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## STATEMENT OF INTEREST

This case involves an action under Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, et seq., alleging violations of ERISA sections 404 and 510, 29 U.S.C. §§ 1104 and 1140. If the Court finds violations under those provisions, the case presents an important and recurring question regarding ERISA remedies: what is the scope of "appropriate equitable relief" under section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), to remedy a section 404 fiduciary breach or a violation of section 510, the Act's anti-retaliation and anti-discrimination provision. The Secretary of Labor (the "Secretary") has a strong interest in the proper construction of ERISA's remedial provisions, which were enacted to ensure the prudent management of pension plan assets and to safeguard participants who exercise their rights under the Act. The Secretary has primary enforcement authority for Title I of ERISA and is authorized under section 502(a)(5), 29 U.S.C. § 1132(a)(5), to bring civil actions to obtain "appropriate equitable relief" to redress violations of, and to enforce, Title I. Accordingly, this Court's determination of what constitutes "appropriate equitable relief" may affect not only the scope of private civil actions under section 502(a)(3), which are a necessary complement to the Secretary's authority to enforce Title I of ERISA, but also the remedies available to the Secretary under section 502(a)(5).

## STATEMENT OF THE ISSUES

1. Whether plan participants may recover restitution of the benefits they would have received but for a fiduciary breach as "appropriate equitable relief" available under section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), to remedy a violation of ERISA section 404, 29 U.S.C. § 1104.

2. Whether plan participants may obtain reinstatement and back pay, or, alternatively, seek front pay as "appropriate equitable relief" available under section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), to remedy a violation of ERISA section 510, 29 U.S.C. § 1140.

#### STATEMENT OF THE CASE

On August 22, 2003, Defendant Abbott Laboratories ("Abbott") announced that it was spinning off its Hospital Products Division ("HPD") into Defendant Hospira, a newly created independent corporate entity, effective April 30, 2004. Nauman v. Abbott Laboratories, 2008 WL 4773135, \*1-2 (N.D. Ill. July 10, 2008). At the time of the announcement, the Plaintiffs were employees in Abbott's HPD and participants in Abbott's pension plan. Id. at \*1.

Before the spin-off became effective, Abbott and Hospira entered into an agreement that included mutual no-hire provisions. Id. at \*5. Hospira agreed not to hire any HPD employees whose employment with Abbott was terminated between the announcement of the spin-off and the end of the two-year period from the effective spin-off date – or May 1, 2006. Id. Abbott promised not to hire any HPD employees transferred to Hospira in the spin-off before the same date. Id. A few days before the two-year no-hire period expired, Abbott amended its plan so that any Hospira employee who previously transferred from Abbott and who was rehired by Abbott after May 1, 2006, would be treated as a "new hire" for benefits purposes even if they had previously been vested participants in the Abbott plans. Id. at \*2.

Following the spin-off, the Plaintiffs and approximately 10,000 other HPD employees were transferred to Hospira, where they were entitled to benefits under a

"transitional" benefit plan that provided the same benefits as the Abbott plan until December 31, 2004. Id. at \*1-2. On January 1, 2005, Hospira employees were transferred to Hospira's plan, which, among other changes in benefits, "froze" the Abbott pension plan (i.e., prevented the further accrual of pension benefits), and eliminated retiree medical benefits. Id. at \*2. In addition, as a result of the mutual no-hire agreements, retirement-eligible HPD employees who retired from Abbott received their Abbott benefits but could not work for Hospira for at least two years. HPD employees who instead accepted employment with Hospira could not return to work at Abbott for at least two years – and then they would not regain their former rights to continue accruing benefits as if they had never left Abbott employment. Id.

The Plaintiffs filed a complaint on November 9, 2004, pursuant to section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), alleging that Defendants Abbott and Hospira ("Defendants") violated ERISA section 510, 29 U.S.C. § 1140, through "termination of their employment, and defendants' adoption of no-hire policies . . . with the specific intent of depriving plaintiffs of their ERISA-protected benefits." Id. at \*9. In November 2005, the Plaintiffs added a fiduciary breach claim alleging that the Defendants, in their capacity as fiduciaries, violated ERISA section 404, 29 U.S.C. § 1104, by deliberately misrepresenting in the period before the spin-off the benefits that Hospira employees could expect post-spin-off. Id. at \*1.<sup>1</sup> The Plaintiffs seek all appropriate equitable relief available under Section 502(a)(3), including reinstatement to Abbott employment and the Abbott plans and restitution or disgorgement (plus interest)

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<sup>1</sup> The Court dismissed the Section 404 claim as to Hospira by order of August 4, 2006, but the Section 404 claim against Abbott remains. Nauman v. Abbott Laboratories, 2006 WL 2413712 (N.D.Ill. Aug. 14, 2006).

for the 404 violations, and reinstatement to both Abbott employment and the Abbott plans, with back pay and restoration of lost benefits, or, alternatively, front pay in lieu of reinstatement for the 510 violations. See Plaintiff's Am. Comp. at 23-24.

This Court denied both parties' motions for summary judgment. Nauman, 2008 WL 4773135, at \*13. A bench trial was completed on October 8, 2009. On December 4, 2009, the parties filed post-trial briefs on the liability and remedies issues. Without expressing a view on the liability issues, the Secretary submits this amicus curiae brief in support of the Plaintiffs on the remedies available under section 502(a)(3).

#### SUMMARY OF THE ARGUMENT

I. ERISA section 404's requirement that fiduciaries act prudently and loyally may be enforced through ERISA section 502(a)(3), which allows participants to obtain "appropriate equitable relief . . . to redress" violations of ERISA's stringent fiduciary provisions. The Supreme Court has ruled that "appropriate equitable relief" includes relief "typically available at equity." Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 210 (2002); see Mertens v. Hewitt Assoc., 508 U.S. 248, 256 (1993). In determining which relief was "typically equitable," the Court has looked to the historical distinction between law and equity that existed before adoption of the Federal Rules of Civil Procedure. Id. at 255-60. It has held that the recovery of money damages against non-fiduciaries who knowingly participate in a fiduciary breach is typically legal, not equitable relief, but it has yet to determine the scope of relief available against fiduciaries under this analytical framework. Great-West, 534 U.S. at 208-10; Mertens, 508 U.S. at 256-63.



The Plaintiffs allege that Abbott breached its fiduciary duty of loyalty to the class of HPD employees by making material omissions and misrepresentations to those employees regarding their post-spin-off benefits and seek, among other things, restitution under section 502(a)(3) to remedy Abbott's alleged breach of section 404. The relief sought by the Plaintiffs is analogous to an action by a beneficiary of a trust to compel the trustee to redress a breach that was exclusively the purview of the courts of equity in the days of the divided bench. The purpose of such monetary redress, or "surcharge," was to make the victim whole by returning the value of the trust to what it would have been in the absence of a fiduciary breach. Therefore, applying the Supreme Court's analysis in Mertens and Great-West, a "surcharge" remedy of the type sought by the Plaintiffs is the type of relief that was typically issued by the courts of equity and that this Court may award issue if it determines Abbott breached its fiduciary duties to the Plaintiffs.

That the "surcharge" remedy was historically available in the equity courts as an exclusively equitable remedy is consistent with the Seventh Circuit's rulings construing the section 502(a)(3) analysis in Mertens and Great-West as permitting restitution against a breaching fiduciary. The Seventh Circuit has repeatedly recognized that "restitution is equitable when it is sought by a person complaining of a breach of trust" against the breaching fiduciary. Mondry v. American Family Mutual Ins. Co., 557 F.3d 781, 806 (7th Cir.) (citing cases), cert. denied, 130 S. Ct. 200 (2009). The Mondry decision relied in part on Bowerman v. Wal-Mart Stores, Inc., 226 F.3d 574 (7th Cir. 2000), in which the court held that the proper relief for the fiduciary's section 404 violation was putting the participant back into the position she would have been but for the breach – a remedy that necessarily included monetary relief. Accordingly, under established Seventh Circuit

precedent, the Plaintiffs are entitled to restitution as a form of "typical" equitable relief designed to make the Plaintiffs whole or to restore the status quo ante, if the Court determines that Abbott breached its section 404 fiduciary duties.

