No. 09-448

In The
Supreme Court of the United States

BRIDGET HARDT,

Petitioner,

v.

RELIANCE STANDARD
LIFE INSURANCE COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

Section 502(g)(1) of the Employee Retirement Income Security Act of 1974 (ERISA) provides that "the court in its discretion may allow a reasonable attorney's fee and costs of the action to either party." 29 U.S.C. § 1132(g)(1).

In vacating the district court's fee award to petitioner Hardt, the Fourth Circuit held that "only a prevailing party is entitled to consideration for attorneys' fees in an ERISA action" and Hardt did not meet the "prevailing party" standard from *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598 (2002), even though the district court found "compelling evidence that [petitioner] is totally disabled," ruled Hardt "did not get the kind of review to which she was entitled under applicable law" and instructed respondent to reassess Hardt's claim "by adequately considering all the evidence discussed within this Opinion within thirty (30) days" or "judgment will be issued in favor of Ms. Hardt," and Hardt obtained the requested long-term disability benefits upon remand.

The questions presented are:

1. Whether ERISA § 502(g)(1) restricts a district court's discretion to award reasonable attorney's fees only to a "prevailing party."

2. Whether a party is entitled to attorney's fees pursuant to § 502(g)(1) when she persuades a district court that a violation of ERISA has occurred, successfully secures a judicially-ordered remand requiring a redetermination of entitlement to benefits and subsequently receives the benefits sought on remand.

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The district court's order remanding the case and requiring respondent to act as instructed "within thirty (30) days" or "judgment will be issued in favor of Ms. Hardt" is reported at 540 F. Supp. 2d 656 (E.D. Va. 2008) and reproduced in the Appendix to the Petition for Certiorari (Pet. App. 31a-49a). The district court's order awarding Hardt attorney's fees and costs and entering judgment in her favor is unreported (Pet. App. 12a-30a). The opinion of the court of appeals (Pet. App. 1a-11a) is unpublished, but may be found at 336 Fed. Appx. 332 (4th Cir. 2009).

JURISDICTION

The court of appeals issued its opinion and entered judgment on July 14, 2009. It denied rehearing and rehearing en banc by order entered August 10, 2009. This Court granted the timely filed Petition for Certiorari on January 15, 2010. This Court's jurisdiction rests upon 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 502(g) of ERISA (29 U.S.C. § 1132(g)) is reproduced in the Appendix in full. The specific section at issue, Section 502(g)(1), provides:

> In any action under this subchapter (other than an action described in paragraph 2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of the action to either party.

29 U.S.C. § 1132(g)(1).

STATEMENT OF THE CASE

1. ERISA and Its Fee-Shifting Provision.

In 1974, after years of study, Congress enacted ERISA "to protect . . . participants in employee benefit plans and their beneficiaries" by establishing substantive regulatory requirements for such plans and "providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b). Congress determined "that the continued well-being and security of millions of employees and their dependents are directly affected by" employee benefit plans. 29 U.S.C. § 1001(a). The employee benefit plans regulated by ERISA include employee welfare benefit plans which, like the long-term disability (LTD) plan at issue in this case, provide "benefits in the event of . . . disability . . ." 29 U.S.C. § 1002(1).

To further ERISA's express goal to provide "appropriate remedies, sanctions, and ready access to the Federal courts," Congress allowed for attorney's fees to encourage participants and others to bring suit when warranted:

> "In any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of the action to either party."

ERISA, § 502(g) (codified at 29 U.S.C. § 1132(g)(1)); *see also Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) (citing § 502(g)(1) and noting its purpose: "in answer to a possible concern that attorney's fees might present a barrier to maintenance of suits for small claims, thereby

risking underenforcement of beneficiaries' statutory rights, it should be noted that ERISA authorizes the award of attorney's fees"). This Court has acknowledged that attorney's fees and costs under § 502(g) may be awarded to either party. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 53 (1987) ("In an action under these civil enforcement provisions, the court in its discretion may allow an award of attorney's fees to either party. § 502(g)."). The first question presented here is whether Section 502(g)(1) limits a court's discretion to award attorney's fees only to a "prevailing party" where that term of art is conspicuously absent from the fee provision.

2. Hardt's Disability and Claim for Benefits.

Petitioner Hardt began to experience symptoms of carpal tunnel syndrome in 2000 when she was working as an executive assistant to the president of Dan River. Pet. App. 32a. Despite surgeries on both wrists, Hardt still experienced pain, and she stopped working in January 2003. *Id.*

In August 2003, Hardt requested LTD benefits under a Group Long-Term Disability Insurance Program Plan (the plan) sponsored by Dan River. *Id.* at 31a-32a. Respondent Reliance Standard Life Insurance Company (Reliance) had the dual, conflicting roles of both determining whether a claimant was entitled to benefits and paying the benefits as the underwriter of the plan. *Id.* at 32a.

Reliance provisionally approved Hardt's claim for LTD benefits, but then terminated the benefits in December 2003. *Id.* at 32a-33a. Hardt filed an administrative appeal, and Reliance partially reversed its decision by agreeing to provide Hardt

LTD benefits for twenty-four months based on her inability to perform the duties of her current position. *Id.* at 33a. (The plan provides LTD benefits for 24 months for workers like Hardt if a claimant "cannot perform the material duties of his/her regular occupation;" to continue receiving benefits thereafter, she must be unable to perform "the material duties of any occupation," as that term is defined. *See* Joint Appendix (JA) 37a-38a.)

Meanwhile, Hardt's health worsened. In addition to pain in her neck, shoulders, arms and hands, she developed tingling and numbness starting in her feet and extending to her knees. Fourth Circuit Joint Appendix (CTA4 JA) at 548-50. Ultimately, a neurologist diagnosed Hardt as also suffering from small fiber neuropathy, a degenerative nerve condition, and reported that Hardt's motor skills were limited by pain. Pet. App. 33a; CTA4 JA at 523-26 and 545-46. Hardt's chronic condition required her to take as many as fourteen medications. *See*, *e.g.*, CTA4 JA at 525. Despite increases in prescribed pain medication, Hardt "continued to have obvious pain," which became worse over the following months. Pet. App. at 34a-35a. She also had difficulty walking. *Id.*

Hardt then applied to the Social Security Administration (SSA) for disability benefits under the Social Security Act. *Id.* at 35a. In February 2005, based on questionnaires submitted by Hardt's treating physicians certifying that Hardt was unable to work, the SSA awarded Hardt disability benefits under the Social Security Act. *See id.* 35a-36a; JA 98a. The SSA found Hardt "has a combination of impairments that makes it impossible for her to

return to her former employment or make an adjustment to perform other work." *See* Pet. App. 35a-36a; CTA4 JA at 162-65; JA 98a.

Despite the SSA's disability finding, Reliance informed Hardt a few months later, in April 2005, that her LTD disability benefits would cease. CTA4 JA at 166-69; JA 98a. In that same letter, Reliance demanded that Hardt pay Reliance $14,913.23 as an offset from prior LTD benefits because she had secured social security disability benefits and the Reliance policy contains a provision coordinating benefits with Social Security payments. CTA4 JA at 168. Hardt paid this amount to Reliance from her social security benefits. JA 98a-99a (Complaint ¶38); CTA4 JA at 161.

Hardt filed a pre-litigation appeal in accordance with 29 U.S.C. § 1133, with additional supporting materials, regarding Reliance's termination of her LTD benefits. *See* Pet. App. at 36a. After further flawed processing and review of her claim in violation of ERISA (*see id.* at 36a-38a), Reliance notified Hardt in March 2006 that it would not change its April 2005 decision to terminate her LTD benefits. *Id.* at 38a.

3. District Court Proceedings and Fee Award in Hardt's Favor.

Having exhausted her administrative appeals, Hardt filed an ERISA action in the District Court for the Eastern District of Virginia. JA at 90a-110a. In her complaint, Hardt specifically pointed to procedural errors and improper review by Reliance of her LTD claim. JA 99a-105a (Complaint ¶41). Hardt requested the continuation of her LTD benefits and

"such other relief . . . to secure her rights." JA 108a-109a.

Both parties moved for summary judgment. The district court denied Reliance's motion for summary judgment. Pet. App. 31a-49a. Applying an abuse of discretion standard, the district court ruled "it is clear that Reliance's decision to deny [] Hardt long-term disability benefits was not based on substantial evidence." *Id.* at 47a. It found Reliance did not assess the impact of Hardt's neuropathy or neuropathic pain on her ability to work. *Id.* The district court determined Reliance's peer review report was incomplete and inadequate for a number of reasons, including that it was "extremely vague and conclusory," "failed to cite any medical evidence to support [its] conclusion," "failed to address the treating physicians' contradictory medical findings," "wrongly rejected [Hardt's] evidence of pain," and "ignored the substantial amount of pain medication" involved. *Id.* at 42a-47a.

