for plan administrators to withhold treatment or delay it as long as possible, since the claim for benefits may be mooted by the beneficiary's death").

Federal courts." 29 U.S.C. § 1001(b); cf. Varity Corp., 516 U.S. at 507, 513 (seriously doubting "Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy").[11] ERISA's "carefully integrated" remedial provisions, Russell, 473 U.S. at 146, not only provide "as a safety net" the "catchall" remedy of "appropriate equitable relief," Varity, 516 U.S. at 512, but they preempt any conflicting or supplemental state law remedies. Aetna Health Inc. v. Davila, 542 U.S. 200, 210-14 (2004); see also 29 U.S.C. § 1144(a). Unless fiduciaries are liable for make-whole or disgorgement relief to the same extent that they typically were at equity for fiduciary breaches, ERISA's broad preemptive reach compounds the gap left by a constricted construction of section 502(a)(3) by creating "a remedy-less 'regulatory vacuum.'" Pichoff v. QHG of Springdale, Inc., 556 F.3d 728, 732 (8th Cir.

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[11] The inequities resulting from the narrower view adopted by courts outside the Seventh Circuit which have excluded any monetary recovery from "appropriate equitable relief" under section 502(a)(3) have been frequently criticized. See Aetna Health Inc. v. Davila, 542 U.S. 200, 222 (2004) (Ginsburg, J., joined by Breyer, J., concurring) (joining "the rising judicial chorus urging that Congress and [this] Court revisit what is an unjust and increasingly tangled ERISA regime") (internal quotation marks and citation omitted); Amschwand v. Spherion Corp., 505 F.3d 342, 348-49 (5th Cir.) (Benavides, J., concurring specially) ("The facts . . . scream out for a remedy beyond the simple return of premiums. Regrettably, under existing law it is not available."), cert. denied, 128 S. Ct. 2995 (2008); Eichorn v. AT&T Corp., 489 F.3d 590, 592-93 (3d Cir. 2007) (Ambro, J., concurring in denial of petition for rehearing en banc); Lind v. Aetna Health, Inc., 466 F.3d 1195, 1200 (10th Cir. 2006); Pereira v. Farace, 413 F.3d 330, 345-46 (2d Cir. 2005) (Newman, J., concurring); DiFelice v. Aetna U.S. Healthcare, 346 F.3d 442, 467 (3d Cir. 2003) (Becker, J., concurring); Cicio v. Does 1-8, 321 F.3d 83, 106 (2d Cir. 2003) (Calabresi, J., dissenting in part), vacated, 542 U.S. 933 (2004). See also Colleen E. Medill, Resolving the Judicial Paradox of "Equitable" Relief Under ERISA Section 502(a)(3), 39 J. Marshall L. Rev. 827, 852 (2006); John H. Langbein, What ERISA Means by "Equitable": The Supreme Court's Trail of Errors in Russell, Mertens, and Great-West, 103 Colum. L. Rev. 1317, 1353-1362 (2003); Randall J. Gingiss, The ERISA Foxtrot: Current Jurisprudence Takes One Step Forward and One Step Back in Protecting Participants' Rights, 18 Va. Tax Rev. 417 (1998); Jayne Elizabeth Zanglein, Closing the Gap: Safeguarding Participants' Rights by Expanding the Federal Common Law of ERISA, 72 Wash. U.L.Q. 671 (1994).

2009) (citation omitted). See, e.g., Cannon v. Group Health Serv., Inc., 77 F.3d 1270, 1274-75 (10th Cir. 1996) (lack of ERISA remedies does not affect preemption analysis); Cromwell v. Equicor-Equitable HCA Corp., 944 F.2d 1272, 1276 (6th Cir. 1991) (same); but compare McDonald v. Household Int'l, Inc., 425 F.3d 424, 430 (7th Cir. 2005) (preempting state claims but remanding for purpose of permitting addition of ERISA claim to seek equitable relief for wrongful denial of medical coverage). Thus, it is vitally important to give full effect to the Seventh Circuit precedents recognizing that fiduciaries, unlike non-fiduciaries, are subject to broad equitable relief including making the plaintiff monetarily whole or disgorging profits unjustly obtained.

In remanding this case to consider whether Ms. Kenseth can "identify a form of equitable relief that is appropriate to the facts of this case," the court of appeals acknowledged not having the benefit of briefing on this remedies issue. Kenseth, 610 F.3d at 483. Now that it is before this Court, with full briefing on the Seventh Circuit precedents and their antecedents in Supreme Court and traditional equity law, there should be no doubt that Ms. Kenseth is entitled to make-whole or restitutionary relief, in accordance with the principles and analyses set forth in this brief.

CONCLUSION

Ms. Kenseth should be awarded "appropriate equitable relief" that makes her whole or that, at her election, requires disgorgement to the extent that Dean was unjustly enriched by its fiduciary breach.

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CERTIFICATE OF SERVICE

Pursuant to Local Civil Rule 5.1, I hereby certify that on November 22, 2010, a copy of the foregoing Brief of the Secretary of the United States Department of Labor as Amicus Curiae, was served upon the parties listed below by electronic means in accordance with procedures promulgated by this Court.

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