The rights established under the statute's stringent liability provisions are meaningful only if "appropriate equitable relief" encompasses make-whole relief comparable to the kind that historically courts of equity imposed on breaching trustees. Authorizing such relief thus serves ERISA's purpose of protecting benefits through the enforcement of strict fiduciary duties on fiduciaries entrusted with the management of ERISA-covered plans and prevents an effective nullification of the statute's protective promise. A finding to the contrary would be an injustice to plan participants who depend on ERISA to protect their pension assets held in trust and other promised employee benefits and significantly undermine the statute's protective regime.

II. The Plaintiffs also seek to remedy the section 510 violations through reinstatement to Abbott employment and its plans for the 10,000 member class of former HPD employees, and they ask for front or back pay on behalf of an 800 member subclass. Violations of section 510 are, like section 404 violations, also enforced through section 502(a)(3). In this context, however, the scope of the available remedies is not readily determined by reference to the historical law of trusts. Instead, the remedies available for violations of ERISA section 510, the statute's anti-retaliation and discrimination provision, must be determined in light of the section's federal employment and discrimination law antecedents. As in other areas of federal employment and discrimination law, the purpose of section 510 is to prevent unlawful discharge, harassment, retaliation, or discrimination that interferes with employment rights – here,

attainment of ERISA-protected employee benefits – through alterations in employment status. The remedies available for a section 510 violation must be addressed to this statutory purpose.

The Supreme Court has never suggested that the "typically equitable relief" analysis it prescribes for determining remedies for section 404 violations is or should be applicable to section 510 employment discrimination. Even in the 404 context, the Court has expressly recognized that the structure and purpose of ERISA may require departing from common law trust requirements to effectuate the statute's protective purposes; the Seventh Circuit has likewise cautioned against applying the Supreme Court's more restrictive rulings on the scope of 502(a)(3) relief to circumstances beyond those that were particularly before the Court. This admonition has particular relevance to enforcement of section 510 through the 502(a)(3) mechanism, since section 510's antecedents lie in other employment and antidiscrimination laws and not the law of trusts.

Section 510's imposition of liability upon "any person" who unlawfully alters the employment relationship to interfere with an employee's promised benefits contrasts with the statute's fiduciary provisions, which hinge liability on the breach of a fiduciary's trust law obligations to plan participants. Unlike ERISA's fiduciary liability provisions, which have their origins in – and are interpreted in accordance with – the common law of trusts, section 510's underpinnings lie in those statutes that similarly attach liability to, and provide relief for, employee retaliation and discrimination. The Seventh Circuit has particularly recognized that section 510 should be expansively construed in light of its statutory precursors, especially the anti-retaliation and discrimination provisions of Title VII of the Civil Rights Act of 1964 on which section 510 was modeled.

Focusing on this and other statutory antecedents supports a conclusion that reinstatement, back pay, and front pay are forms of appropriate equitable relief that are available under section 502(a)(3) to remedy a violation of section 510's employment protection provisions. The Supreme Court and Seventh Circuit recognize that reinstatement, back pay, and front pay are considered equitable relief under Title VII and have used Title VII to interpret ERISA. Title VII expressly provides for reinstatement, which is the "preferred" remedy for employment discrimination violations, and the Seventh Circuit has held that front pay is the functional equivalent of reinstatement because it attempts to achieve the equitable result of placing plaintiffs in the position they would have been in the absence of illegality. The Seventh Circuit has also determined that back pay is an equitable remedy in the Title VII context. Because of Title VII's common lineage with ERISA section 510, the remedies considered equitable under the former statute should also be considered equitable in the latter context if ERISA is to provide any meaningful relief for victims of benefits-related employment discrimination or retaliation.

Even if the Court applies the Supreme Court's "typically equitable relief" analysis in the section 510 context, however, the Plaintiffs should be able to obtain section 502(a)(3) relief in the form of reinstatement to their prior positions and former plans, back pay, and front pay if the Defendants are found to be liable. The Seventh Circuit in Bowerman determined that, in the fiduciary breach context, reinstatement to a plan is "appropriate equitable relief" available pursuant to section 502(a)(3). Four other circuits agree with the Seventh Circuit that the Supreme Court's section 502(a)(3) rulings permit reinstatement to a plan as a form of equitable relief. Both the Supreme Court and

standard treatises have declared that back pay is equitable when, as here, it is an integral and incidental part of other equitable relief (e.g., reinstatement) to remedy employment discrimination. In addition, front pay is an appropriate equitable remedy for a violation of section 510 because, as the standard treatises make clear, front pay is an equitable equivalent to, and a substitute for, the equitable remedy of reinstatement.

## ARGUMENT

### I. Supreme Court and Seventh Circuit Precedent Support the Availability of Section 502(a)(3) Equitable Relief Against a Plan Fiduciary Equal to the Benefits that the Plan Participant Would Have Received Absent the Fiduciary's Breach.

ERISA section 404 requires plan fiduciaries to "discharge [their] duties with respect to a plan solely in the interest of the participants . . . and for the exclusive purpose of . . . providing benefits to participants." 29 U.S.C. § 1104(a)(1). The statute contains several "carefully integrated" remedial provisions to enforce its fiduciary duties, Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146 (1985), including section 502(a)(3), which allows a participant to sue "to enjoin any act or practice which violates" ERISA or "to obtain other appropriate equitable relief . . . to redress such violations." 29 U.S.C. § 1132(a)(3).<sup>2</sup> The Supreme Court has determined that, when enforcing ERISA's fiduciary provisions, section 502(a)(3) permits only those forms of relief "typically available in equity." Great-West, 534 U.S. at 210; accord Mertens, 508 U.S. at 256; cf. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110-11 (1989) (trust law informs

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<sup>2</sup> Section 502(a)(3) states: "A civil action may be brought . . . by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of [Title I of ERISA] or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of [Title I of ERISA] or the terms of the plan." 29 U.S.C. § 1132(a)(3). ERISA section 502(a)(5), 29 U.S.C. § 1132(a)(5), which is similarly worded, gives the Secretary the right to bring the same kind of action for the same types of relief.

the interpretation of ERISA's fiduciary duties and the remedial provisions designed to enforce those duties). Neither Mertens nor Great-West involved a claim against a fiduciary for fiduciary breach. In Mertens, the section 502(a)(3) cause of action was against a non-fiduciary actuary, against whom, the Court held, any monetary recovery would be considered legal damages and not typically equitable relief. 508 U.S. at 256-63. In Great-West, the section 502(a)(3) cause of action was brought by a plan against a participant to recoup benefits under a plan provision requiring repayment from a third-party tort recovery. 538 U.S. at 208-10. Cf. Sereboff v. Mid-Atlantic Med. Servs., Inc., 547 U.S. 356, 362-68 (2006) (enforcement of "equitable lien established by agreement" by plan against non-fiduciary beneficiary is available relief under 502(a)(3)); Harris Trust & Savings Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 250 (2000) (relying on historical availability of an action in equity against a person who acquired property from a breaching fiduciary to conclude that such a suit seeks "equitable relief" under section 502(a)(3)).

