

**In the  
United States Court of Appeals  
for the Sixth Circuit**

---

**TODD ROCHOW and JOHN ROCHOW, as  
personal representatives of the ESTATE OF  
DANIEL J. ROCHOW,**

*Plaintiffs-Appellees,*

v.

**LIFE INSURANCE COMPANY OF NORTH AMERICA,**

*Defendant-Appellant.*

---

**On Appeal from the Judgment of District Judge Arthur J. Tarnow,  
United States District Court for the Eastern District of Michigan**

---

**BRIEF AMICUS CURIAE OF AARP IN SUPPORT OF  
PLAINTIFFS-APPELLEES URGING AFFIRMANCE**

---

MARY ELLEN SIGNORILLE  
*Counsel of Record*  
AARP Foundation Litigation

Melvin Radowitz  
AARP

601 E St., NW  
Washington, DC 20049  
202-434-2060  
msignorille@aarp.org

*Counsel for Amicus Curiae AARP*

---

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

**Disclosure of Corporate Affiliations  
And Financial Interest**

Sixth Circuit

Case Number: 12-2074

Case Name: Rochow, et al. v. LINA

Name of Counsel: Mary Ellen Signorille

Pursuant to 6th Cir. R. 26.1, AARP makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

**CERTIFICATE OF SERVICE**

I certify that on March 11, 2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Mary Ellen Signorille  
Mary Ellen Signorille

## TABLE OF CONTENTS

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST .....	i
TABLE OF AUTHORITIES .....	iii
INTEREST OF AMICUS CURIAE .....	1
SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	3
I.    THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY AWARDING AN ACCOUNTING AND DISGORGEMENT OF PROFITS AS APPROPRIATE EQUITABLE RELIEF UNDER ERISA § 502(a)(3) .....	3
A.    Appropriate Equitable Relief Under ERISA § 502(a)(3) Includes Restitution Of Profits To Prevent Unjust Enrichment.....	3
B. <i>Cigna v. Amara</i> Confirms That A Court May Prevent A Fiduciary’s Unjust Enrichment Through An Award Of Surcharge Under ERISA § 502(a)(3) .....	5
C.    The Sixth Circuit Has Consistently Held That A Participant May Obtain Restitution For The Delayed Payment Of Benefits Without Proof Of Scier, Wrongdoing Or Bad Faith .....	8
D.    The District Court Did Not Abuse Its Discretion By Ordering The Defendant To Disgorge The Profits It Made On Mr. Rochow’s Withheld Benefits .....	10
CONCLUSION.....	12

CERTIFICATE OF COMPLIANCE.....13

CERTIFICATE OF SERVICE .....14

## TABLE OF AUTHORITIES

### CASES

<i>Bricklayers' Pension Trust Fund v. Taiariol</i> , 671 F.2d 988 (6th Cir. 1982) .....	9
<i>Caffey v. UNUM Life Ins. Co.</i> , 302 F.3d 576 (6th Cir. 2002) .....	2, 3, 8
<i>Chao v. Hall Holding Co., Inc.</i> , 285 F.3d 415 (6th Cir. 2002).....	10
<i>Cigna v. Amara</i> , 131 S. Ct. 1866 (2011) .....	<i>passim</i>
<i>Dardaganis v. Grace Capital, Inc.</i> , 889 F.2d 1237 (2d Cir. 1989) .....	10
<i>Donovan v. Bierwirth</i> , 680 F.2d 263 (2d Cir. 1982).....	4
<i>Drennan v. General Motors Corp.</i> , 977 F.2d 246 (6th Cir. 1992) .....	9
<i>Ford v. Uniroyal Pension Plan</i> , 154 F.3d 613 (6th Cir. 1998).....	2, 3, 8, 10
<i>Fotta v. Trustees of the UMWA Health &amp; Ret. Fund of 1974</i> , 165 F.3d 209 (3rd Cir. 2008).....	6
<i>Gearlds v. Entergy Servs.</i> , 2013 U.S. App. LEXIS 3831 (5th Cir. 2013).....	5
<i>GIW Indus., Inc. v. Trevor, Stewart, Burton &amp; Jacobsen, Inc.</i> , 895 F.2d 729 (11th Cir. 1990) .....	10
<i>Gore v. El Paso Energy Corp. Long Term Disability Plan</i> , 477 F.3d 833 (6th Cir. 2007) .....	4
<i>Great-West Life &amp; Annuity Ins. Co. v. Knudson</i> , 534 U.S. 204 (2002).....	5
<i>Massachusetts Mut. Life Ins. Co. v. Russell</i> , 473 U.S. 134 (1985).....	4