As to Hardt's motion for summary judgment, the district court found "compelling evidence that [Hardt] is totally disabled due to her neuropathy" and that "the record indicates that [she] did not get the kind of review to which she was entitled under applicable law." *Id.* at 48a. The district court identified "the deficiencies in [Reliance's] approach" and remanded the case to Reliance "to fully and adequately assess [Hardt's] claim." *Id.* The district court specifically "**INSTRUCT[ED]** Reliance to act on [Hardt's] application by adequately considering all the evidence discussed within this Opinion within thirty (30) days of its date of issuance. Otherwise,

judgment will be issued in favor of [Hardt]." *Id.* at 49a (emphasis in original).

The district court retained jurisdiction to enforce its order. In fact, the court subsequently entered another order noting that the reconsideration deadline (which the court had extended previously at Reliance's request) already had passed and requiring the parties to file a status report within seven days. JA 113a-114a (June 10, 2008 Order). The order provided that "[a]ny failure by Reliance to comply with the court's [reconsideration] deadline will result in judgment being entered in favor of [Hardt], per [prior] order." *Id.* at 114a. It concluded that "[s]hould the parties fail to submit a timely status report, judgment will be entered in favor of [Hardt]." *Id.*

In accordance with the order, Reliance submitted a status report "confirming its compliance with the Court's Order" in that it "acted within the specified time frame [on remand] and found Ms. Hardt eligible for benefits." JA 115a. Hardt likewise advised the district court that Reliance reinstated her LTD benefits on remand and paid her $55,250 in accrued past due LTD benefits. JA 117a-118a. She also requested that the court enter judgment on her behalf based upon "obtaining a reversal of Reliance's prior decision to deny her disability benefits" and the court's order "declaring that Reliance failed to conduct a full and fair review prior to [the court's] order to do so." *Id.* at 118a.

Hardt then moved the district court to award her attorney's fees and costs pursuant to ERISA Section 502(g)(1), and the district court granted Hardt's motion. Pet. App. 12a-30a. The district court followed the Fourth Circuit's unusual three-step

process for determining whether to award fees under ERISA. *See id.* 15a-18a.

First, the district court recognized that, "[a]lthough not statutorily-mandated," the Fourth Circuit nonetheless requires that a § 502(g)(1) fee applicant must be a "prevailing party" under *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598 (2002). *Id.* at 15a. The district court found that its earlier ruling on the merits and order of remand had "sanctioned a material change in the legal relationship of the parties by ordering the defendant to conduct the type of review to which the plaintiff was entitled." *Id.* at 22a. Thus, the court explained, "[i]n light of the fact that, on remand, the plaintiff received precisely the benefits she had sought, she meets the definition of a 'prevailing party' and is eligible for an award of attorneys' fees." *Id.*

Second, the district court evaluated whether attorneys' fees were justified under an established five-factor test used to guide the court's discretion in ERISA fee cases. *Id.* at 22a-25a. These factors are: (1) the degree of opposing parties' culpability or bad faith; (2) the ability of opposing parties to satisfy an award of attorney's fees, (3) whether an award of attorneys' fees against the opposing parties would deter other persons acting under similar circumstances; (4) whether the parties requesting attorney's fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself;

and (5) the relative merits of the parties' positions. *Id.* at 16a-17a.[1]

Applying the five-factor test, the district court exercised its discretion and awarded fees and costs to Hardt. *Id.* at 25a. The district court found "the bad faith and culpability of [Reliance] in ignoring the medical evidence of [Hardt's] disability weigh in favor of an award of attorneys' fees to [Hardt]." *Id.* at 23a. The record, the court explained, was "replete with instances of [Reliance's] staunch opposition to awarding any benefits to [Hardt]." *Id.* The district court determined that "it was [Reliance's] goal from the beginning to deny [Hardt] the benefits she had claimed." *Id.* It found that Reliance "engaged in only the most cursory review of the medical evidence" and that Reliance "has opposed [Hardt's] position throughout the course of this litigation." *Id.* The district court observed that Reliance awarded Hardt the benefits she sought, but "only after having been ordered by the court to provide the kind of

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[1] The district court relied on Fourth Circuit precedent using the five-factor test, *Quesinberry v. Life Ins. Co. of N. America*, 987 F.2d 1017, 1028-29 (4th Cir. 1993) (en banc), and all other courts of appeals have used this test to determine whether to award fees. *See Eddy v. Colonial Life Ins. Co. of America*, 59 F.3d 201, 206-07 (D.C. Cir. 1995); *Gray v. New Eng. Tel. & Tel. Co.*, 792 F.2d 251, 257-258 (1st Cir. 1986) (citing cases from Second, Third, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits adopting test); *Sec. of Dept. of Labor v. King*, 775 F.2d 666, 669 (6th Cir. 1985). The Seventh Circuit has used two tests, including the five-factor test, to determine whether fee awards in ERISA actions are justified. *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574, 592-93 (7th Cir. 2000) (describing five-factor test and "substantially justified" test). The Seventh Circuit does not consider the two tests to be meaningfully different. *See id.*

meaningful review of the evidence to which [Hardt] was entitled by law." *Id.* The district court further found that Reliance could pay an award of attorneys' fees and that an award of fees in this case "would deter similarly-situated defendants from failing to consider the full breadth of medical evidence available to them when reviewing a claim for benefits." *Id.* at 23a-24a. The district court determined that Hardt's "position clearly has the higher relative merit, as demonstrated in the court's remand order and–more importantly–the ultimate resolution of the case." *Id.* at 24a-25a (noting, in addition, that the court had previously held that "Reliance's decision to deny [] Hardt long-term disability benefits was not based on substantial evidence").

Finally, the district court examined the reasonableness of Hardt's request for $59,920.73 in fees and costs using a lodestar calculation. The district court reduced the requested amount and issued judgment in Hardt's favor for $39,149. *Id.* at 29a-30a.

4. The Fourth Circuit's Ruling.

Reliance appealed to the Fourth Circuit, raising a single question: "Is Ms. Hardt a 'prevailing party?'" Fourth Circuit Case No. 08-1896, Appeal Docket 15, (Brief of Appellant, at 11). *See also id*. at Appeal Docket 21 (Reply Brief of Appellant at 1) ("The single question before this Court is whether Ms. Hardt can be considered a 'prevailing party' as required under the ERISA fee-shifting statute when there is no judgment on the merits in her favor and there is no consent decree."). Reliance chose not to appeal the district court's summary judgment findings and

remand order, the use of the five-factor test, the findings made by the district court under that test, or the amount of fees and costs awarded.

The Fourth Circuit vacated the district court's award of attorneys' fees. Pet. App. 1a-11a. The Fourth Circuit first explained the prerequisite it imposes before a court may exercise discretion under the five-factor test to determine whether to award fees in ERISA cases: that a beneficiary first must establish "prevailing party" status under *Buckhannon* because "only a prevailing party is entitled to consideration for attorneys' fees in an ERISA action." *Id.* at 7a-8a (citing *Martin v. Blue Cross & Blue Shield of Va., Inc.*, 115 F.3d 1201, 1210 (4th Cir. 1997)). The court further explicated its view that "only enforceable judgments on the merits and court-ordered consent decrees" satisfy the *Buckhannon* "prevailing party" standard. *Id.* at 8a.

The Fourth Circuit next examined whether Hardt met its *Buckhannon* prevailing-party standard. The Fourth Circuit reviewed its decision in *Goldstein v. Moatz*, 445 F.3d 747, 751 (4th Cir. 2006), in which the court "clarified [the] *Buckhannon* standard by holding that there is no exception for 'tactical mooting' – the situation where a defendant chooses to settle rather than risk an award of attorney's fees." *Id.* at 8a. The court noted that *Goldstein* "left open the question of whether there is an exception to the *Buckhannon* rule where a defendant has agreed to provide the relief requested in response to an affirmative indication by the presiding court that the plaintiff is about to prevail." *Id.* at 8a-9a (internal punctuation omitted).

The Fourth Circuit ultimately concluded that Hardt's case involved "tactical mooting" and that she therefore did not meet the court's prevailing party test. As the Fourth Circuit saw it, the district court's findings that Hardt is totally disabled and that she did not get the kind of review to which she was entitled under applicable law, coupled with its order remanding for Reliance to re-determine whether Hardt qualified for benefits under threat of judgment being entered in Hardt's favor, were "simply insufficient to overcome the statutory requirement that a party applying for a fees and costs award must first have been accorded some relief in the district court." *Id.* at 10a (quoting *Goldstein*, 445 F.3d at 752). The Fourth Circuit held that because the district court remand "did not require Reliance to award benefits" the order does not "constitute an 'enforceable judgment[] on the merits' as *Buckhannon* requires. 532 U.S. at 604," *id.,* thus reversing the award of fees and costs.