The Plaintiffs allege that Defendant Abbott, in its capacity as a fiduciary, breached its section 404 fiduciary duty of loyalty to the participants in its employee benefit plans by omitting material information and making affirmative misrepresentations in its communications to plan participants. They ask this Court to remedy the alleged breach of trust by granting the class, pursuant to section 502(a)(3), restitution against Abbott to return the gain it purportedly realized from its breach.<sup>3</sup> The suit is thus distinct

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<sup>3</sup> The Plaintiffs also seek reinstatement remedies for Abbott's section 404 breach. As explained, infra, at 30-34, reinstatement is indisputably a form of equitable relief available under section 502(a)(3) to remedy a fiduciary breach.

from the Mertens line of cases because, in seeking relief against a breaching fiduciary, it is directly analogous to an action by the beneficiary of a trust against a breaching trustee for monetary redress of a breach of trust. Both the basis for the claim – breach of trust – and the requested monetary relief – sometimes called "surcharge" – were typically available in courts of equity in the days of the divided bench. Indeed, the equity courts exercised exclusive jurisdiction over claims by a beneficiary against a trustee for breach of trust. Restatement (Second) of Trusts § 197, at 433 (1959) (Second Restatement); *id.* § 198, at 434; 1 John N. Pomeroy, A Treatise on Equity Jurisprudence § 151, at 184 (4th ed. 1918) (Pomeroy); 2 Joseph Story, Commentaries on Equity Jurisprudence § 975, at 175 (12th ed. 1877) (Story); see Duvall v. Craig, 15 U.S. (2 Wheat.) 45, 56 (1817) ("[a] trustee, merely as such, is, in general, only suable in equity"); 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"). The Plaintiffs' suit therefore seeks "equitable relief" that meets the Supreme Court's requirement for "appropriate equitable relief" under section 502(a)(3).

In traditional trust law, the available equitable remedies afforded by equity courts included "compel[ling] the trustee to redress [the] breach" with "the payment of money." Second Restatement § 199, at 437; 3 Austin W. Scott & William F. Fratcher, The Law of Trusts § 199.3, at 206 (4th ed. 1987) (Scott); see 3 Pomeroy § 1080, at 2481-2482; 2 Story §§ 1266-1278, at 519-534. 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); see 3 Scott § 205, at 238-239; Black's Law Dictionary 1482 (8th ed. 2004); 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).<sup>4</sup>

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 Trustees § 862, at 36 (rev. 2d ed. 1995), and the monetary recovery could be paid to the beneficiary rather than the trust itself. See, e.g., Gates v. Plainfield Trust Co., 194 A. 65 (N.J. 1937) (per curiam) (upholding decree that required executor to pay income to life beneficiary); Kendall v. DeForest, 101 F. 167, 170 (2d Cir. 1900) (upholding decree that held trustee liable to beneficiaries for income deficiency resulting from breach of trust that had depleted annuity fund); cf. United States v. Mitchell, 463 U.S. 206, 226 (1983) (relying on trust law in holding that individual Indian beneficiaries could sue for monetary compensation for losses allegedly caused by government's violation of statutes imposing specific duties concerning management of timber).

Restitution measured by a monetary recovery equal to the benefits that the Plaintiffs lost because of Abbott's breach of its fiduciary duties is the 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

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<sup>4</sup> 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.



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). Unlike the Plaintiffs, the parties seeking relief in Mertens and Great-West did not seek to surcharge fiduciaries with the loss they suffered, but instead sought damages for that loss from a non-fiduciary third party. Mertens, 508 U.S. at 253-54, 262; Great-West, 534 U.S. at 212-18. Loss recovery against non-fiduciaries, however, is typically legal in nature. Id. at 210-18. Thus, neither case controls the outcome of the Plaintiffs suit.

Accordingly, because equity courts had exclusive jurisdiction over trust fiduciaries and could require them to recompense beneficiaries for losses caused by their fiduciary breaches or to disgorge profits gained as a result of such breaches, similar make-whole relief is available against Abbott under section 502(a)(3) – comparable to restoration of monetary losses to a plan authorized by section 502(a)(2), 29 U.S.C. § 1132(a)(2) – for fiduciary breaches under the "typically equitable relief" analysis. Thus, the availability of a monetary remedy in the form of equitable restitution against Abbott for its fiduciary breach is demonstrably the type of equitable relief that was available in the historic courts of equity.<sup>5</sup>

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<sup>5</sup> The Secretary has consistently argued this position since Mertens. See, e.g., DOL Am. Br., Callery v. United States Life Ins. Co. (10th Cir.), available at <http://www.dol.gov/sol/media/briefs/callery-08-20-2003.htm>. While this view has not prevailed in courts outside the Seventh Circuit, the inequities resulting from the more narrow view of section 502(a)(3) adopted by these courts have been frequently criticized. See Aetna Health Inc. v. Davila, 542 U.S. 200, 222 (2004) (Ginsburg, J., joined by Breyer, J., concurring) (citation omitted); Amschwand v. Spherion Corp., 505 F.3d 342, 348-49 (5th Cir. 2007) (Benavides, J. concurring specially); Eichorn v. AT&T Corp., 489 F.3d 590, 592-593 (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, 345-346 (2d Cir. 2005) (Newman, J. concurring);

The foregoing analysis is entirely consonant with the law of the Seventh Circuit, which 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." Mondry, 557 F.3d at 805-09 (citations omitted). Mondry is the latest in a series of cases in which the Seventh Circuit has recognized that such relief, when sought by a participant against a breaching fiduciary for breach of trust, is equitable restitution available under section 502(a)(3). See McDonald v. Household Int'l, Inc., 425 F.3d 424, 430 (7th Cir. 2005); Bowerman, 226 F.3d at 592; see also Brosted v. Unum Life Ins. Co. of America, 421 F.3d 459, 465-66 (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"); Clair v. Harris Trust & Sav. Bank, 190 F.3d 495, 498 (7th Cir.1999); Health Cost Controls of Ill., Inc. v. Washington, 187 F.3d 703, 710 (7th Cir.1999). It is therefore settled law in the Seventh Circuit that this Court can award equitable restitution pursuant to section 502(a)(3) if it determines that Abbott breached its section 404 fiduciary duty.

In Mondry, the plaintiff alleged breaches of the section 404 duty of loyalty for the plan administrator's omissions and misrepresentations regarding information and

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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. Law 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).

documents necessary to prosecute her benefits claim. 557 F.3d 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"). While restitution in Mondry (as in this case) would result in disgorgement of gain from the breach, the court did not hold that unjust enrichment was a prerequisite to awarding such relief, and instead simply maintained that "restitution is equitable when it is sought by a person complaining of a breach of trust." Id. at 806 (citation omitted).<sup>6</sup>

The Mondry court cited the earlier Seventh Circuit decision in Bowerman as precedent for the availability of monetary relief against a breaching fiduciary. In Bowerman, the Seventh Circuit held that section 502(a)(3) authorizes suits seeking equitable relief that results in monetary redress because monetary relief "when sought as a remedy for breach of fiduciary duty[,] . . . is properly regarded as an equitable remedy." 226 F.3d at 592. Id. The court determined that the Wal-Mart Plan breached its fiduciary duty of loyalty under ERISA section 404(a)(1) by failing to provide Bowerman with material information she needed to protect her health benefits under the Plan, and causing

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<sup>6</sup> Similarly, in a prior decision the Seventh Circuit, the court remanded a case specifically to permit the plaintiff to consider amending his complaint to add ERISA claims. McDonald, 425 F.3d at 429-30 ("as a plan participant at the time of his stroke whose benefits were allegedly wrongfully being denied, depending on the terms of the plan, he may have a claim for reimbursement of the medical expenses he incurred and continues to incur"). The court quoted to Justice Ginsburg's concurrence in Aetna v. Davila, 542 U.S. 200, 223 (2004), which referenced the Government's suggestion that section 502(a)(3) "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." McDonald, 425 F.3d at 430 (emphasis in original).

her health care coverage to lapse. Id. at 590-91. Turning to the appropriate remedy, the court stated that Bowerman's claim for section 502(a)(3) relief was "limited to traditional equitable remedies such as awarding an injunction or restitution," id. at 592 (citing Mertens, 508 U.S. at 255), and quoted its prior decision in Health Cost Controls of Ill., Inc. v. Washington, 187 F.3d 703, 710 (7th Cir. 1999), for the proposition that, "when sought as a remedy for breach of fiduciary duty[,] restitution is properly regarded as an equitable remedy because the fiduciary concept is equitable." Bowerman, 226 F.3d at 592. The court then ordered equitable relief in the form of retroactive reinstatement to the Plan, which resulted in the Plan paying medical expenses for which it had previously denied coverage. Id. at 584, 592.<sup>7</sup> These decisions leave no doubt that, under the Seventh Circuit's analysis of Mertens and Great-West, the Plaintiffs' claims against Abbott 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.