<i>McCrary v. Metro. Life Ins. Co.</i> , 690 F.3d 176 (4th Cir. 2012) .....	6, 7
<i>Mertens v. Hewitt Assocs.</i> , 508 U.S. 248 (1993) .....	2, 5
<i>Mosser v. Darrow</i> , 341 U.S. 267 (1951) .....	8
<i>Nickel v. Bank of Am.</i> , 290 F.3d 1134 (9th Cir. 2002).....	11
<i>Rochow v. Life Ins. Co. of N. Am.</i> , 482 F.3d 860 (6th Cir. 2007).....	9
<i>Thornton v. Graphic Commc'ns. Conf. of the Int'l Bhd. of Teamsters Supplemental Ret. &amp; Disability Fund</i> , 566 F.3d 597 (6th Cir. 2009) .....	4
<i>Varity Corp. v. Howe</i> , 516 U.S. 489 (1996) .....	4
<i>Wells v. United States Steel &amp; Carnegie Pension Fund</i> , 76 F.3d 731 (6th Cir. 1996) .....	8, 9

## STATUTES AND REGULATIONS

Employee Retirement Income Security Act (ERISA) of 1974	
§ 2(b), 29 U.S.C. § 1001(b) .....	3
§ 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).....	4, 5
§ 502(a)(3), 29 U.S.C. § 1132(a)(3) .....	<i>passim</i>
§ 502(a)(3)(B), 29 U.S.C. § 1132(a)(3)(B).....	4
§ 502(a)(5), 29 U.S.C. § 1132(a)(5) .....	5

## TREATISES AND RESTATEMENTS

1 Dobbs, <i>Law of Remedies</i> (2d ed. 1993)	
§ 3.6(2).....	11
Jeffrey Lewis <i>et al.</i> , <i>Employee Benefits Law</i> (3d ed. 2012)	
12-17 .....	3, 9
12-37 .....	3, 9

Restatement (Second) of Trusts (1992)	
§ 201 .....	10
§ 205 .....	6, 7
Restatement (Third) of Restitution and Unjust Enrichment (2011)	
§ 1.....	6
§ 3.....	6, 11
§ 41.....	6
§ 43.....	6, 11
§ 51.....	6, 11
§ 55.....	6
Restatement (Third) of Trusts (Tent. Draft No. 5, Mar. 2, 2009)	
§ 95.....	6
Restatement (Third) of Trusts (2012)	
§ 100 .....	6
3 Austin W. Scott & William F. Fratcher, <i>The Law of Trusts</i> (4th ed. 1987)	
§ 205 .....	6
§ 237 .....	6

**MISCELLANEOUS**

California Department of Insurance, Order to Show Cause, <i>available at</i> <a href="http://www20.insurance.ca.gov/epubacc/PLD/120709.htm">http://www20.insurance.ca.gov/epubacc/PLD/120709.htm</a> .....	9
Press Release, Insurance Commissioner Poizner Announces \$600,000 Settlement with Life Insurance Company of North America for Alleged Claims Handling Violations (Sept. 29, 2009), <a href="http://www.insurance.ca.gov/0400-news/0100-press-releases/0080-2009/release146-09.cfm">http://www.insurance.ca.gov/0400-news/0100-press-releases/0080-2009/release146-09.cfm</a> .....	9

