IN THE

COURT OF SPECIAL APPEALS OF MARYLAND

September Term, 2011

No. 270

DANIEL J. BARUFALDI,
Appellant,

v.

OCEAN CITY, MARYLAND CHAMBER OF COMMERCE,
Appellee.

On Appeal from the Circuit Court for Worcester County
(Hon. Thomas C. Groton, III, Judge)

BRIEF OF THE PUBLIC JUSTICE CENTER, AMERICAN CIVIL LIBERTIES UNION OF MARYLAND, MARYLAND EMPLOYMENT LAWYERS ASSOCIATION, METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION, NATIONAL FEDERATION OF THE BLIND OF MARYLAND, D.C. EMPLOYMENT JUSTICE CENTER, AND WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS AS *AMICI CURIAE*

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SUMMARY OF ARGUMENT

Awards of attorneys' fees to successful plaintiffs under the Wage Payment and Collection Law (WPCL), Md. Code Ann. Lab. & Empl. § 3-507.2(b), produce important public benefits. They deter employers from unlawfully withholding wages, and thereby reduce the need for litigation, both by raising the expected costs of breaking the law and by making it possible for the law to be enforced regularly. They also deter dilatory tactics that waste the courts' time and unnecessarily drive up the cost of litigation. But fee awards can achieve these goals only if they are relatively routine and predictable as required by law. Therefore, whenever lower courts fail to follow the Court of Appeals' clear instruction in *Friolo v. Frankel* to "exercise their discretion liberally in favor of awarding a reasonable fee," 373 Md. 501, 518 (2003) [*Friolo I*], they undercut the WPCL's deterrent effect and give employers reason to believe there is little or no cost to violating the law.

Defendants' claimed inability to pay is irrelevant to the decision whether to award attorneys' fees to successful plaintiffs under the WPCL. Allowing defendants to make self-serving claims of insolvency creates a perverse incentive for scorched-earth litigation tactics. It also violates the traditional principle that compensatory damages are awarded without regard to defendants' ability to pay. And it promises to give rise to a second major round of litigation at the fee award stage as parties seek to substantiate or disprove defendants' assertions of insolvency.

Fee-shifting under the WPCL should not be influenced by the wholly inapposite five-factor test that the circuit court in this case borrowed from Employee Retirement

Income Security Act (ERISA) jurisprudence. The relevant provision of ERISA provides for two-way fee-shifting, as opposed to one-way fee-shifting for plaintiffs under the WPCL, reflecting fundamental differences between the policies underlying the two statutes. Moreover, the five-factor test under ERISA is based on traditional equitable principles in the law of trusts, a body of law that has no relevance to the WPCL. And the five-factor test conflicts directly with the Court of Appeals' decision in *Friolo I*, which, drawing on well-established federal jurisprudence, established a presumption in favor of awarding attorneys' fees to successful plaintiffs.

INTERESTS OF *AMICI*

The Public Justice Center (PJC), a non-profit civil rights and anti-poverty legal services organization, has a longstanding commitment to promoting the rights of low-wage workers. Towards that end, the PJC has represented thousands of employees seeking to recover unpaid wages from their employers through collective and/or class actions under state wage and hour laws and the Fair Labor Standards Act (FLSA). *See In re Tyson Foods, Inc., Fair Labor Standards Act Litigation,* MDL Docket No. 1854 (M.D. Ga.) (pending); *Trotter v. Perdue Farms, Inc.*, 2001 WL 1002448, 144 Lab. Cas. ¶ 34,364 (D. Del. Aug. 16, 2001); *Heath v. Purdue Farms, Inc.*, 87 F. Supp. 2d 452 (D. Md. 2000). The PJC has also filed *amicus curiae* briefs in several cases involving the rights of low-wage workers to collect unpaid wages and attorneys' fees under Maryland's wage and hour laws and the FLSA. *See Jackson v. Estelle's Place, LLC*, 391 F. App'x 239 (4th Cir. 2010) (unpublished); *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350 (4th

Cir. 2011); *Friolo v. Frankel*, 403 Md. 443 (2008); *Friolo v. Frankel*, 373 Md. 501 (2003).

The American Civil Liberties Union of Maryland is the state affiliate of the American Civil Liberties Union (ACLU), a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in this nation's Constitution and civil rights laws. Since its founding in 1931, the ACLU of Maryland, which is comprised of approximately 14,000 members throughout the state, has appeared before various courts and administrative bodies in numerous civil rights, employment, and civil liberties cases against private and public actors, both as direct counsel and as amicus curiae. The ACLU, nationally and locally, is extensively involved in the representation of individuals who have been the victims of constitutional and civil rights violations. The ACLU's ability to serve as "private attorneys general" in doing this important work is made possible by statutory fee-shifting provisions. Without these laws, and courts' willingness to fairly compensate attorneys who prevail in private enforcement of civil rights laws to vindicate individual rights and promote the public good, the ACLU's ability to take on this role would be severely limited. As such, the ACLU often participates in cases like the instant matter, where access to justice is threatened by a cramped or improper reading of the fee-shifting laws.