Moreover, such relief also ensures that ERISA is not rendered an empty promise – that its stringent fiduciary duties actually can and do achieve the statute's goal of protecting plan participants. The narrower interpretation of section 502(a)(3) adopted by some courts illogically results in a set of fiduciary duties enforceable through that section

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<sup>7</sup> While Bowerman explicitly supports the availability of equitable restitution, the court ordered a remedy in "the same form as the remedy fashioned by the district court with respect to the equitable estoppel claim." Id. The district court's remedy for the equitable estoppel claim required the Wal-Mart Plan to retroactively reinstate Bowerman to the Plan and treat her as if her health coverage had never lapsed. Id. at 584. Whether characterized as restitution or reinstatement, the court's order ultimately authorized monetary relief restoring her to the position that she would have occupied but for the breach. See infra, at 30-32 (Argument II.C.).

but without any meaningful remedy. Congress could not have intended such a result when it was drafting a statute whose express purpose was "protect[ing] . . . the interests of participants in employee plans and their beneficiaries" through "ready access to the Federal courts." ERISA § 1(b); 29 U.S.C. § 1001(b). ERISA's broad preemptive regime compounds the gap left by a constricted construction of section of section 502(a)(3). See ERISA § 514(a), 29 U.S.C. § 1144(a); see, e.g., Goeres v. Charles Schwab & Co., 220 Fed. Appx. 663 (9th Cir. 2007) (no meaningful relief for participants and beneficiaries who received significantly lower benefits because of misinformation provided by fiduciaries); Griggs v. E.I. Dupont de Nemours & Co., 237 F.3d 371, 373-74 (4th Cir. 2001) (same); McFadden v. R&R Engine & Mach. Co., 102 F. Supp. 2d 458 (N.D. Ohio 2000) (no recovery for participant left without insurance during costly illness due to fiduciary's negligent failure to pay premiums). Thus, this Court should, in accordance with not only Seventh Circuit precedent and the law in the days of the divided bench, but also the statute's protective purpose of safeguarding trust assets and other promised employee benefits from fiduciary misconduct, permit the Plaintiffs' claim for equitable restitution if it determines that Abbott has breached its fiduciary duty of loyalty.

II. Plan Participants May Seek Reinstatement and Backpay, or Frontpay, as "Appropriate Equitable Relief" for a Violation of ERISA Section 510

- A. ERISA section 510 is an anti-retaliation and anti-discrimination provision whose remedies must be determined in light of the section's genesis in federal employment and discrimination law.

Section 510 of ERISA expansively imposes liability upon "any person" who interferes with a participant's employment status or relationship for the purpose of interfering with that participant's exercise or attainment of "any" ERISA right:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan.

29 U.S.C. § 1140.<sup>8</sup> The legislative history of section 510 makes clear that, unlike the fiduciary responsibility provisions of the Act, the anti-retaliation and discrimination protections create a statutory right that is not grounded in the law of trusts. See 119 Cong. Rec. 30043-30044 (statement of Senator Javits) ("I have included [section 510] which would provide a remedy for any person fired such as is provided for a person discriminated against because of race or sex, for example"). "Congress viewed § 510 as a crucial part of ERISA because, without it, employers would be able to circumvent the provision of promised benefits." Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 143 (1990); Inter-Modal Rail Employees Ass'n v. Atchison, Topeka and Santa Fe Ry. Co., 520 U.S. 510, 515 (1997) ("§ 510 helps to make [ERISA's] promises credible").

The Seventh Circuit has repeatedly recognized that the section's "primary aim" is preventing "unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights or other benefits." Lindemann v. Mobil Oil Corp., 141 F.3d 290, 295 (7th Cir. 1998) (internal quotations omitted); see Teumer v. General Motors Corp., 34 F.3d 542, 545 (7th Cir. 1994) (section 510 ensures that "changes in one's employment status . . . [do not] stem from benefit-based motivations") (emphasis in original); McGath v. Auto-Body North Shore, Inc., 7 F.3d

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<sup>8</sup> Section 510 also protects from retaliation "any person" who raises concerns or provides information in "any inquiry or proceeding" regarding ERISA: "It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act." 29 U.S.C. § 1140.

665, 669 (7th Cir. 1993) (section 510 actions seek "primarily to protect the employment relationship that gives rise to an individual's pension rights"); Deeming v. American Standard, Inc., 905 F.2d 1124, 1127 (7th Cir. 1990) (section 510 "protect[s] the employment relationship against actions designed to interfere with, or discriminate against, the attainment of a pension right"). This Court accordingly explained in its prior ruling in this case that "[a] fundamental prerequisite to a § 510 action is an allegation that the employment relationship – as opposed to merely the pension plan – was changed in some wrongful way." Nauman, 2008 WL 4773135, at \*7 (citing Deeming, 905 F.2d at 1127).<sup>9</sup>

Section 510's purpose is distinct from the purpose of the "Fiduciary Responsibility" provisions, which are located elsewhere in the statute in Part 4 of ERISA Title I.<sup>10</sup> The fiduciary provisions, addressed in Argument I above, primarily impose fiduciary obligations on trustees related "to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest," Mass. Mut. Life Ins. Co., 473 U.S. at 142-143, and "'codify and make applicable to ERISA fiduciaries certain principles developed in the evolution of the law of trusts.'" Firestone Tire & Rubber Co., 489 U.S. at 109. The fiduciary principles codified in Part 4 are absent from section 510, because

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<sup>9</sup> In some circumstances, section 510 may be violated without there being a change in employment status. See, e.g., Mattei v. Mattei, 126 F.3d 794, 804 (6th Cir. 1997) (section 510 "reaches further than the employment relationship" where plaintiffs are discriminated against because they exercised their ERISA rights); Heimann v. Nat'l Elevator Industry Pension Fund, 187 F.3d 493, 507 (5th Cir. 1999) (same), but see Becker v. Mack Trucks, Inc., 281 F.3d 372, 383 & n.10 (3d Cir. 2002).

<sup>10</sup> Section 510 is in Part 5 of Title I, which is entitled "Administration and Enforcement."

section 510 liability does not hinge on the existence of fiduciaries, fiduciary obligations, and fiduciary misconduct. See Deeming, 905 F.2d at 1127. Instead, like any rights-creating statute, the words of section 510 "must be read in their context and with a view to their place in the overall statutory scheme." Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 809 (1989) (citation omitted). Section 510's "broad and encompassing language," Kross v. Western Electric Co. Inc., 701 F.2d 1238, 1242 (7th Cir. 1983), generally asks not whether there has been a breach of the fiduciary-participant relationship, but rather whether "the employer-employee relationship . . . was changed in some discriminatory or wrongful way." Deeming, 905 F.2d at 1127.