SUMMARY OF ARGUMENT

I. The Fourth Circuit's decision rests on the faulty premise that ERISA Section 502(g)(1) is a "prevailing party" statute governed by *Buckhannon*. It is not. Section 502(g)(1) does not use the term "prevailing party" (or even "prevail"), but expressly authorizes an award of fees and costs "in [the court's] discretion . . . to either party." *Buckhannon* recognized that "prevailing party" is "a legal term of art," 532 U.S. at 603, with its own set of rules regarding when fees may be authorized. As the Court recognized in *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), the absence of the "prevailing party" language means Congress "intended to eliminate" the restrictive

interpretation of "prevailing party" used in other fee-shifting provisions prevalent at the time of its enactment. *See id.* at 687 (interpreting Clean Act Act's language allowing fee-shifting "to any party . . . where appropriate" and discussing use of the term "prevailing party" in the 1970's when ERISA was being considered and ultimately enacted). Congress chose not to include the "prevailing party" legal term of art in Section 502(g)(1), and that choice must be given effect.

Moreover, when Congress amended ERISA in 1980, it reaffirmed the original language of Section 502(g) and created a new fee-shifting provision, Section 502(g)(2), that mandates fees when "judgment" is entered in favor of the plan in cases seeking delinquent contributions to multiemployer employee benefit plans. Congress retained in full the original, broad discretionary fee-shifting language of Section 502(g)(1); it simply added a parenthetical to that section to provide the exception for multiemployer plan cases. The addition of the word "judgment" in Section 502(g)(2) indicates that its statutory sibling, Section 502(g)(1), does not require an "enforceable judgment on the merits," contrary to the Fourth Circuit's holding below. Pet. App. 10a. (brackets omitted).

The decision by Congress not to include a "prevailing party" requirement is fully consistent with its intent that concepts of trust law directly inform regulation and enforcement under ERISA. It was settled law at the time of ERISA's enactment that courts in trust cases generally could award fees to either party, paid by the opposing party. The five-factor test used by lower courts to guide their

discretion whether to award fees is analogous to principles considered under trust law in the same circumstances. The five-factor balancing test appropriately considers the relative merits of the parties' positions, among other factors, before allowing fees to issue. The majority of those factors address the merits of the case, but appropriately without the limiting "prevailing party" requirement.

This Court has acknowledged the carefully-crafted and reticulated enforcement scheme established by Congress in ERISA. *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) (stating the Court is "reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA"). "The civil enforcement scheme of [Section 502] is one of the essential tools for accomplishing the stated purposes of ERISA." *Dedeaux*, 481 U.S. at 52. This Court repeatedly has concluded, without exception, that the precise language of Section 502 must be followed. The Fourth Circuit's imposition of *Buckhannon*'s "prevailing party" test conflicts with the clear text of the statute authorizing courts "in their discretion" to award fees and impermissibly adds a prerequisite for consideration of fees that Congress did not include.

In exercising the discretion provided by Section 502(g)(1), courts should apply the universally-accepted five-factor test without demanding a party meet the "prevailing party" standard from *Buckhannon*. Here, the district court exercised its discretion and held Hardt eligible for fees under that well-established five-factor test. Reliance did not contest on appeal the district court's use of or factual findings under that test (or, indeed, raise such issues in its brief in

opposition in this Court, *see* S. Ct. Rule 15.2). The Court therefore should reverse the Fourth Circuit's judgment and remand with instructions that the Fourth Circuit remand to the district court to enter the original judgment and to determine additional fees and costs in light of the appeals.

II. Even if there is a prerequisite to the five-factor test, the district court's decision to award Hardt fees was correct and not an abuse of discretion. The Fourth Circuit's judgment vacating the district court's award of fees constitutes error.

First, Hardt meets the standard approved in *Ruckelshaus*. Hardt obtained substantial relief directly as a result of her lawsuit. The district court found that Reliance violated ERISA in handling Hardt's claim for LTD benefits and in deciding to terminate her LTD benefits. The district court remanded the matter to Reliance to re-assess whether Reliance should have terminated Hardt's benefits. The district court stated it would enter judgment for Hardt if Reliance did not act as directed. Reliance advised the district court that it complied with the court's order, and Hardt received the LTD benefits after the court-ordered remand. She therefore is eligible for attorney's fees.

Second, Hardt meets *Buckhannon*'s prevailing party standard. The district court's orders significantly altered the legal relationship of the parties, and thus constitute the "judicial imprimatur" to satisfy *Buckhannon* and other "prevailing party" precedent. The Fourth Circuit's holding that *Buckhannon* is satisfied only by a judicially-approved consent decree or an enforceable judgment on the merits is not supported by *Buckhannon*'s language

and impermissibly overrules this Court's precedents that a judicially-ordered remand in analogous circumstances satisfies the "prevailing party" test. And, in any event, the district court's remand order constitutes judicially-ordered relief to Hardt for the ERISA violations. It effectively granted Hardt partial summary judgment on her claim that Reliance violated ERISA in its handling and review of her request for LTD benefits and abused its discretion in terminating those benefits. The orders were enforceable, and Reliance acknowledged complying with them in its filings in the district court. Hardt therefore was eligible for fees even under *Buckhannon*.

ARGUMENT

I. ERISA Section 502(g)(1) Authorizes Courts to Use Their Discretion to Determine Whether to Award Fees and Does Not Limit Fees Only to a "Prevailing Party."

Section 502(g)(1) allows a court to award fees and costs "in its discretion . . . to either party." This plain language, as well as the structure of the statute after the 1980 ERISA Amendments (which reaffirmed Section 502(g)(1)'s discretionary language and added an exception under Section 502(g)(2)), and the object and policy of ERISA, demonstrate that Section 502(g)(1) is not a *Buckhannon* "prevailing party" statute as the Fourth Circuit held. *See Gibbs v. Gibbs*, 210 F.3d 491, 501-02 (5th Cir. 2000) (holding "a party need not prevail in order to be eligible for an award of attorneys' fees under [Section 502(g)(1)] of ERISA"); *see also Gaeth v. Hartford Life Ins. Co.*, 538 F.3d 524, 534 (6th Cir. 2008) ("the express language of 29 U.S.C. § 1132 does not limit an award of attorney

fees to the prevailing party"); *Miller v. United Welfare Fund*, 72 F.3d 1066, 1074 (2d Cir. 1995) ("Section 502(g)(1) contains no requirement that the party awarded attorney's fees be the prevailing party"); *Freeman v. Continental Ins. Co.*, 996 F.2d 1116, 1119 (11th Cir. 1993) (stating that "[u]nlike other fee-shifting provisions, which give the court discretion to award fees to a prevailing party, [Section 502(g)(1)] allows a court to award fees to either party.").

A. "Prevailing Party" Is a Well-Established Legal Term of Art, and Its Absence in a Fee-Shifting Statute Has Clear Meaning.

This Court has ruled that the term "prevailing party" is a "legal term of art," circumscribing the instances in which courts may award fees or costs. *Buckhannon*, 532 U.S. at 603; *see id.* at 610 (Scalia, J., concurring) ("'Prevailing party' is not some newfangled legal term invented for use in late-20th-century fee-shifting statutes."). In *Buckhannon*, the Court considered a case in which the plaintiff sued defendant for declaratory and injunctive relief, but, prior to any judicial action on the merits, the state legislature mooted the case by changing the offending statutory provision. *Id.* at 600-01. The Court surveyed its prior precedents involving "prevailing party" fee-shifting statutes and observed that it had never approved an award of attorney's fees without some degree of formal success. It thus concluded:

> A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change. Our precedents thus counsel against holding that the term

> "prevailing party" authorizes an award of attorney's fees *without* a corresponding alteration in the legal relationship of the parties.

Id. at 605 (emphasis in original). When Congress uses such "clear legislative language" as "prevailing party" in a fee-shifting provision, that legal term of art thus has "clear meaning." *See id.* at 610.

Where Congress does *not* incorporate the "prevailing party" term of art in a fee-shifting statute, this Court has determined that Congress thereby rejects application of the "prevailing party" standard to that provision. *See Ruckelshaus*, 463 U.S. at 687. In *Ruckelshaus*, the Court considered whether a lower court had properly awarded fees under the Clean Air Act to two plaintiffs whose legal claims were rejected completely. *See id.* at 682-83. Although reversing the lower court's fee award, the Court recognized a clear distinction between "prevailing party" fee provisions and the language of the Clean Air Act that "the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate." By using the language "whenever . . . appropriate," "Congress intended to eliminate . . . the restrictive readings of 'prevailing party' adopted in some of the cases" at the time the Clean Air Act was enacted, *see id.* at 689, which was the same time period in which Congress considered and enacted ERISA.