The Maryland Employment Lawyers Association (MELA), a local affiliate of the National Employment Lawyers Association, is comprised of more than 100 attorneys who represent individuals under federal and state laws that protect the interests of

employees in receiving their full wages earned for their work performed, including the Fair Labor Standards Act and Maryland wage laws. The purpose of MELA is to bring into close association employee advocates and attorneys in order to promote the efficiency of the legal system and fair and equal treatment under the law. MELA has been granted leave to participate as *amicus curiae* in many cases before Maryland state and federal appellate courts. *See, e.g., Newell v. Runnels*, 967 A.2d 729 (Md. 2009); *Haas v. Lockheed Martin Corp.*, 914 A.2d 735 (Md. 2007). Because the outcome of this case will have a direct impact upon the ability of MELA members and their clients to protect employees' interest in receiving the full fruits of their labors, MELA has a specific interest in the fair resolution of the issues presented in this appeal.

The Metropolitan Washington Employment Lawyers Association (MWELA) is a legal membership organization with over 325 members who represent plaintiffs in employment and civil rights litigation in the metropolitan Washington area. MWELA has participated as *amicus curiae* in the following recent cases: *Jordan v. Alternative Res. Corp.*, 458 F.3d 332, *reh'g en banc denied*, 467 F.3d 378 (4th Cir. 2006); *Haas v. Lockheed Martin Corp.*, 396 Md. 469 (2007); *Manor Country Club v. Flaa*, 387 Md. 297 (2005); *Towson Univ. v. Conte*, 376 Md. 543 (2003). As a longtime advocate in employment and labor law, MWELA appreciates this opportunity to offer the Court its wide-ranging expertise and unique perspective on the issues presented in this appeal. The lower court's disposition of this case threatens to undermine important statutory rights which protect employees in the state of Maryland by deterring competent counsel from accepting such cases. Because the outcome of this case will directly impact the ability of

MWELA members to take cases on behalf of Maryland workers, MWELA has an interest in the fair resolution of the issues presented in this appeal.

The National Federation of the Blind of Maryland (NFB-Md) is the Maryland state affiliate of the National Federation of the Blind (NFB), the oldest and largest national advocacy organization of blind persons in the United States. The vast majority of NFB-Md's members are blind persons. NFB-Md is recognized by the public, the General Assembly of Maryland, executive agencies of state government and the courts as a collective and representative voice on behalf of blind Marylanders and their families. Its purpose, like that of the NFB, is to promote the general welfare of the blind by (1) assisting the blind in their efforts to integrate themselves into society on equal terms and (2) removing barriers and changing social attitudes, stereotypes, and mistaken beliefs that sighted and blind persons hold concerning the limitations created by blindness and that result in the denial of opportunity to blind persons in virtually every sphere of life. To effectuate these goals, NFB-Md has brought civil rights actions in its own name and supported litigation by individual blind Marylanders under a variety of statutes that contain fee-shifting provisions for prevailing parties. NFB-Md and NFB often bring such litigation by paying its attorneys their customary hourly fees as they accrue, and then petitioning for a court award of attorneys' fees as part of its total relief when the litigation is successful.

The D.C. Employment Justice Center (EJC) is a non-profit organization whose mission is to secure, protect, and promote workplace justice in the D.C. metropolitan area. EJC provides legal assistance on employment law matters to the working poor and

supports a local workers' rights movement, bringing together low-wage workers and advocates for the poor. Established on Labor Day of 2000, EJC advises and counsels well over 1000 workers from D.C., Maryland, and Virginia each year on their rights in the workplace. Approximately 25% of EJC's clinic cases are from Maryland. The most common category of complaints among EJC's clients are wage and hour complaints, especially unpaid wages for work performed; indeed, in 2010, 32.6% of the claims handled in EJC's Workers' Rights Clinic were wage and hour claims. The EJC believes it is crucial to the enforcement of wage theft laws that courts award successful plaintiffs their attorneys' fees. The EJC often refers cases from its weekly clinic to the private bar for representation. Without such fee awards, plaintiffs in wage theft cases would have limited success in finding legal representation, and this would diminish the enforcement of wage-theft laws.

The Washington Lawyers' Committee for Civil Rights and Urban Affairs is a non-profit civil rights organization established to eradicate discrimination and poverty by enforcing civil rights laws through litigation. In furtherance of this mission, the Washington Lawyers' Committee represents victims of wage and hour violations in individual, class, and collective actions in state and federal courts. *See, e.g., Montoya v. S.C.C.P. Painting Contrs., Inc.*, 530 F. Supp. 2d 746 (D. Md. 2008); *Granados v. Hann & Hann, Inc.*, No. 8:08-cv-01206 (D. Md.) (pending); *Pachina v. Chanticleer of Frederick, Inc.*, No 1:07-cv-03235 (D. Md.). From these cases, the Washington Lawyers' Committee has amassed expertise in issues arising under state and federal wage and hour laws, as well as in awards of attorneys' fees to prevailing plaintiffs in civil

rights cases generally. The Washington Lawyers' Committee has also filed *amici curiae* briefs in cases involving awards of attorneys' fees under the FLSA. *See, e.g.*, *Jackson v. Estelle's Place, LLC*, 391 F. App'x 239 (4th Cir. 2010) (unpublished).