Thus, section 510 is an anti-retaliation and anti-employment discrimination provision embedded in a statute otherwise built around "principles developed in the evolution of the law of trusts." 1974 U.S.C.C.A.N. 4639, 4649. Trust law, however, "offer[s] only a starting point, after which courts must go on to ask whether, or to what extent, the language of the statute, its structure, or its purposes require departing from common-law trust requirements" even with respect to fiduciary breach cases. Varity Corp. v. Howe, 516 U.S. 489, 497 (1996). It is particularly important, therefore, for courts to realize that section 510 cases require their own analysis in light of the fact that section 510 has its roots in other like statutes, and does not trace back to the common law of trusts.<sup>11</sup> "After all, ERISA's standards and procedural protections partly reflect a

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<sup>11</sup> Back pay is generally considered equitable relief under numerous other employment and discrimination statutes, including the National Labor Relations Act, 29 U.S.C. § 151, et seq., see NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48-49 (1937); the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, et seq., see Mitchell, 361 U.S. at 292-93; Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, et seq., see Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75-76 (1992); Section 1981, 42 U.S.C. § 1981, see Randolph v. IMBS, Inc., 368 F.3d 726, 732 (7th Cir. 2004); and Section 1983, 42



congressional determination that the common law of trusts did not offer completely satisfactory protection." Id.<sup>12</sup>

The remedies available for violations of section 510 are set forth in Section 502(a)(3), which allows suits "to enjoin any act or practice that violates" ERISA or the terms of the plan, and "to obtain appropriate equitable relief . . . to redress" statutory violations. See Tolle v. Carroll Touch, Inc., 977 F.2d 1129, 1133-34 (7th Cir. 1992). This is the same "catchall" enforcement provision that is used to remedy fiduciary breaches. Varity, 516 U.S. at 512. Section 510 actions, however, do not allege breaches of trust or require reference to trust law; rather, they are statutorily-created employment discrimination or retaliation claims. See Deeming, 905 F.2d at 1127. The analysis of Section 502(a)(3) in Mertens and Great-West must therefore be informed by this background rather than principles of trust law.<sup>13</sup>

The Secretary's analysis of the proper approach in determining which remedies are available in a section 510 case is entirely consistent with that of the Seventh Circuit, which has recognized that "the Supreme Court's ERISA enforcement precedent" is very

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U.S.C. § 1983, see Matlock v. Barnes, 932 F.2d 658, 660, 667-68 (7th Cir. 1991). The NLRA, in particular, was a model for ERISA, in addition to Title VII. See, e.g., Stiltner v. Beretta U.S.A. Corp., 74 F.3d 1473, 1483 (4th Cir. 1996) (section 510 modeled after NLRA section 8(a)(3)) (citing legislative history). Back pay is considered equitable under the NLRA. See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. at 48-49.

<sup>12</sup> Varity further stated: "And, even with respect to the trust-like fiduciary standards ERISA imposes, Congress 'expect[ed] that the courts will interpret [ERISA] bearing in mind the special nature and purpose of employee benefit plans . . . as they 'develop a federal common law of rights and obligations under ERISA-regulated plans.'] Consequently, we believe that the law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA's fiduciary duties." Id.

<sup>13</sup> The Supreme Court has recently cautioned against broadly applying its analysis of one type of statutory action – and the resulting available remedies – to other causes of action not expressly addressed or analyzed by the Court. See Atlantic Sounding Co. v. Townshend, 129 S. Ct. 2561, 2571-72 (2009).

"specific[ally] focus[ed]" and cautioned against litigants who apply the Court's more restrictive section 502 analyses "far too expansively." Northcutt v. General Motors Hourly-Rate Employees Pension Plan, 467 F.3d 1031, 1037 (7th Cir. 2006). Indeed, the Seventh Circuit's "consideration of the scope of § 510" particularly recognizes "that ERISA is a remedial statute to be liberally construed in favor of employee benefit fund participants." Kross, 701 F.2d at 1242-43. The scope of "appropriate equitable relief" in the section 510 context requires a different justification than the fiduciary breach context, which is grounded in historic (pre-divided bench) equity law. Because section 510's roots lie in similar statutory precursors with no common law antecedents, fashioning appropriate equitable remedies for section 510 violations requires looking at similar statutory provisions and stands apart from the ongoing, active debate over the scope of Section 502(a)(3) in the fiduciary breach context. Therefore, what constitutes "appropriate equitable relief" for section 510 purposes is not necessarily identical to what constitutes "appropriate equitable relief" for section 404 purposes.

B. ERISA Section 510's Statutory Precursor in Anti-Discrimination and Retaliation Law, Title VII of the 1964 Civil Rights Act, Confirms that Reinstatement, Front Pay, and Back Pay are Forms of Equitable Relief Available for Section 510 Violations.

The Seventh Circuit relies on Title VII of the Civil Rights Act of 1964 to interpret ERISA section 510. See, e.g., Kampmier v. Emeritus Corp., 472 F.3d 930, 943 (7th Cir. 2007); Grottkau v. Sky Climber, Inc., 79 F.3d 70, 73 (1996) (applying Title VII's "McDonnell Douglas" method of proof to Section 510 claim). Indeed, section 510's and Title VII's respective language and legislative history confirm that section 510 was modeled on Title VII. Compare 29 U.S.C. § 1140 (prohibiting "unlawful discharge") with 42 U.S.C. § 2000e-2 (same); see 119 Cong. Rec. 30043-30044 (statement of Senator

Javits) (section 510 provides "the same right[s]" as a person discriminated against because of race or sex); but see Millsap v. McDonnell Douglas Corp., 368 F.3d 1246, 1259 (10th Cir. 2004) (interpreting differently the "different remedial schemes under each statute").<sup>14</sup> Title VII's employment discrimination protections typically treat reinstatement, back pay, and front pay as forms of equitable relief. See E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 292 (2002) (reinstatement); Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 854 n.3 (2001) (front pay); Albemarle Paper Co. v. Moody, 422 U.S. 405, 416-24 (1975) (back pay).<sup>15</sup>

Section 510 protects participants from ERISA-related retaliatory or discriminatory acts by "any person" that, among other things, interfere with their ERISA rights. The fact

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<sup>14</sup> In Millsap, the plaintiffs alleged that the defendant closed one of its plants to prevent employees who were working there from attaining benefit eligibility. Id. at 1248. As has occurred in a number of other similar cases, the Millsap plaintiffs had to seek back pay as a freestanding claim because the plant closures rendered reinstatement into prior positions an impossibility. 369 F.3d at 1254; see also Alexander, 232 Fed. Appx. at 497; Calhoon, 400 F.3d at 598. These cases are inapposite, because in the instant case there is no "plant closure." Abbott remains fully operational, and reinstatement to prior positions or comparable employment, and to the Abbott plans, may be a real possibility. Moreover, even if Millsap is correct that Title VII's remedial scheme is not on all fours with ERISA's, ERISA's remedial scheme can be traced to the NLRA, 29 U.S.C. § 1141, which provides for reinstatement and back pay, among other equitable remedies.

<sup>15</sup> In Great-West, Justice Ginsburg argued in dissent that, because Congress had treated back pay – a remedy similar to the restitution sought in Great-West – as equitable under Title VII, restitution should be considered equitable and available under ERISA. 534 U.S. at 230. The majority responded in dicta that Congress only treated Title VII back pay as equitable in the narrow sense that it allowed back pay together with, and as an integral part of, an equitable remedy. Id. at 218 n.4. Thus, in disputing Justice Ginsburg's position that "all forms of restitution are equitable," the majority's footnote 4 recognized that Title VII back pay is equitable insofar as it is integral or incidental to the equitable remedy of reinstatement. Id.; In re Monumental Life Ins. Co. v. W. & S. Life Ins. Co., 343 F.3d 331 (5th Cir. 2003) (Title VII back pay is equitable because it is integral to the provision's remedial scheme) (citing Great-West, 534 U.S. at 218 n.4). Unlike in Great-West, the Plaintiffs' claim is not a "freestanding claim for money damages," Great-West, 534 U.S. at 218 n.4, because it seeks reinstatement for thousands of class members.

that it is modeled on Title VII and similar statutes is significant because Congress is presumed to legislate purposefully against the backdrop of existing law. See Cannon v. Univ. of Chicago, 441 U.S. 677, 698-99 (1979). The background law at the time of ERISA's enactment treated reinstatement, back pay, and front pay as appropriate equitable relief for discriminatory discharge. Courts generally retained broad equitable powers in enforcing statutes passed in the public's interest to promote the general welfare. See, e.g., Porter v. Warner Holding Co., 328 U.S. 395, 398-400 (1946) (restitution of rents under the Emergency Price Control Act of 1942) ("the inherent equitable jurisdiction . . . clearly authorizes a court in its discretion, to decree restitution of excessive charges in order to give effect to the policy of Congress"). The Seventh Circuit recognizes that this equity power includes the award of reinstatement, back pay, and front pay to effectuate the purpose of Title VII. Hildebrandt v. Illinois Dep't of Nat. Resources, 347 F.3d 1014, 1031 (7th Cir. 2003) (reinstatement); Williams v. Pharmacia, Inc., 137 F.3d 944, 951-52 (7th Cir. 1998) (front pay); Franzen v. Ellis Corp., 543 F.3d 420, 425 (7th Cir. 2008) (back pay); cf. Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 291-92 (1960) (Court retains "historic power of equity" to award back pay to effectuate purposes of Fair Labor Standards Act even absent explicit statutory authorization of back pay awards).