When it chooses not to include the term of art "prevailing party," Congress "extend[s]" fee-shifting to situations not covered under the "prevailing party" standard. *Id.* at 686 n.8. And, outside of the

narrower "prevailing party" standard, a court order is not required for a party to achieve the degree of success necessary to trigger eligibility for a fee award (though Hardt has such an order here). *Id.* ("whenever . . . appropriate" language authorizes award of fees in "suits that force[] defendants to abandon illegal conduct" (citing S. Rep. No. 91-1196 (1970)); *see also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 67 n.6 (1987) (citing Senate report language from Clean Water Act that is identical to report cited in *Ruckelshaus*, and stating that the Clean Water Act fee-shifting provision protects plaintiffs from "the suddenly repentant defendant"). *Cf. Ohio River Valley Environmental Coalition, Inc. v. Green Valley Coal Co.*, 511 F.3d 407, 414 (4th Cir. 2007) (holding party who pursues a claim under a fee-shifting statute that does not contain "prevailing party" or "judgment" language may be eligible for fees where the party obtains, through settlement or otherwise, substantial relief prior to adjudication on the merits); *Association of California Water Agencies v. Evans*, 386 F.3d 879 (9th Cir. 2004); *Sierra Club v. EPA*, 322 F.3d 718, 719 (D.C. Cir. 2003); *Loggerhead Turtle v. County Council of Volusia County*, 307 F.3d 1318 (11th Cir. 2002).

The absence of the "prevailing party" term of art within Section 502(g)(1) means that a court, in exercising its discretion vested by Congress, should apply a more expansive standard than *Buckhannon* when determining whether to award fees. Reliance below, and in its brief in opposition to certiorari here, did not object to that standard being the well-accepted five-factor test.

B. Congress Twice Declined to Incorporate a *Buckhannon* "Prevailing Party" Standard into Section 502(g)(1).

"The starting point for [the] interpretation of a statute is always its language." *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989). Under this first and "cardinal canon" of statutory construction, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there[.]" *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992). Accordingly, when a statute is unambiguous, "this first canon is also the last: 'judicial inquiry is complete.'" *Id.* at 254 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

1. Congress Chose Not to Incorporate a "Prevailing Party" Requirement When Enacting ERISA.

Section 502(g)(1) is clear in its own right: A court may allow a reasonable attorney's fee and costs of action "in its discretion. . . to either party." 29 U.S.C. § 1132(g)(1). Nowhere in the section does the term "prevailing party" appear. Had Congress intended to restrict attorney's fees and costs only to a "prevailing party"–as the Fourth Circuit erroneously held below– it could have and would have so stated. Congress knew well how to incorporate a "prevailing party" standard into a fee-shifting statute, as amply demonstrated by the numerous occasions in which it

expressly incorporated such a requirement in other fee-shifting provisions prior to enacting ERISA.[2]

In fact, Congress considered and rejected language in precursor bills to ERISA that would have limited attorney's fees and costs to prevailing participants or beneficiaries upon entry of judgment in their favor. *See* H.R. Rep. 90-1867, at 27 (Sept. 5, 1968) (reporting language of forerunner bill H.R. 6498 as: "The court in such action may in its discretion, *in addition to any judgment awarded to the plaintiff or plaintiffs*, allow a reasonable attorney's fee to be paid *by the defendant*, and costs of the action") (emphasis added). Congress also rejected explicit urging from business and public interest groups and employee representatives to restrict a district court's discretion, either by requiring a party to be "successful in an action" before fees could be awarded or by mandating a fee award.[3]

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[2] As to "prevailing party" statutes, *see*, *e.g.*, 5 U.S.C.A. § 504(a)(1) (1976 ed., Supp. V); 12 U.S.C.A. § 2607(d)(5) (Real Estate Settlement Procedures Act); *see also*, Samuel R. Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?*, 126 U. Pa. L. Rev. 281, 305 nn.109-10 (1977) (collecting fee-shifting statutes in existence around time ERISA was enacted in 1974).

[3] For example, the primary bill that became ERISA, H.R. 2, contained language in § 106(i)(1) mirroring that ultimately enacted as Section 502(g)(1). In the Congressional hearings held on that bill, business groups repeatedly requested that Congress allow reasonable attorney's fees and cost of action only to a party "successful in an action." *See*, *e.g.*, Statement of Stetson B. Harman, President, Trust Division, The American Bankers Association, Before the House of Representatives, General Subcommittee on Labor of the Committee on Education and Labor (Washington, D.C. February 22, 1973) (suggesting the provision "be amended to grant the court discretion to award attorney's fees and costs to defendants, if successful in an action, as well as to successful participants or

Instead, Congress declined to restrict a court's discretion and retained the broader phrase "in its discretion . . . to either party" for an award of fees and costs under Section 502(g)(1).

Thus, the legal term of art "prevailing party" is "conspicuously absent" from this ERISA fee-shifting provision. *Gibbs*, 210 F.3d at 501. As in *Ruckelshaus*, Congress did not direct that fee awards had to be pre-conditioned on a finding in accordance with that well-established term of art and all of the requirements associated with it. *Id.* at 501, 503 (holding "a party need not prevail in order to be eligible for an award of attorneys' fees under § 1132(g)(1) of ERISA" based on "conspicuous[] absen[ce]" of the word "'prevailing' which term has generally been included in the other fee-shifting statutes enacted by Congress").

2. Congress Chose Not to Incorporate a "Prevailing Party" Requirement When Amending and Reenacting the Fee-Shifting Provision at Issue.

In 1980, Congress amended ERISA specifically to create an exception within Section 502(g) to mandate an award of reasonable attorney's fees and costs to

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beneficiaries and to give the court discretion . . . to require the plaintiff to post security for payments of costs and attorney's fees."), *reprinted in*, 19-A Arnold & Porter, *Arnold & Porter Legislative History: Employee Retirement Income Security Act of 1974*, at 164 (1993) [hereinafter "__ A&P Leg. Hist. at __"].

As to proposed language mandating an award of fees to successful plaintiffs, see, *e.g.*, Statements of Ralph Nader and Karen Ferguson, Public Interest Research Group, Washington, D.C., Before the House of Representatives, General Subcommittee on Labor of the Committee on Education and Labor (Washington, D.C. February 27, 1973), *reprinted in*, 19-A A&P Leg. Hist. at 249, 270.

be paid by a defendant in certain cases, but only where judgment is entered. *See* Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, § 306(b), as codified at 29 U.S.C. § 1132(g)(2). Specifically, the 1980 Amendments added new standards for a fee award in multiemployer plan delinquent contribution cases (also known as "Section 515" cases, codified at 29 U.S.C. § 1145) that were not present in the original statute, providing in relevant part:

> In any action under this title by a fiduciary or on behalf of a plan to enforce section 515 *in which a judgment in favor of the plan is awarded*, the court shall award the plan [specified relief, including] reasonable attorney's fees and costs of the action, *to be paid by the defendant*.

29 U.S.C. § 1132(g)(2) (emphasis added). Congress renumbered original Section 502(g) as Section 502(g)(1) and added a parenthetical to it to carve out the newly created exception for Section 515 cases. *See* 94 Stat. 1295 (1980).[4]

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[4] In the same 1980 Amendments, Congress added a "prevailing party" fee-shifting provision for multiemployer plan withdrawal liability cases under a different subchapter of ERISA. *See* Pub. L. No. 96-364, § 104(2), 94 Stat. 1208, 1263 (1980), as codified at 29 U.S.C. § 1451(e) ("In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to the prevailing party.").

Moreover, in 1986, Congress added a fee-shifting provision to this other subchapter of ERISA for claims related to single-employer plans where a "party who prevails or substantially prevails." *See* 29 U.S.C. § 1370(e)(1).

That is, under Section 502(g)(2) of ERISA, an award of reasonable attorney's fees is available only where a fiduciary has obtained a judgment to enforce an employer's obligation to make contributions to a multiemployer plan. However, by specifically amending the original language via a parenthetical to carve out the newly inserted exception, Congress chose to retain the statutory language vesting courts with expansive discretion to award fees and costs in all other actions brought under this subchapter of ERISA: "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1).

When Congress chooses to amend a statute, it is presumed to have acted intentionally. Here, the resulting differences in language between the two related attorney's fee provisions demonstrate Congress's understanding that the original language – still present at Section 502(g)(1) – does not set forth the narrower "prevailing party" requirement. *See Gross v. FBL Fin. Servs.*, --- U.S. ---, 129 S. Ct. 2343, 2349 (2009) ("negative implications raised by disparate provisions are strongest" where the provisions were "considered simultaneously when the language raising the implication was inserted"); *see also Miller*, 72 F.3d at 1074 (noting difference in language between §§ 502(g)(1) and 502(g)(2) in concluding no prevailing party requirement exists within § 502(g)(1)).