## **INTEREST OF AMICUS CURIAE<sup>1</sup>**

AARP is a nonpartisan, nonprofit organization with a membership dedicated to addressing the needs and interests of people age fifty and older in ways beneficial and affordable to them and to society as a whole. Countless members and older individuals participate in employer-sponsored pension, health, disability and other benefit plans. Through education, advocacy and service, AARP seeks to enhance the quality of life for older persons and all Americans by promoting independence, dignity, and purpose. In its efforts to foster the economic security of individuals as they age, AARP seeks to increase the availability, security, equity, and adequacy of public and private pension, health, disability and other employee benefits. One of AARP's main objectives is to ensure that participants receive those benefits to which they are entitled in a timely manner in accordance with ERISA's protections.

AARP is presenting its views on the discrete issue of whether ERISA permits a participant to sue for disgorgement of profits on delayed benefit payments from an ERISA plan. This is a fundamental remedial issue concerning the scope of monetary remedies under § 502(a)(3) of ERISA. Allowing participants to obtain their benefit as

---

<sup>1</sup>Plaintiffs have consented to the filing of this brief, while the defendant has not; a motion for leave to file this amicus brief has been filed. No counsel for a party authored this brief, in whole or in part; and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No party other than amicus or its counsel made a monetary contribution to its preparation or submission.

well as restitution in the form of disgorgement of profits to prevent the unjust enrichment of the plan and its fiduciaries through the use of the benefit payment which was unjustifiably delayed will provide plan administrators with the incentive to timely and accurately process and pay claims.

The decision in this case will have a direct and vital bearing on their economic security of working people. In light of the significance of the issue presented by this case, AARP respectfully submits this brief amicus curiae.

### **SUMMARY OF ARGUMENT**

Appropriate equitable relief under ERISA § 502(a)(3) includes restitution of profits to prevent unjust enrichment. *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993). To that end, if a court finds that an ERISA benefit has been wrongly denied and orders the benefit paid, it is well settled that a participant can receive restitution, without a showing of scienter, wrongdoing or bad faith, to prevent the unjust enrichment of the plan and its fiduciaries for the delayed payment of benefits in addition to the actual payment of the benefit. *See, e.g., Caffey v. UNUM Life Ins. Co.*, 302 F.3d 576, 585 (6th Cir. 2002)(permitting the award of prejudgment interest as restitution in ERISA cases at the discretion of the district court); *Ford v. Uniroyal Pension Plan*, 154 F.3d 613, 616 (6th Cir. 1998)(“Although ERISA does not mandate the award of prejudgment interest to prevailing plan participants, we have long recognized that the district court may do so at its discretion in accordance with

general equitable principles”). The majority of circuit courts agree with the Sixth Circuit. *See generally* Jeffrey Lewis *et al.*, *Employee Benefits Law* 12-17, 12-37 (3d ed. 2012). Moreover, *Cigna v. Amara*, 131 S. Ct. 1866, 1878 (2011), made clear that equitable relief in the form of disgorgement of profits is permitted not only under the law of equity, but also under the law of ERISA.

The district court was well within its discretion to grant Mr. Rochow’s<sup>2</sup> choice of remedy – an accounting and disgorgement of profits as restitutionary equitable relief to prevent the unjust enrichment of the plan and its fiduciaries caused by the delayed benefit payment. *Caffey*, 302 F.3d at 585-86; *Uniroyal Pension Plan*, 154 F.3d at 618.