Under Title VII and ERISA alike, equity requires the imposition of reinstatement, front pay, and back pay among other forms of injunctive relief, where appropriate to remedy harm caused by retaliatory or discriminatory acts that thwart the full exercise or attainment of statutory rights. Rather than fully compensate the victim for consequential damages or punish or deter the wrongdoer, such remedies are equitable remedies simply

designed to restore the status quo ante or prevent unjust enrichment. Curtis v. Loether, 415 U.S. 189, 196 (1974) ("actual and punitive damages . . . is the traditional form of relief offered in courts of law . . . [but w]e need not, and do not, go so far as to say that any award of monetary relief must necessarily be 'legal' relief"). If reinstatement, front pay, and back pay are not "appropriate equitable" remedies for section 510 violations, then in many and perhaps most such cases, section 510 provides a right without a remedy, contrary to general legal principles, the statute's purpose, and the provision's broad and ostensibly enforceable terms. See Varsity, 516 U.S. at 515 ("[w]e are not aware of any ERISA-related purpose that denial of a remedy would serve").

In Mertens, the Supreme Court looked to Title VII to interpret the remedies available under section 502(a)(3) for an ERISA violation outside of the direct fiduciary-participant relationship. The Court explained that compensatory and punitive damages were unavailable for a section 502(a)(3) claim in part because, while it had "never interpreted the precise phrase 'other appropriate equitable relief,' [it had] construed the similar language of Title VII of the Civil Rights Act of 1964 (before its 1991 amendments) – 'any other equitable relief as the court deems appropriate,' 42 U.S.C. § 2000e-5(g) – to preclude 'awards for compensatory or punitive damages.'" 508 U.S. at 255 (citing United States v. Burke, 504 U.S. 229, 238 (1992)). Of significance to the instant case is not only the Court's usage of Title VII to determine the scope of "appropriate equitable relief" under section 502(a)(3), but also its reliance on Burke for support, a case in which the Court held that Title VII remedies in the original enactment included "back pay, injunctions, and other equitable relief" – i.e., the relief sought by the Plaintiffs in the instant case for the alleged section 510 violations. See 504 U.S. at 238.

Consistent with this approach, the Supreme Court has recognized that the availability of statutorily-created remedies for statutorily-created causes of action should not be determined by reference to general common law. See Atlantic Sounding Co. v. Townsend, 129 S. Ct. 2561, 2572 (2009) (citing Miles v. Apex Marine Corp., 498 U.S. 19 (1990)). Thus, the equitable relief available under section 502(a)(3) for a violation of section 510's anti-retaliation and discrimination provisions – reinstatement, back pay, and front pay in the instant case – is more appropriately guided by statutory enactments enforcing federal employment and discrimination rights than by the common law of trusts.

#### 1. Reinstatement

The Plaintiffs' requests for reinstatement of employees to their prior positions and reinstatement to the Abbott plans are properly brought under ERISA section 502(a)(3). For the reasons previously explained, Title VII provides suitable precedent in this regard. "Title VII explicitly authorizes reinstatement as an equitable remedy" for a violation of its employment discrimination provisions. Williams, 137 F.3d at 952; McKnight v. General Motors, Corp., 973 F.2d 1366, 1370 (7th Cir. 1992) (reinstatement is the "preferred" remedy for Title VII violation). Title VII provides that, if an employer has engaged in an unlawful employment practice, then "the court may order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees . . . or any other equitable relief as the court deems appropriate." 42 U.S.C. § 20003e-5(g)(1); Pollard, 532 U.S. at 848-50; Gaffney v. Riverboat Services of Indiana, Inc., 451 F.3d 424, 460 n.35 (7th Cir. 2006). Courts have broad discretion to consider several factors in determining whether such remedy is appropriate, such as whether the

sought position is available or whether there is a pervasive hostility in the employer-employee relationship that would militate against reinstatement. McKnight, 973 F.2d at 1370-71. Moreover, the Supreme Court has concluded that retroactive reinstatement is a necessary component of Title VII relief, because mere rehiring on a going forward basis fails to provide the relief required to achieve the statute's equitable purpose. Franks v. Bowman Transp. Co., Inc., 424 U.S. 747, 763-64 (1976) (awarding seniority credit dating from time that plaintiff was discriminatorily denied employment). Likewise, if the Court determines that the Defendants' spin-off and/or mutual no-hire provisions violated section 510, then it is within the Court's discretion under ERISA to grant the Plaintiffs' claims for reinstatement to Abbott and retroactive reinstatement to its plans.

## 2. Back Pay

In addition to their claim for reinstatement on behalf of the entire class, a subclass of approximately 800 individuals seeks back pay as part of the overarching reinstatement remedy. The relevant statutory antecedents likewise confirm that the Plaintiffs can recover back pay under section 502(a)(3) for a violation of section 510 when it is integrally or incidentally related to the reinstatement remedy. See supra, n.11. Back pay "is a creature of positive law; that is, the remedy of back pay did not exist at common law." Millsap, 368 F.3d at 1252. This provenance, however, is not a reason to deny awarding it as appropriate equitable relief; indeed, for the reasons argued above, the opposite is true. The Supreme Court in Great-West recognized that Title VII exemplifies a statute where back pay is part of an overall equitable remedy. See supra, n. 15; 534 U.S. at 218 n.4 (citing Curtis, 415 U.S. at 197 (Title VII back pay is "an integral part of an equitable remedy"). The Seventh Circuit similarly concluded that "back pay, like front

pay, is an 'equitable remedy'" in the Title VII context. Franzen, 543 F.3d at 425 (citations omitted); Robert Belton, Remedies § 9.1, at 302 (1992) ("[t]itle VII back pay] is an integral part of the equitable remedy of reinstatement . . . and is not comparable to damages in a common law action for breach of contract"). For this reason, plaintiffs seeking the related remedies of back pay and reinstatement traditionally had "no jury trial right under Title VII," 2 Dobbs, Remedies, at 193; see, e.g., Curtis, 415 U.S. at 197; Pals v. Schepel, Buick & GMC Truck, 220 F.3d 495, 500 (7th Cir. 2000) (juries do not issue equitable relief), and courts are accorded "broad equitable discretion to fashion back pay awards." David v. Caterpillar, Inc., 324 F.3d 851, 865 (7th Cir. 2003); Pals, 220 F.3d at 500 (comparing back pay to the equitable remedy of injunction). The Seventh Circuit's determination that Title VII back pay is equitable indicates that back pay is available to the Plaintiffs to remedy the Defendants' alleged section 510 violations. See Clarke v. Ford Motor Co., 220 F.R.D. 568, 580 (E.D. Wis. 2004) (using Seventh Circuit reference to Title VII "equitable monetary relief such as back pay" in analysis of ERISA's remedial scheme) (emphasis in original).