The differences between these statutory siblings – Sections 502(g)(1) and 502(g)(2) – re-enforce the conclusion that Section 502(g)(1) is not governed by *Buckhannon*. If the original fee-shifting language required "an enforceable judgment on the merits," as

the Fourth Circuit required of Hardt, Pet. App. 10a (brackets omitted), there would have been no need for Congress specifically to require a "judgment" before fees could be awarded in the new Section 502(g)(2). *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) ("it is a general principle of statutory construction that when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotations omitted).

Moreover, the legislative history of the 1980 Amendments confirms that Congress clearly understood the new requirement of "judgment in favor of the plan" under Section 502(g)(2) as meaning that the plan must "prevail."[5] Yet, Section 502(g)(1) does

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[5] Section 502(g)(2) originated in the Senate as S. 1076. *Bd. of Trs. of the Hotel & Rest. Emples. Local 25 v. JPR, Inc.*, 136 F.3d 794, 803 and n.8 (D.C. Cir. 1998) (recounting legislative history of MPPAA). The accompanying Senate Report stated:

> The public policy of this legislation to foster the preservation of the private multiemployer plan system mandates that provision be made to discourage delinquencies and simplify delinquency collection. . . . A plan sponsor that *prevails in any action to collect delinquent contributions* will be entitled to recover the delinquent contributions, court costs, attorney's fees, and double interest on the contributions owed.

Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., S. 1076: The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration, at 43-44 (Comm. Print 1980) (emphasis added).

The Court has relied on this Senate committee report in interpreting the purpose of Section 502(g)(2). *Laborers Health*

not require a "judgment" before a court may award fees, as the Fourth Circuit held below. The 1980 Amendments, and the resulting language and structure of § 502(g) as a whole, show that Congress did not intend to limit Section 502(g)(1) fee awards to a narrower "prevailing party" standard.

In sum, Congress twice – once in 1974 when originally enacting ERISA and once when it amended Section 502(g)(1) and created Section 502(g)(2) – made a considered decision not to include a "prevailing party" requirement within ERISA. The Court must give effect to Section 502(g)(1) as written, without a "prevailing party" requirement. The Fourth Circuit erred in holding that Hardt was not entitled to a fee award under Section 502(g)(1) if she was not a "prevailing party" within the meaning of *Buckhannon*.

If the rejection by Congress of a prevailing party standard and its retention of more expansive authority in Section 502(g)(1) for a court to issue a fee award "in its discretion" means anything, it surely authorizes a district court to award fees under an established five-factor test that takes into account the merits of the parties' positions (including that Hardt proved a violation of ERISA, secured a remand for a re-determination of benefits and was awarded the benefits on remand), as well as the parties' bad faith or culpability.

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and Welfare Trust Fund for Northern California, et al. v. Advanced Lightweight Concrete Co., Inc., 484 U.S. 539, 546-48 (1988).

Because Reliance did not appeal the district court's use of or findings under the established five-factor balancing test, this should end the matter. Nonetheless, Hardt shows below that the district court's decision is supported by the object and policy of ERISA, as well as trust law concepts upon which Congress intended courts to rely in interpreting and enforcing ERISA.

C. Reading a "Prevailing Party" Requirement into Section 502(g)(1) Would Upset ERISA's Carefully Crafted Enforcement Scheme.

As the Court has recognized, ERISA is "an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests." *See Mertens v. Hewitt Associates*, 508 U.S. 248, 262 (1993). The Court has repeatedly emphasized that ERISA is a "comprehensive and reticulated statute" with "carefully integrated civil enforcement provisions," *Russell*, 473 U.S. at 146 (quoting *Nachman Corp. v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361 (1980)).

As a result, the Court has concluded, without exception, that courts must follow the precise language of the Section 502's detailed enforcement scheme. The Court has declined to read into ERISA any implied claims or remedies. *See Russell*, 473 U.S. at 146 (declining to expand Section 502(a)(2) to encompass relief to an individual unrelated to any loss to the plan); *Mertens*, 508 U.S. at 262 (rejecting claim that ERISA allows cause of action against a nonfiduciary who knowingly participates in a fiduciary breach); *Dedeaux*, 481 U.S. 41, 56 (holding

that the civil enforcement scheme codified at § 502(a) is not to be supplemented by state-law remedies). Likewise, the Court has declined to read limiting language into Section 502 where none is stated. *See*, *e.g.*, *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 239 (2000) (declining to limit the universe of defendants who may be sued under § 502(a)(3) because there is no such limiting language there); *Varity Corporation v. Howe*, 516 U.S. 489, 507-508 (1996) (rejecting argument that § 502(a)(2) precludes an action pursuant to § 502(a)(3) for violation of "any provision of this title" based on a fiduciary breach because the language of § 502(a)(3) allows, without limitation, suits to remedy violations of ERISA).

Tinkering with the enforcement scheme of ERISA is rightfully for the other branches of government via the legislative process, in which the will of the people may resolve the "innumerable disputes between powerful competing interests." *See Mertens*, 508 U.S. at 262. The legal term of art "prevailing party" is absent from Section 502(g)(1). The Fourth Circuit's incorporation of the "prevailing party" term of art into Section 502(g)(1) is contrary to this Court's approach to ERISA and upsets the Act's carefully crafted civil enforcement provisions. Accordingly, the Court should reverse the judgment and decision below.

D. The Express Goal of ERISA's Fee Provision to Prevent Underenforcement of Beneficiaries' Rights Supports the Plain Meaning of the Statute.

In interpreting ERISA, as any statute, the Court also will "look to the provisions of the whole law, and to its object and policy." *Pilot Life*, 481 U.S. at 50 (internal quotations omitted). *See also Dada v. Mukasey*, --- U.S. ---, 128 S. Ct. 2307 (2008) ("'In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.'") (quoting *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991) (in turn quoting *Crandon v. United States*, 494 U.S. 152, 158 (1990)). That is, the "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan v. Postal Service*, 546 U.S. 481, 486 (2006).

Authorizing a court to award reasonable attorney's fees and costs "in its discretion. . . to either party," without additional unstated prerequisites to or limitations on the court's discretion other than those set forth in the established five-factor test, best fulfills the overarching goal of ERISA "to protect . . . participants in employee benefit plans and their beneficiaries" by "providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b). The fee-shifting provision is designed to ensure "that attorney's fees [do not] present a barrier to maintenance of suits for small claims, thereby risking underenforcement of

beneficiaries' statutory rights." *See Russell*, 473 U.S. at 147.

Reading a "prevailing party" requirement into Section 502(g)(1) when none exists in the statutory text thus not only conflicts with the twice-exercised congressional choice not to limit a court's discretion to award fees to prevailing party litigants in ERISA's enforcement scheme, but also undermines the express purpose of ERISA to protect beneficiaries' rights and provide appropriate remedies and meaningful access to federal courts. *See Chambless v. Masters, Mates & Pilots Pension Plan*, 815 F.2d 869, 872 (2d Cir. 1987) ("ERISA's attorney's fee provisions must be liberally construed to protect the statutory purpose of vindicating retirement rights, even when small amounts are involved.").

Many participants or beneficiaries who bring suit to enforce their rights under ERISA are of limited means. *See*, *e.g.*, *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 590 (9th Cir. 1984) ("when an employee participant brings suit under ERISA, whether it is against the trustees or the employer, the resources available to the pensioner are limited."); *Marquardt v. N. Am. Car Corp.*, 652 F.2d 715, 718 (7th Cir. 1981) ("Lavern Marquardt is a retired man in his sixties. He receives an actuarily reduced pension from the Company, and the record does not show that he has any significant alternative source of funds."). Indeed, most, if not all, persons seeking disability benefits by definition cannot work. *See*, *e.g.*, JA 37a-38a (requiring inability to work at one's own occupation or any occupation to qualify for LTD benefits). The disability benefits they seek, and for which they have

paid premiums, are intended to replace a portion of the income lost from their inability to work.