## **ARGUMENT**

### **I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY AWARDING AN ACCOUNTING AND DISGORGEMENT OF PROFITS AS APPROPRIATE EQUITABLE RELIEF UNDER ERISA § 502(a)(3).**

#### **A. Appropriate Equitable Relief Under ERISA § 502(a)(3) Includes Restitution Of Profits To Prevent Unjust Enrichment.**

Congress designed ERISA 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), invoking the

---

<sup>2</sup>Amicus notes that Mr. Rochow’s personal representatives of his estate were substituted for him as plaintiffs upon his death. Amicus uses his name in this brief since it was his original disability claim that is the subject of this litigation.

common law of trusts to define the general scope of these duties. *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996). At the core of ERISA's fiduciary obligations are the twin duties of loyalty and prudence that are at the heart of trust law and are among the "highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982).

Although Congress relied on trust law as the foundation of ERISA, it realized that trust law was inadequate to completely protect participants. *See Varity Corp.*, 516 U.S. at 497. Thus, it provided enforcement of its stringent fiduciary duties and other requirements through a number of "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 § 502(a)(3)(B), which permits a plan participant or beneficiary to obtain "appropriate equitable relief," to redress plan violations and to prevent a plan fiduciary's unjust enrichment. 29 U.S.C. § 1132(a)(3)(B). 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."<sup>3</sup> *Varity Corp.*, 516 U.S. at 512. The Supreme

---

<sup>3</sup>Defendant suggests that Mr. Rochow's claim for disgorgement of profits is redundant with his claim for benefits. This Circuit has consistently held that when § 502(a)(1)(B) cannot "provide an adequate remedy for the alleged injury to the plaintiffs caused by the breach of fiduciary duties" a § 502(a)(1)(B) and § 502(a)(3) claim can be brought together. *Gore v. El Paso Energy Corp. Long Term Disability Plan*, 477 F.3d 833, 840 (6th Cir. 2007). *Accord, Thornton v. Graphic Commc'ns.*

Court has defined "appropriate equitable relief" as "those categories of relief that traditionally speaking (*i.e.* prior to the merger of law and equity) were *typically* available in equity," *Mertens*, 508 U.S. at 256, such as restitution. *Id.* Noting that the language in § 502(a)(5) was identical to the language at issue in § 502(a)(3), and should be interpreted similarly, the *Mertens* Court observed that the "equitable relief" awardable under § 502(a)(5) included "restitution of ill-gotten plan assets or profits." *Id.* at 260. As a consequence, equitable relief awardable under § 502(a)(3) would also include restitution of profits.

**B. *Cigna v. Amara* Confirms That A Court May Prevent a Fiduciary's Unjust Enrichment Through An Award Of Surcharge Under ERISA § 502(a)(3)**

In *Amara*, 131 S. Ct. 1866, the Supreme Court confirmed that "appropriate equitable relief" under § 502(a)(3) included monetary relief.<sup>4</sup> *Amara* explained that

---

*Conf. of the Int'l Bhd. of Teamsters Supplemental Ret. & Disability Fund*, 566 F.3d 597 (6th Cir. 2009). Here, Mr. Rochow alleged a denial of his plan benefits under § 502(a)(1)(B) and a claim for restitution to prevent unjust enrichment of the plan and its fiduciaries as appropriate equitable relief under § 502(a)(3); these are separate and distinct claims with distinct remedies. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 221 (2002) (to determine redundancy in §§ 502(a)(1)(B) and 502(a)(3) claims, it is essential to note that § 502(a)(1)(B) provides participants with a civil action to enforce their rights under the terms of their plan "without reference to whether the relief sought is legal or equitable" in nature).

<sup>4</sup> AARP submits that *Amara*'s disposition of the remedy issue was essential to deciding the question presented for *certiorari*, and thus the Court's discussion of permissible remedies under § 502(a)(3) is not *dicta*. However, even if it is regarded as *dicta*, it was carefully considered and supported by six (out of eight) justices, and thus should be followed. *See Gearlds v. Entergy Servs.*, 2013 U.S. App. LEXIS 3831 (5th Cir. 2013) (and cases cited therein) (explaining that the court "give[s] serious

preventing unjust enrichment with the remedy of surcharge falls within the traditional category of equitable relief:

Equity courts possessed the power to provide relief in the form of monetary "compensation" for a loss resulting from a trustee's breach of duty, or to prevent the trustee's unjust enrichment. . . . Indeed, prior to the merger of law and equity this kind of monetary remedy against a trustee, sometimes called a "surcharge," was "exclusively equitable."