### 3. Front Pay

If the Court determines that reinstatement is unavailable as a practical matter, it can instead award front pay as an appropriate form of equitable relief. See Williams, 137 F.3d at 951-52. The availability of front pay, a statutorily created remedy for employment discrimination, is most appropriately determined by reference to federal employment discrimination statutes. See Atlantic Sounding Co., 129 S. Ct. at 2572. Front pay is "designed to compensate discrimination victims for the reasonable time it would take to find comparable employment elsewhere." Williams, 137 F.3d at 953-54; 2 Dan B.



Dobbs, The Law of Remedies, § 6.10(4), p. 214 (2d ed. 1993) (front pay places plaintiff in position he or she would have been in absence of discrimination).<sup>16</sup>

In Title VII cases, the Supreme Court has held that front pay is available when eventual reinstatement is difficult or unfeasible:

We see no logical difference between front pay awards made when there eventually is reinstatement and those made when there is not. Moreover, to distinguish between the two cases would lead to the strange result that employees could receive front pay when reinstatement eventually is available but not when reinstatement is not an option . . . Thus, the most egregious offenders could be subject to the least sanctions.

Pollard, 532 U.S. at 853. In Williams, the Seventh Circuit similarly explained that Title VII authorizes "equitable relief" such as reinstatement, but reinstatement may be unfeasible in some circumstances. In those instances, a court may award front pay as "the functional equivalent of reinstatement because it is a substitute remedy that affords the plaintiff the same benefit . . . as the plaintiff would have received had she been reinstated. As the equivalent of reinstatement, front pay falls squarely within the statutory language authorizing 'any other equitable relief.'" Id. at 952-53 (scope of available front pay is a decision for the court, not the jury). This settled conclusion that front pay is an equitable Title VII remedy, in concert with both the Supreme Court's and Seventh Circuit's willingness to borrow aspects of Title VII law in interpreting ERISA, require the conclusion that such relief is available under ERISA section 502(a)(3) for a violation of section 510, as other courts have held. See Schwartz v. Gregori, 45 F.3d 1017, 1021-23 (6th Cir. 1995) (permitting front pay in lieu of reinstatement in ERISA

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<sup>16</sup> In this context, "comparable employment" includes comparable benefits, of which the Plaintiffs claim they are deprived as a result of the Defendants' actions.

case); Warner v. Buck Creek Nursery, Inc., 149 F. Supp. 2d 246, 257 (W.D.Va. 2001) (same); Folz v. Marriott Corp., 594 F.Supp. 1007, 1018-19 (W.D. Mo. 1984) (same).

- C. Under the Supreme Court's Mertens and Great-West Analyses, Appropriate Equitable Relief for a Violation of ERISA Section 510 Includes Reinstatement, Front Pay and Back Pay.

As explained in Argument I above, "typical equitable relief" encompasses restitution or disgorgement for unjust enrichment that, long before ERISA, were always – in fact, were exclusively – available in equity against fiduciaries for breach of duty. For similar reasons, the conclusion that reinstatement, back pay and front pay are appropriate equitable remedies for a section 510 violation holds even if the Mertens/Great West distinction between law and equity carries over to the 510 context.

The Seventh Circuit has already held, post-Mertens, that retroactive reinstatement into a plan is "appropriate equitable relief" under ERISA section 502(a)(3). See supra, at 17-19 & n.7. In Bowerman, the court noted that section 502(a)(3) relief is "limited to traditional equitable remedies such as awarding an injunction or restitution," 226 F.3d at 592 (citing Mertens, 508 U.S. at 255), before ordering retroactive reinstatement to the Wal-mart Plan, which required monetary payments by the Plan. Id. at 584, 592.

Although retroactive reinstatement resulted in monetary recovery, it did not alter its equitable nature. "After all, any equitable relief, including those forms explicated by the Court as available under § 502(a)(3), must involve the direct or indirect transfer of money, and we cannot read the statute to proscribe all forms of relief." Administrative Committee of the Wal-Mart Associates Health & Welfare Plan v. Willard, 393 F.3d 1119, 1125 (10th Cir. 2004); see Sereboff, 547 U.S. at 362-65.

The Seventh Circuit's conclusion in Bowerman that Mertens permits retroactively reinstating a plaintiff into a plan as part of section 502(a)(3) relief was not overruled by the Supreme Court's decisions in Great-West and Sereboff, which confirmed that monetary recovery can be a permissible form of equitable relief. This is because reinstatement was considered equitable relief before the merger of the courts of law and equity. See Lorillard v. Pons, 434 U.S. 575, 583 n. 11 (1978); see, e.g., N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937). As such, the Supreme Court and Seventh Circuit have recently recognized the inherently equitable nature of reinstatement. See Great-West, 435 U.S. at 218 n. 4; Levenstein v. Salafsky, 414 F.3d 767, 772 (7th Cir. 2005). In addition, Great-West asserts that the "standard current works such as Dobbs" will inform the courts whether relief is equitable or legal, Great-West, 534 U.S. at 217, and Dobbs confirms that reinstatement is "equitable because such relief is essentially injunctive." 2 Dobbs, Remedies, § 6.10(5), p. 226; see Dobbs, Remedies, § 12.21(4), p. 489 (3d. ed. 1997); Great-West, 532 U.S. at 218 n.4.

The Seventh Circuit has since cited the relief ordered in Bowerman as a form of equitable relief available under section 502(a)(3). See Mondry, 557 F.3d at 806; Brosted, 421 F.3d at 465-66. District courts in the Seventh Circuit also agree that 502(a)(3) relief may include retroactively reinstating a plaintiff to a plan and treating the plaintiff as covered for the disputed period. See Slayhi v. High-Tech Institute, Inc., 2007 WL 4284859, \*16 (D. Minn. Dec. 3, 2007); Kannapien v. Quaker Oats Co., 433 F. Supp. 2d 895, 905 (N.D. Ill. 2006), aff'd in 507 F.3d 629 (7th Cir. 2007), cert. denied, 129 S. Ct. 62 (2008). If in these cases, which concerned fiduciary breaches, reinstatement is "clearly equitable as a form of injunctive relief," 2 Dobbs, Remedies, § 610(5), p. 226,

there should be no question that reinstatement is an available form of equitable relief in a section 510 case.

Four other circuits have ruled that retroactive reinstatement to a plan is a form of "typical" equitable relief available under section 502(a)(3). For example, the Tenth Circuit recently reaffirmed its longstanding position that retroactive reinstatement to a plan is equitable.<sup>17</sup> Phelan v. Wyoming Associated Builders, Inc., 574 F.3d 1250 (10th Cir. 2009). In Phelan, the district court had ordered a plaintiff (Phelan) – and all of his coworkers – reinstated to a plan following his employer's unlawful termination from a trade organization's health insurance coverage. Id. at 1254-55. The Tenth Circuit held that the district court's order did not mandate legal relief for past losses "even if such reimbursement might very well be one practical consequence of the reinstatement." Id. at 1255. The court reasoned:

It was WAB that benefitted from that [wrongful] termination [of the Lock Shop's policy], not only because it avoided paying Mr. Phelan's claim but also because it avoided paying *all* potential Lock Shop claims and also avoided the accounting consequences . . . of having a longterm cancer patient on its books. By ordering reinstatement, the court unwound this unlawful gain. The fact that the plaintiff was one victim of the unlawful action and, consequently, a beneficiary of the remedy, does not make this reinstatement substantively legal in nature.

Id.