If the Court permits the Fourth Circuit's decision to stand such that only enforceable judgments and court-ordered consent decrees qualify for fee-shifting (even though Hardt meets that requirement here, as shown below), plan administrators vigorously will oppose benefits at every step of the process until they are compelled under threat of adverse judgment to provide such benefits. The Fourth Circuit's rule will lead to underenforcement of rights. That is because, under the Fourth Circuit's holding, fee shifting would not apply in such a circumstance, and the costs of securing an attorney could deprive a worker of a substantial portion of her entire award (or more). This is not merely a theoretical possibility. It occurred in this case, as Hardt's requested attorney's fees and costs were greater than the benefits granted by Reliance on remand. Compare Pet. App. 14a (seeking $58,920.73 in fees and costs), *with* JA 118a (granting Hardt $55,250 in accrued LTD benefits). The Fourth Circuit's rule encourages plan administrators and fiduciaries to engage in scorched earth "you sue, you lose" tactics, giving in only when they see the handwriting on the wall and realize they will be forced by a court to abide by the law. Under that rule, the express Congressional goals of "protect[ing] . . . participants in employee benefit plans" by "providing for appropriate remedies [and] ready access to the Federal courts" would become empty words.

E. ERISA Is Informed by the Historical Backdrop of Trust Law, Which Provided Courts Discretion to Award Fees and Costs to Either Party, Not Only to "Prevailing Parties."

This Court has determined that Congress intended that courts should look to trust law for guidance in interpreting ERISA. *See Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985); *see also Beck v. PACE Int'l Union*, 551 U.S. 96, 101 ("common law of trusts . . . serves as ERISA's backdrop"); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) ("a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans" (quoting 120 Cong. Rec. 29942 (1974) (remarks of Sen. Javits), as quoted in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24, n.26 (1983)). In creating a single federal regulatory scheme under ERISA, Congress knew it would supplant federal and state laws regulating employee benefits plans, including the body of state trust law that had long been relied upon in this arena. *See* 29 U.S.C. § 1144(a) (broad preemption provision); *see also New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656-57 (1995) (acknowledging "Congress's intent to establish the regulation of employee welfare benefit plans 'as exclusively a federal concern'") (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981)). It nonetheless intended that the

development of federal common law rules to govern ERISA would be informed by trust law concepts.[6]

It is recognized that courts have the power to award fees to either party under trust law without requiring "prevailing party" status. *In re Catell's Estate*, 38 A.2d 466 (Del.Ch.Ct.1944) (beneficiaries awarded fees even though unsuccessful on action to have trustee removed); George Gleason Bogert & George Taylor Bogert, *The Law of Trusts & Trustees*, § 871, at 184-85 (rev. 2d ed. 1998) ("In suits to enforce the rights of trust beneficiaries the court exercises discretion as to the allowance of attorneys fees and costs, either from the trust or other sources."). Such a

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[6] In deliberation prior to enacting ERISA, Congress noted:

> In the absence of adequate federal standards, the participant is left to rely on the traditional equitable remedies of the common law of trusts. . .
>
> The fact that [] rules exist says little as to their efficacy in adjusting inequities that are visited upon plan participants, as evidenced by the hearings before this Committee.

H.R. Rep. No. 93-533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4639, 4643.

In regard to the enforcement powers granted by Section 502, Congress noted:

> The intent . . . is to provide the full range of . . . equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law for recovery of benefits due to participants.

Id. at 4655; *see also* S. Rep. No. 127, 93d Cong., 2d Sess. 35, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4871 (same).

rule developed not only at common law, but also by statute. *See*, *e.g.*, Uniform Trust Code § 1004 ("In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.").[7]

As a result, although the general "American Rule" of civil litigation is that a party to a lawsuit ordinarily pays its own attorney's fees, it was widely accepted at ERISA's enactment, and is today, that trust law is an exception to the rule. *See Dardovitch v. Halzman, et al.*, 190 F.3d 125, 145-46 (3d Cir. 1999) (recognizing that "[o]ne of the more common exceptions to the American Rule is that attorney's fees are available at the discretion of the court in cases involving trusts"); *see also Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257-58 (1975) (recognizing "the historic power of equity" used in certain trust law cases as an exception to the American Rule).

It is therefore not surprising that Congress chose to vest such discretion in district courts to award

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[7] Section 1004 is based, according to the UTC comment, on a Mass. Gen. Laws Ch. 215 § 45. *See* Uniform Trust Code § 1004, 2006 Comment. A version of the Massachusetts law extends back to 1783. *See* Mass. Gen. Laws Ann. Ch. 215 § 45 (Historical and Statutory Notes). UTC Section 1004 "codifies the court's historic authority to award costs and fees, including reasonable attorney's fees, in judicial proceedings grounded in equity. . ." Uniform Trust Code § 1004, 2006 Comment. The comment notes certain circumstances where such fees should be awarded, which generally track factors considered in the five-factor test used by the lower courts in ERISA cases. *Id.*

reasonable fees and cost "to either party"–without the narrower "prevailing party" requirement–when the background trust rules used to inform ERISA provided precisely that same discretion to award fees. As a result, consistent with Section 502(g)(1)'s text vesting courts with broad discretion to award fees and costs "to either party," the Court should not imply an unwritten "prevailing party" standard into that text. *See NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981) ("Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms").

F. The Five-Factor Test Is a Well-Established, Appropriate Guide for the Exercise of a Court's Discretion in Awarding Fees to Either Party Under ERISA.

Given that the five-factor test that lower courts use in exercising their discretion already weighs the relative merits of parties' positions, including the degree of success, there is no need for the Court to imply an unwritten and narrower "prevailing party" step before (or as part of) that test. *See Gibbs*, 210 F.3d at 503. In fact, because "ERISA does not use the 'prevailing party' language in its attorneys' fee provision," courts simply should apply the well-established five-factor test to guide them in determining whether to award fees at their discretion. *Gibbs*, 210 F.3d at 503; *see also Salovaara v. Eckert*, 222 F.3d 19, 27-28 (2d Cir. 2000) (holding "a court has discretion to award attorney's fees 'to either party'" pursuant to Section 502(g)(1) and that the settled five-

factor test for awarding fees is "applicable regardless of which party seeks attorney's fees").

The established five factors under ERISA are: (1) the degree of opposing parties' culpability or bad faith; (2) the ability of opposing parties to satisfy an award of attorneys' fees, (3) whether an award of attorney's fees against the opposing parties would deter other persons acting under similar circumstances; (4) whether the parties requesting attorney's fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties' positions. "No one of these factors is necessarily decisive, and some may not be apropos in a given case, but together they are the nuclei of concerns that a court should address in applying section 502(g)." *Iron Workers Local # 272 v. Bowen*, 624 F.2d 1255, 1266 (5th Cir. 1980); *see also Quesinberry*, 987 F.2d at 1029 (following *Iron Workers*). The absence of the distinct concepts of culpability or bad faith does not preclude a fee award, though they weigh heavily in the analysis. *See Paese v. Hartford Life Ins. Co.*, 449 F.3d 435, 450-51 (2d Cir. 2006). Indeed, at least three of the five factors are affected by the degree of success on the merits – meaning that the litigant has gained at least some of what she sought in the suit – although formal, court-ordered success or "prevailing party" status in the *Buckhannon* sense is not required. *See Miles v. New York State Teamsters Conference, Pension and Retirement Fund Employee Pension Benefit Plan*, 698 F.2d 593, 602 (2d Cir.), *cert. denied*, 464 U.S. 829 (1983). Applying these factors generally will mean that fees are limited to litigants who have achieved at least some degree of success on

their claims (in both the *Ruckelshaus* and the common meaning of "success").

These five factors closely and appropriately track the trust law concepts that inform ERISA's enforcement scheme. *See* Bogert et al., *The Law of Trusts and Trustees* § 871, at 187-94 (listing factors courts considered under trust law, which generally mimic the five-factor test used by the lower courts under ERISA, including: 1) "whether the plaintiff or other party was successful in obtaining the relief requested or in defending or conserving the trust estate"; 2) "whether the successful party benefitted or enhanced the trust estate"; 3) "the nature and extent of the defendant's wrongful conduct, and whether there was good faith on the part of the defendant"; and 4) the source from which the costs and fees should be paid.

The five-factor test adequately guides a court's broad discretion to award fees under Section 502(g)(1) by allowing the court to assess the relative culpability of the parties, among a combination of factors that balance the express statutory goal of ready access to the courts and ensuring enforcement of ERISA rights.

II. Hardt Should Have Been Awarded Fees Under Established Precedent, Even If This Court Imposes a Prerequisite to the Five-Factor Test.

Petitioner believes the Court appropriately may dispose of this case on the first question presented by following the express text of Section 502(g)(1) and holding that, because the statute imposes no "prevailing party" requirement, the court of appeals erred in importing *Buckhannon* into a statutory scheme where it should not apply. Nonetheless, should the Court look beyond that narrow question, Hardt is entitled to an award of fees under the standard described in *Ruckelshaus* or *Buckhannon's* "prevailing party" rule.