131 S. Ct. at 1880 (citations omitted). *See* Restatement (Third) of Trusts § 95, cmt. a (Tent. Draft No. 5, Mar. 2, 2009); Restatement (Third) of Trusts § 100 (2012) ("trustee who commits a breach of trust is chargeable with . . . the amount of any benefit to the trustee personally as a result of the breach"); Restatement (Third) of Restitution and Unjust Enrichment §§ 1, 3, 41, 43, 51, 55 (2011) (disgorgement of the benefits of wrongful conduct); *see, e.g., Fotta v. Trustees of the UMWA Health & Ret. Fund of 1974*, 165 F.3d 209, 213 (3rd Cir. 2008) (payment for the time-value of money "not only ensures full compensation, but also serves to prevent unjust enrichment").

A standard treatise on trust law confirms that surcharge also permits the beneficiary to "charge the trustee . . . with any profit that would have accrued if there had been no breach of trust." *See* 3 Austin W. Scott & William F. Fratcher, *The Law of Trusts* §§ 205, 237 (4th ed. 1987); Restatement (Second) of Trusts § 205, cmt. a

---

consideration to this recent and detailed discussion of the law by a majority of the Supreme Court"); *McCravy v. Metro. Life Ins. Co.*, 690 F.3d 176, 181 n.2 (4th Cir. 2012) (stating about *Amara* that the court "cannot simply override a legal pronouncement endorsed just last year by a majority of the Supreme Court").

(1992) (trustee was “chargeable” for profits could be based on total return experience for other trust investments).

As a recent decision commented, the Supreme Court’s clarification in *Amara* of the broad boundaries of equitable relief was necessary to put disincentives in place to prevent abuse by fiduciaries. *McCravy v. Metro. Life Ins. Co.*, 690 F.3d 176, 183 (4th Cir. 2012). Without *Amara*, when fiduciaries arbitrarily and capriciously deny benefits, their only risk would be to eventually pay the benefit (and discretionary attorneys’ fees for their litigation work). Thus, fiduciaries would enjoy risk-free windfall profits for as long it would take the court to determine liability. “With *Amara*, the Supreme Court has put these perverse incentives to rest,” *id.* at 183, and has instead permitted participants to seek a remedy beyond the benefit wrongfully denied.

It is clear that there are alternative remedies to prevent unjust enrichment – among them surcharge or disgorgement of profits. *See* Restatement (Second) of Trusts § 205, cmt. a. The determination of the amount to be surcharged is the loss to the plaintiff, while determination of the amount of profits to be disgorged is the gain to the defendant. *Id.* This choice of remedy belongs to the participant. *Id.*

Here, there not only has been an actual breach of trust through LINA’s delay in the payment of benefits, but there also have been profits that have accrued to LINA for the use of Mr. Rochow’s money which should be disgorged. Indeed, as the Supreme Court has validated, surcharge for the amount of unjust enrichment or

disgorgement of profit is always an appropriate remedy for a fiduciary breach because it is effective. *See generally Mosser v. Darrow*, 341 U.S. 267, 274 (1951) (suggesting surcharge is appropriate remedy for trustee’s negligent breach because “a trusteeship is serious business and is not to be undertaken lightly or so discharged”).

The district court’s decision to award Mr. Rochow his choice of alternative remedies is consistent with both *Amara* and trust law, and thus is not an abuse of discretion.