The Eighth Circuit has declared that retroactive reinstatement to a plan is a form of injunctive relief available under section 502(a)(3) to "restore [plaintiffs] to the position

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<sup>17</sup> See Gorman v. Carpenters & Millwrights' Health Benefit Trust Fund, 410 F.3d 1194, 1201-02 (10th Cir. 2005); Callery v. United States Life Ins. Co. in the City of New York, 392 F.3d 401, 407 (10th Cir. 2004); Downie v. Independent Drivers Ass'n Pension Plan, 934 F.2d 1168, 1170 (10th Cir. 1991); see also Atwood v. Swire Coca-cola, USA, 482 F.Supp.2d 1305, 1316-17 (D. Utah 2007) (retroactive "instatement" to the plan is equitable relief under 502(a)(3))

they would have occupied if the [breach] never occurred." Howe v. Varsity Corp., 36 F.3d 746, 756 (8th Cir. 1994), aff'd, 516 U.S. 489 (1996). On appeal, the Supreme Court upheld and "implicitly approved the [Eighth Circuit's] remedy" reinstating former employees to the plan. Mathews v. Chevron Corp., 362 F.3d 1172, 1186 (9th Cir. 2004) (citing Varsity, 516 U.S. at 495).<sup>18</sup> The Eighth Circuit has since reaffirmed the availability of reinstatement to a plan under section 502(a)(3). See Calhoon v. Trans World Airlines, Inc., 400 F.3d 593, 598 (8th Cir. 2005) (reinstatement available but for company's bankruptcy and plan's non-existence). The Fourth Circuit also recently reaffirmed an earlier decision holding that "appropriate equitable relief" may include retroactive "reinstatement to the status quo." See Adams v. Brink's Company, 261 Fed. Appx. 583, 596-97 (4th Cir. 2008) (citing Griggs, 237 F.3d at 384-85). In another case decided after Great-West, the Ninth Circuit went even further and concluded that instatement (as opposed to reinstatement) is a permissible form of 502(a)(3) equitable relief because "[t]o instate the plaintiffs retroactively into [the plan] simply puts them in the position they would have been had [the defendant] not breached its fiduciary duty" and such relief is "equitable in substance." Mathews, 362 F.3d at 1185-86.<sup>19</sup> In sum,

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<sup>18</sup> The question of whether retroactive reinstatement to a plan is a form of equitable relief was not squarely before the Supreme Court, but the opinion embraced Varsity Corporation's concession that "the plaintiffs satisfy most of [Section 502(a)(3)'s] requirements, namely, that the plaintiffs . . . are suing for 'equitable' relief." Varsity, 516 U.S. at 508.

<sup>19</sup> In an unpublished opinion, the Sixth Circuit analogized the remedy of "instatement" to the remedy of contractual reformation – instead of reinstatement – and denied the contractual reformation. Alexander v. Bosch Automotive Systems, Inc., 232 Fed. Appx. 491, 496-98 (6th Cir. 2007). The issue of "instatement" is not squarely presented in the instant case because the Plaintiffs seek reinstatement. To the extent that the Court finds Alexander relevant, the Secretary disagrees with the Sixth Circuit's analysis for two reasons: (1) Both reinstatement and instatement are equitable. Mathews, 362 F.3d at

five courts of appeals that have addressed this issue, including the Seventh Circuit, have concluded that reinstating employees to a plan to remedy a fiduciary breach is appropriate equitable relief.

The Plaintiffs in this case seek retroactive reinstatement to the Abbott plans; if the Court finds the Defendants liable, then retroactive reinstatement into the plans would accomplish the equitable goal of "restor[ing] the status quo." See Tull v. United States, 481 U.S. 412, 422 (1987). The Plaintiffs claim that Abbott spun off its HPD into Hospira for the intentional, unlawful purpose of interfering with its employees' benefit rights under the Abbott plans – and that Hospira, as a party to the spin-off, is also culpable for the alleged section 510 violation. If proven, pursuant to Bowerman and as in Phelan, retroactive reinstatement of the Plaintiffs into the Abbott plans would constitute an appropriate equitable remedy for this violation.

Similarly, back pay and front pay are forms of appropriate equitable relief under the Supreme Court's section 502(a)(3) jurisprudence. While the Plaintiffs seek reinstatement for approximately 10,000 individuals, only 800 members of the class additionally seek the attendant remedy of back pay. The Supreme Court has recognized that back pay is equitable where it is "incidental to or intertwined with injunctive relief." Tull, 481 U.S. at 424; Great-West, 534 U.S. at 218 n.4 (back pay is "integral part of an equitable remedy"). In the employment discrimination context, the "standard current

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1186 ("If 'reinstating' employees into a plan constitutes 'appropriate equitable relief,' there is no reason to conclude that 'instating' them would not."); (2) Even if contractual reformation is the equitable analog, such relief is appropriate if the Court finds that the current arrangement violates ERISA. See Nechis v. Oxford Health Plans Inc., 421 F.3d 96, 103 (2d Cir. 2005) (illegal provisions can be reformed); 2 Dobbs, Remedies, § 11.6(3), p. 751 ("reformation is historically an equitable remedy, not a legal one").

works," which the Supreme Court instructs are to be consulted in determining whether a remedy is legal or equitable, see 534 U.S. at 217, agree that "back pay and reinstatement remedies are usually considered equitable." 2 Dobbs, Remedies, § 6.10(1), p.193 (traditionally there was no jury trial right for employment discrimination claims); Belton, Remedies, § 9.1, at 302 ("[back pay] is an integral part of the equitable remedy of reinstatement . . . and is not comparable to damages in a common law action for breach of contract.").<sup>20</sup>

Back pay is a particularly integral and incidental part of the overall equitable remedy in the instant case, because the Plaintiffs' chief claim is for reinstatement on behalf of 10,000 class members; a subclass of merely 800 individuals seeks back pay. Unlike in the "plant closure" cases, see supra, at n.14, the Plaintiffs' requested relief is not for "[a]n award of backpay, without more." Millsap, 368 F.3d at 1253. Instead, Plaintiffs seek to protect "the employment relationship against actions designed to interfere with, or discriminate against, the attainment of a pension right," Deeming, 905 F.2d at 1127, through a request for reinstatement – with the incidental equitable relief of back pay. See Tull, 481 U.S. at 424 ("a court in equity may award monetary restitution as an adjunct to injunctive relief."); Millsap, 368 F.3d at 1256-57. Back pay is therefore an available form of 502(a)(3) equitable relief because it is integral and incidental to the overall section 510 remedy sought by the Plaintiffs.

Finally, standard treatises like Dobbs instruct that "[f]ront pay is a substitute for [the equitable remedy of] reinstatement." 2 Dobbs, Remedies, at 214. Dobbs reasons

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<sup>20</sup> The Second and Sixth Circuits recognize back pay as an appropriate remedy for a Section 510 violation. Sandberg v. KPMG Peat Marwick, LLP, 111 F.3d 331, 336 (2d Cir. 1997); Schwartz, 45 F.3d at 1022-23.

that front pay "is to be awarded only when reinstatement would be an available remedy for the kind of case involved" – a circumstance that is often met under section 510. Id. Where reinstatement to a prior position is not feasible, court-ordered front pay achieves the equitable goal of making discrimination victims whole by affording relief while seeking comparable employment elsewhere. Id. (front pay places plaintiff in position they would have been in absence of discrimination). The "standard current works" thus confirm front pay's equitable nature as a substitute for reinstatement (the quintessential equitable relief) that is traditionally determined by a court rather than a jury. Thus, whether viewed exclusively in its statutory context or through the lens of traditional trust law, front pay can be "appropriate equitable relief" to remedy a section 510 violation.

#### CONCLUSION

For the foregoing reasons, this Court should find that reinstatement, restitution or similar make-whole relief is a form of "appropriate equitable relief" in an ERISA section 502(a)(3) action for fiduciary breach under section 404, and that reinstatement, front pay, and back pay are all forms of "appropriate equitable relief" in an ERISA section 502(a)(3) action for retaliation or discrimination violations of section 510.



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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on December 17, 2009, the foregoing **Brief for the Secretary of Labor as Amicus Curiae** was filed electronically with the Clerk of the Court for the United States District Court for the Northern District of Illinois through ECF. ECF will send an e-notice on the following parties:

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