A. Hardt Satisfies the Standard for Awarding Fees Set Forth in *Ruckelshaus*.

This Court has held that the absence of "prevailing party" language means Congress intends to expand fee-shifting to situations not covered under the "prevailing party" term of art. *See Ruckelshaus*, 463 U.S. at 687-88. In contrast to *Buckhannon*, *Ruckelshaus* does not require judicial action (that is, a "judicial imprimatur") that changes the parties' legal relationship. Instead, *Ruckelshaus* recognized that, under the analogous "whenever . . . appropriate" fee-shifting statutes, a party need only achieve "some success." *See id.* at 684. Indeed, the Court specifically concluded that a court order is *not* required for "success" under the "whenever . . . appropriate" fee-shifting language. The Court found that Congress intended the "whenever . . . appropriate" language to allow fee recovery for "suits that force[] defendants to abandon illegal conduct,

although without a formal court order." *Id.* at 686 n. 8 (citing S. Rep. No. 91-1196 (1970)); *see also Gwaltney*, 484 U.S. at 67 n.6 (noting that, like the Clean Air Act, the Clean Water Act fee-shifting provision protects plaintiffs from "the suddenly repentant defendant").

Thus, under *Ruckelshaus*, a party who pursues a claim under a "whenever . . . appropriate" fee-shifting statute and "obtains, through settlement or otherwise, substantial relief prior to adjudication on the merits" may be eligible for a fee award. *Ohio River Valley Environmental Coalition, Inc. v. Green Valley Coal Co.*, 511 F.3d 407, 414 (4th Cir. 2007) (quoting *Sierra Club v. EPA*, 322 F.3d 718, 719 (D.C. Cir. 2003)). All other circuits to have considered the issue agree. *See*, *e.g.*, *Association of California Water Agencies v. Evans*, 386 F.3d 879 (9th Cir. 2004); *Loggerhead Turtle v. County Council of Volusia County*, 307 F.3d 1318 (11th Cir. 2002).

As a result, if *Ruckelshaus* applies here, rather than, or as a prerequisite to, the well-established five-factor test, the Court should reverse the Fourth Circuit. It its fee decision, the district court below found that Reliance had awarded Hardt the sought-after benefits "only after having been ordered by the court to provide the kind of meaningful review of the evidence to which [Hardt] was entitled by law." Hardt's complaint was based on Reliance's mishandling and shoddy review of her LTD claim, and she requested LTD benefits and "such other relief . . . to secure [her] rights." JA at 99a-105a (Complaint, ¶41); *id.* at 109a (requesting relief). The district court found that Reliance abused its discretion in terminating Hardt's LTD benefits and that Hardt "did

not get the kind of review to which she is entitled under applicable law." Pet. App. 48a. The district court remanded to Reliance, as the fiduciary administering the plan, for a full and fair review in accordance with the ERISA's claims handling regulations. *Id*.

Hardt's lawsuit and resulting court order remanding the case for a redetermination of benefits caused Reliance to award Hardt the LTD benefits she sought in the case. Obviously, no benefits would have been awarded to Hardt had the district court ruled in the first instance in favor of Reliance. This is sufficient for fees to be awarded under *Ruckelshaus*. *See Ohio River Valley Environmental Coalition*, 511 F.3d at 415.

B. Hardt Satisfies a "Prevailing Party" Standard for Awarding Fees.

Contrary to the Fourth Circuit's decision below, Hardt meets this Court's "prevailing party" standard.

1. A Judicially-Ordered Remand Is Sufficient to Qualify for Fees Under ERISA.

Hardt should be deemed a "prevailing party" by securing a remand, based on a judicial finding that Reliance acted unlawfully in violation of ERISA and which required Reliance to reevaluate Hardt's claim. In finding that Reliance abused its discretion in terminating Hardt's LTD benefits, the district court ruled Reliance breached a fiduciary duty to Hardt by failing to afford her "the kind of review to which she is entitled under applicable law." Pet. App. 48a. *See Metro. Life Ins. Co. v. Glenn*, --- U.S. ---, 128 S. Ct. 2343, 2347 (2008) (considering "a benefit

determination to be a fiduciary act (i.e., an act in which the administrator owes a special duty of loyalty to the plan beneficiaries).”). After identifying deficiencies in Reliance’s approach, the district court remanded to Reliance, as the fiduciary administering the plan, for a full and fair review in accordance with the ERISA’s claims handling regulations. *Id.*

Securing a court-ordered remand based on an ERISA defendant’s misconduct constitutes success on the merits. This Court previously has held that a remand to an administrative agency confers “prevailing party” status in analogous situations arising under the Social Security Act, which uses the “prevailing party” standard for determining fees under the Equal Access to Judgment Act (EAJA), 28 U.S.C. § 2412. *See Shalala v. Schaefer*, 509 U.S. 292 (1993); *Sullivan v. Hudson*, 490 U.S. 877 (1989).

Taken together, *Schaefer* and *Sullivan* establish two complementary principles that trigger fee eligibility in Social Security Act cases: 1) where the district court remands to the agency without retaining jurisdiction, the securing of the remand order itself creates “prevailing party” status because “the plaintiff has succeeded on a[] significant issue in litigation which achieved some of the benefit sought in bringing suit,” *Schaefer*, 509 U.S. at 302 (citation and internal punctuation omitted); and 2) when there is such a remand, but the trial court retains jurisdiction, the claimant is a prevailing party only after she succeeds before the agency on remand. *Hudson*, 490 U.S. at 877-88. In the former situation, the plaintiff is entitled to seek and be awarded fees immediately upon remand (and the expiration of the appeal period), whereas in the latter circumstance, the

plaintiff must return to the district court after remand to seek fees. *See Schaefer*, 509 U.S. at 297-98.

The differences between the two scenarios are compelled by the "exclusive methods by which district courts may remand to the Secretary," which "are set forth in sentence four and sentence six of [42 U.S.C.] § 405(g)." *Id.* at 296.[8] A "sentence-four" remand results in the immediate entry of judgment (and relinquishment of jurisdiction) by the district court, whereas in the "sentence-six" remand context judgment is not entered (and the district court retains jurisdiction) until post-remand agency proceedings are complete. *Id.* at 297. "Immediate entry of judgment (as opposed to entry of judgment after postremand agency proceedings have been completed and their results filed with the court) is in fact the principal feature that distinguishes a sentence-four remand from a sentence-six remand." *Id.*[9]

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[8] "Sentence-six remands may be ordered in only two situations: where the Secretary requests a remand before answering the complaint, or where new, material evidence is adduced that was for good cause not presented before the agency." *Id.* at 297 n.2. In contrast, under sentence four "the [district] court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. . ." *Id.* at 297 n.1 (bracket in original).

[9] As to the timing of a fee award, Social Security Act cases, via the fee-shifting provision of EAJA, requires a "final judgment" before an award may issue. Yet, Section 502(g)(1) does not require judgment before a fee award may issue. *Compare* 29 U.S.C. § 1132(g)(1) (no judgment required before fee award); *with* 29 U.S.C. § 1132(g)(2) (requiring judgment before fees may issue). As a result, the lack of a judgment

Sentence-four remands in social security cases and remands in an ERISA case are analogous: In both instances, the remand is based on a legal infirmity with the substance of the administrator's or fiduciary's decision or in the procedures employed. Convincing a court to reverse or vacate an ERISA benefits decision and remand the claim for a redetermination of benefits means a claimant is a "prevailing party" because she "'succeeded on any significant issue in litigation which achieved some of the benefit . . . sought in bringing suit.'" *Schaefer*, 509 U.S. at 302 (quoting *Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782, 791-92 (1989), and noting that *Garland* "affirmatively supports the proposition that a party who wins a sentence-four remand order is a prevailing party."). Having a remand order trigger "prevailing party" status upon entry also furthers the goals of the statute, as plan administrators and fiduciaries appropriately will be encouraged to fulfill their fiduciary obligations and handle and determine the claim for benefits properly in the first instance. *See Mizzell v. Provident Life and Accident Insurance Co.*, 32 Fed. Appx. 352, 353 (9th Cir. 2002) (affirming fee award where district court concluded that the plan administrator abused its discretion and remanded benefits claim to plan administrator for a new determination of benefits eligibility); *Sansevera v. E.I. DuPont de Nemours & Co.*, 859 F. Supp. 106, 117 (S.D.N.Y. 1994) (granting attorney's fees to plaintiff whose summary judgment motion was partially granted as to claim that fiduciary acted

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should be immaterial in Section 502(g)(1) cases as to when a fee award may issue.

arbitrarily and capriciously in denying benefits, reasoning that the claimant "was forced to bring this suit in order to receive the fair consideration to which he is entitled. An award of attorney's fees and costs is necessary both to relieve [claimant] of the financial burden undertaken to pursue this action, and to deter other employers from similarly denying an applicant a fair consideration of his or her claim.").