**C. The Sixth Circuit Has Consistently Held That A Participant May Obtain Restitution For The Delayed Payment Of Benefits Without Proof of Scienter, Wrongdoing Or Bad Faith.**

It is well settled in this Circuit that a participant may obtain restitution in the form of prejudgment interest from a fiduciary or its agent for delayed benefit payments. *See, e.g., Caffey*, 302 at 585 (permitting the award of prejudgment interest as restitution in ERISA cases at the discretion of the district court); *Uniroyal Pension Plan*, 154 F.3d at 616 (“Although ERISA does not mandate the award of prejudgment interest to prevailing plan participants, we have long recognized that the district court may do so at its discretion in accordance with general equitable principles.”); *Wells v. United States Steel & Carnegie Pension Fund*, 76 F.3d 731, 737 (6th Cir. 1996) (“Generally, the beneficiaries of pension plans have a right to prejudgment interest on

benefits wrongly withheld.”); *Bricklayers' Pension Trust Fund v. Taiariol*, 671 F.2d 988, 990 (6th Cir. 1982).<sup>5</sup>

Consistent with trust law and the general ERISA policy favoring awards of prejudgment interest, this Circuit has recognized that an award of restitution against a fiduciary for delayed benefit payments does not require scienter, wrongdoing, or bad faith and is compensatory, not punitive. *Wells*, 76 F.3d at 737-38; *Drennan v. General Motors Corp.*, 977 F.2d 246, 253 (6th Cir. 1992)(an award of prejudgment interest against fiduciary does not require wrongdoing). It is enough that the benefit payments were incorrectly held.<sup>6</sup> Thus, under trust law, fiduciaries commit a breach of trust even where they violate one of their duties because of a mistake as to the scope of their duties and powers. Like this case, this mistake as to the scope of their

---

<sup>5</sup> Likewise, other circuits permit restitution from a fiduciary in the form of prejudgment interest where there has been delayed payment of benefits to remedy the plan's unjust enrichment. *See generally* Lewis, *Employee Benefits Law* at 12-17, 12-37 (explaining that the majority of circuit courts permit award of prejudgment interest).

<sup>6</sup> Amicus notes that this Court affirmed the district court's finding that LINA's review of Mr. Rochow's claim was arbitrary and capricious. *Rochow v. Life Ins. Co. of N. Am.*, 482 F.3d 860 (6th Cir. 2007). Given that at least one state Department of Insurance had found various problems with LINA's claims handling procedures during the last decade, this Court's holding was not unanticipated. *See* California Department of Insurance, Order to Show Cause, *available at* <http://www20.insurance.ca.gov/epubacc/PLD/120709.htm>; Press Release, Insurance Commissioner Poizner Announces \$600,000 Settlement with Life Insurance Company of North America for Alleged Claims Handling Violations (Sept. 29, 2009), <http://www.insurance.ca.gov/0400-news/0100-press-releases/0080-2009/release146-09.cfm>.

fiduciary duties could include a misinterpretation of the trust's governing instruments as authorizing them to do acts which the court determines they are not so authorized to do. *See* Restatement (Second) of Trusts, § 201 (1992).

**D. The District Court Did Not Abuse Its Discretion By Ordering The Defendant To Disgorge The Profits It Made On Mr. Rochow's Withheld Benefits.**

A court has "wide latitude in compensating participants" when a fiduciary has breached its duty." *Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 444 (6th Cir. 2002). Such compensation must adhere to the Goldilocks rule – not too much or too little. The award must not over compensate plaintiffs and thus effectively constitute punitive damages, *Uniroyal Pension Plan*, 154 F.3d at 618, and it cannot be so low as to fail to make plaintiffs whole by inadequately compensating him or her for the lost use of money. *Id.* ("[A]n exceedingly low prejudgment interest rate fails to make the plaintiffs whole by inadequately compensating him or her for the lost use of money.").