Thus, in ERISA cases, the remand alone provides the judicial imprimatur required by *Buckhannon* for fee awards under "prevailing party" statutes. *See Flom v. Holly Corp.*, 276 Fed. Appx. 615, 617 (9th Cir. 2008) (holding district court erred in denying a disability benefit claimant's motion for attorney's fees against the plan administrator under § 502(g)(1) where the district court's remand to the administrator provided the "judicial imprimatur required by *Buckhannon*" for the claimant to be a prevailing party because it created "a judicially-sanctioned change" in claimant's "legal relationship with [the administrator] and ultimately led to [claimant's] success in securing a reinstatement of benefits."); *Mizzell*, 32 Fed. Appx. at 354 (affirming fee award in benefits case based on remand because plaintiff "succeeded on a significant issue in litigation, *i.e.*, whether [the plan administrator] abused its discretion in denying [plaintiff's] claim, which achieve[d] some of the benefit [plaintiff] sought in bringing suit, *i.e.*, to obtain a full and fair review of his claim.") (some internal punctuation omitted). For that reason, the district remand order here made Hardt a prevailing party.

And even if the proper analogy were the sentence-six remand, the district court in this case retained jurisdiction, and Hardt secured the benefits on remand. The parties reported the award of benefits after the remand to the district court, which thereafter entered judgment. Hardt thus is eligible for an award of fees as a "prevailing party" under *Hudson*.

In sum, Hardt is a "prevailing party" under the reasoning of *Schaefer* and *Hudson* based solely on the remand order. The Court should reverse the Fourth Circuit decision below.

2. Hardt Satisfies the Prevailing Party Standard in *Buckhannon*.

In *Buckhannon*, the Court held that the term "prevailing party" required a "'material alteration of the legal relationship of the parties'" or a "court ordered 'change [in] the legal relationship between [the plaintiff] and the defendant.'" 532 U.S. at 604 (quoting *Garland*, 489 U.S. at 792 (alterations in *Buckhannon*)). As examples of the types of actions that would convey the necessary "judicial imprimatur," the Court offered "settlement agreements enforced through a consent decree" and "judgments on the merits." *Buckhannon*, 532 U.S. at 604-05. The Court specifically held that the "'catalyst theory' falls on the other side of the line from these examples" because "it allows an award where there is no judicially sanctioned change in the legal relationship of the parties." 532 U.S. at 605. For additional examples of actions that would not convey the necessary imprimatur, the Court mentioned successful results obtained through private settlement agreements, non-dispositive victories such as

surviving a motion to dismiss for lack of jurisdiction, withstanding a motion to dismiss for failure to state a claim upon which relief may be granted, or receiving an interlocutory ruling that reversed a dismissal for failure to state a claim. *See id.* at 604-06 & n.7. The Court further explained that "[a] defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change." *Id.*

Contrary to the Fourth Circuit's decision below, the holding and rationale in *Buckhannon* did not limit attorney's fee awards only to cases in which there is either a final judgment on the merits or a consent decree. Rather than defining these two forms of relief as the "only" ways in which a party could "prevail" for purposes of recovering fees and costs, the Court expressly used these forms of relief as discrete "examples," 532 U.S. at 605, from precedent, showing the requirement for the "judicial imprimatur" changing the parties' legal relationship. *Id.*

That *Buckhannon's* "prevailing party" status is not limited "only" to court-ordered consent decrees and enforceable judgments on the merits is further supported by the fact that two members of the majority noted that court-approved settlements, in addition to consent decrees, bore the necessary judicial imprimatur. 532 U.S. at 618 (Scalia, J., concurring, joined by Thomas, J.). *See also Truesdell v. Phila. Hous. Auth.*, 290 F.3d 159, 165 (3d Cir. 2002) (Alito, J.) ("We do not agree with the District Court's conclusion that the parties' settlement was an inappropriate basis for an award of attorney's fees."; holding court-ordered settlement containing

mandatory language and allowing enforcement satisfied *Buckhannon* under Section 1988 fee-shifting statute); *Robertson v. Guiliani*, 346 F.3d 75, 81 (2d Cir. 2003) ("[I]t seems clear from even the majority opinion in *Buckhannon* that the Court intended its statements about judgments on the merits and court-ordered consent decrees as merely 'examples' of the type of judicial action that could convey prevailing party status . . . We therefore join the majority of courts to have considered the issue since *Buckhannon* in concluding that judicial action other than a judgment on the merits or a consent decree can support an award of attorney's fees, so long as such action carries with it sufficient judicial imprimatur."). Moreover, *Schaefer*, which *Buckhannon* neither listed as an example nor questioned, held that a "sentence-four" remand to an administrative agency was a judgment that satisfied the "prevailing party" requirement.

Buckhannon did not need to provide a complete catalog of the various forms of judicial relief that a party must obtain in order to be a "prevailing party" for purposes of an award of attorney's fees under statutes using that term of art because, in that case, the litigation was resolved without judicial involvement. Rather, the State legislature repealed the statute at the heart of petitioner's lawsuit for declaratory and injunctive relief, thereby mooting the case. 532 U.S. at 601. Thus, in *Buckhannon*, legislative action – not judicial action – provided the plaintiff the desired relief. *Id*. at 601.

Here, by sharp contrast, judicial action altered the parties' relationship. The facts of this case cannot reasonably be read to suggest that Reliance

"voluntarily change[d] [its] conduct." *Buckhannon*, 532 U.S. at 605; *see* BLACK'S LAW DICTIONARY 1569 (7th ed. 1999) (Voluntary means "not impelled by outside influence.").

In her complaint, Hardt specifically pointed to Reliance's procedural error and improper review of her LTD claim. JA 90a-110a. She requested LTD benefits and "such other relief . . . to secure her rights." JA at 108a-110a.[10] The remand provided Hardt a form of relief she sought via her complaint and therefore constitutes formal success on the merits. The district court's remand order constitutes judicially-ordered relief to Hardt for the ERISA violations, as the court effectively granted Hardt partial summary judgment on her claim that Reliance violated ERISA in its handling and review of her request for LTD benefits and abused its discretion in terminating those benefits. *See Sansevera*, 859 F. Supp. 106, 117 (S.D.N.Y. 1994).

Moreover, the district court retained the authority to enforce its remand order, coupled with the express threat of entry of judgment against Reliance in the event of non-compliance. Indeed, the district court specifically "**INSTRUCT[ED]** Reliance to act on [Hardt's] application by adequately considering all the evidence discussed within this Opinion within thirty (30) days of its date of issuance," or "judgment will be issued in favor of [Hardt]." Pet. App. 49a (emphasis in original). The district court subsequently reinforced that order with another order noting the reconsideration deadline (which the district

[10] The Fourth Circuit's conclusion that Hardt did not seek this relief simply is incorrect.

court had extended once at Reliance's request) had passed and required the parties to file a status report within seven days. JA at 113a-114a. The order cautioned that "[a]ny failure by Reliance to comply with the court's [reconsideration] deadline will result in judgment being entered in favor of the plaintiff," per the previous order, and concluded that "[s]hould the parties fail to submit a timely status report, judgment will be entered in favor of the plaintiff." *Id.* at 114a.

When Reliance finally changed its position and awarded continued LTD benefits to Hardt, it filed the required status report "confirming its compliance with the Court's Order" and that it "acted within the specified time frame and found Ms. Hardt eligible for benefits." JA 115a (Docket 49). Thus, Reliance expressly acknowledged that the lawsuit and the district court's remand order changed the legal relationship of the parties.

The district court therefore appropriately found that Reliance's change in position was not voluntary. The court determined that "it was [Reliance's] goal from the beginning to deny [Hardt] the benefits she had claimed" and that Reliance "has opposed [Hardt's] position throughout the course of this litigation." The court additionally found the record "replete with instances of [Reliance's] staunch opposition to awarding any benefits to [Hardt]," prior to the remand order. As a matter of fact, the district court ruled that Reliance awarded Hardt the sought-after benefits, but "only after having been ordered by the court to provide the kind of meaningful review of the evidence to which [Hardt]

was entitled by law." *Id.* at 22a-23a. That judicial finding, not challenged on appeal, is conclusive here.

Accordingly, this case does not fall on the "voluntary change in conduct" side of the line established by *Buckhannon*. Rather, the court-ordered remand changed the parties' legal relationship, requiring Reliance to give Hardt the full and fair review to which she was entitled by law in the first instance.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded with instructions that the district court reinstate its award of attorney's fees and costs and conduct any other appropriate proceedings concerning Hardt's entitlement to additional attorney's fees and costs in light of the appeals.

Respectfully submitted,

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APPENDIX

29 U.S.C. § 1132(g) on following page

Section 502(g) of ERISA (29 U.S.C. §1132(g)) provides:

g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph 2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of the action to either party.

(2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of the Internal Revenue Code of 1986.