This is consistent with other circuits and the common law presumption that, but for the fiduciary breach, the fiduciary would have invested in most profitable alternative and thus the fiduciary bears burden of both showing that the choice for measuring restitution is unreasonable and proving that the fund would have actually earned less. *See Dardaganis v. Grace Capital, Inc.*, 889 F.2d 1237, 1244 (2d Cir. 1989); *GIW Indus., Inc. v. Trevor, Stewart, Burton & Jacobsen, Inc.*, 895 F.2d 729, 733 (11th Cir. 1990)(a district court was within its discretion in awarding

prejudgment interest under a model portfolio approach). It is also consistent with the concept that disgorgement of actual profits is a prophylactic function where fiduciaries have breached their duties. *See* Restatement (Third) of Restitution and Unjust Enrichment §§ 3, 43 (2011).

Here, the district court determined that an accounting of profits and disgorgement thereof was appropriate to compensate Mr. Rochow for LINA's unjust enrichment that LINA gained through the use of Mr. Rochow's wrongly withheld benefit. The court's determination adheres to the "elementary rule [concerning fiduciaries] . . . that if you take my money and make money with it, your profit belongs to me." *Nickel v. Bank of Am.*, 290 F.3d 1134, 1138 (9th Cir. 2002); *see generally* 1 Dobbs, *Law of Remedies* § 3.6(2), at 344 (2d ed. 1993) ("[W]henver the defendant holds money or property that belongs in good conscience to the plaintiff, and the objective of the court is to force disgorgement of his unjust enrichment, interest upon the funds or property so held may be necessary to force complete restitution."); Restatement (Third) of Restitution and Unjust Enrichment § 51 (2011). The district court's determination was also consistent with ERISA's goal of adequately compensating the participant for the lost time value of money. The district court was well within its discretion to choose the method it did – disgorgement of profits – as it happens to follow recent Supreme Court ERISA jurisprudence, Sixth Circuit precedent, and the law of trusts and equity.

## CONCLUSION

For the foregoing reasons, the Court should affirm the district court's decision and order that judgment be entered for plaintiffs.

Dated: March 11, 2013

Respectfully submitted,

s/Mary Ellen Signorille  
Mary Ellen Signorille  
AARP Foundation Litigation

Melvin Radowitz  
AARP

601 E Street, NW  
Washington, DC 20049  
Telephone: (202) 434-2060  
msignorille@aarp.org

Attorneys for Amicus Curiae AARP

**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(a)(7)(C) and 6th Cir. R. 32, I, Mary Ellen Signorille, an attorney, hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,020 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 6th Cir. R. 32(b)(1).

/s/ Mary Ellen Signorille  
Mary Ellen Signorille

## CERTIFICATE OF SERVICE

I, Mary Ellen Signorille, hereby certify that on this 11th day of March 2013, I filed a PDF file of the foregoing brief with the Clerk of the U.S. Court of Appeals for the Sixth Circuit using the Court's electronic filing and docketing system (CM/ECF), which electronically served the following registered attorneys by transmitting a

Notice of Docket Activity:

John J. Cooper  
Cooper Law Firm, PLLC  
1615 W. Big Beaver Road, Suite A6  
Troy, Michigan 48084  
johnjcooper@sbcglobal.net

Erik W. Scharf  
Erik W. Scharf, P.A.  
6574 North State Road Seven, #381  
Coconut Creek, Florida 33073  
escharf@ewscharfpa.com

Jeremy P. Blumenfeld  
Erica E. Flores  
Morgan, Lewis & Bockius LLP  
1701 Market Street  
Philadelphia, PA 19103  
jblumenfeld@morganlewis.com  
eflores@morganlewis.com

John D. Pirich  
Brian T. Quinn  
Honigman Miller Schwartz & Cohn, LLP  
222 N. Washington Square, Suite 400  
Lansing, MI 48933  
jpirich@honigman.com  
bquinn@honigman.com

s/Mary Ellen Signorille  
Mary Ellen Signorille