ARGUMENT

I. Courts should routinely require losing defendants to bear the full costs of successful litigation under the WPCL, because doing so gives all parties incentives to act in the public interest.

When deciding whether to award attorneys' fees to a successful plaintiff under the WPCL, a court determines which party must bear the cost of proving the wage violation: if the cost is not borne by the defendant, then the plaintiff (or his or her attorney) is forced to bear it. That choice has important consequences extending beyond the individual case because it shapes the expectations, and thus affects the actions, of all potential plaintiffs and defendants under the WPCL.

The Court of Appeals held in *Friolo v. Frankel*, 373 Md. 501 (2003) [*Friolo I*], that "courts should exercise their discretion liberally in favor of awarding a reasonable fee, unless the circumstances of the particular case indicate some good reason why a fee award is inappropriate in that case." *Id.* at 518; *see also Friolo v. Frankel*, 403 Md. 443, 456-67 (2008) [*Friolo III*] (reiterating that courts should exercise discretion liberally in favor of awarding fees).

The presumption that losing defendants should bear the cost of proving a violation of the WPCL (when the jury has made the necessary finding of no bona fide dispute) creates important incentives for all parties to act in ways that benefit the public at large. First, it raises the expected costs of violating the law, thereby giving all employers an

incentive to follow the law by paying wages on time and in full. Second, it encourages frequent enforcement of the WPCL — another factor that will motivate employers to act within the law. Third, it gives defendants an incentive not to unnecessarily drive up the cost of litigation and waste the courts' time. Therefore, when trial courts fail to exercise their discretion liberally in favor of awarding fees, as the circuit court did in this case, they not only harm individual plaintiffs, but also do genuine disservice to the public interest.

A. Routinely awarding attorneys' fees under the WPCL, as required by law, encourages all employers to comply with the law by raising the expected costs of unlawful behavior.

A major purpose of fee-shifting statutes is "to stimulate voluntary compliance with the law." *Md. Nat'l Capital Park & Planning Comm'n v. Crawford*, 59 Md. App. 276, 302 n.12 (1984).[1] Specifically with regard to fee-shifting provisions in employment laws like the WPCL, the *Friolo I* Court stated that "the provision for counsel fees is an important element in ensuring that the law is obeyed." 373 Md. at 518.[2] One important reason why fee-shifting leads to voluntary compliance with the law is that it raises the potential cost to an employer that violates the law. If employees could only ever recover

[1] This point has been echoed by numerous other courts. *E.g.*, *Ackerley Commc'ns, Inc. v. City of Salem, Or.*, 752 F.2d 1394, 1397 (9th Cir. 1985); *Rutherford v. McKissack*, No. C09–1693, 2011 WL 3421516, *3 (W.D. Wash. Aug. 4, 2011); *Gillespie v. Brewer*, 602 F. Supp. 218, 226 (N.D. W. Va. 1985); *Robinson v. City of Omaha*, 242 Neb. 408, 414 (1993).

[2] The *Friolo I* Court was referring to the fee-shifting provision of the Wage and Hour Law, Md. Code Ann. Lab. & Empl. § 3-427(d), which is a close analog to the fee-shifting provision of the WPCL, *id.* § 3-507.2(b).

their lost wages and nothing more under the WPCL, then it would often be economically rational for employers to unlawfully withhold wages and force their employees to go to the trouble and expense (often prohibitive) of suing to recover those wages. In order to stimulate voluntary compliance with the WPCL, the cost imposed on an employer that is found to have violated the law must be significantly higher than the cost of simply following the law in the first place. This goal is accomplished by *Friolo I*'s presumption that employers that violate the law should bear the full cost of the litigation.[3]

Unfortunately, the prospect that many employers will fail to comply with wage laws is not just a theoretical concern. In fact, wage theft — the unlawful deprivation of legally mandated wages — is shockingly widespread among low-wage workers in Maryland and throughout the United States. For instance, a study of 4,387 low-wage workers in Chicago, Los Angeles, and New York in 2008 found, among other things, that more than 25 percent had been paid less than the minimum wage in just the previous week, and more than 75 percent of those who had worked more than 40 hours in the previous week were not paid overtime. Annette Bernhardt et al., Ctr. for Urban & Econ. Dev., Nat'l Emp't Law Project, & UCLA Inst. for Research on Labor & Emp't, *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in American*

[3] The fact that the WPCL allows a jury to award treble damages, Md. Code Ann. Lab. & Empl. § 3-507.2(b), also has the potential to strengthen this deterrent effect. In order to further incentivize voluntary compliance with the law, trial courts (including juries) should be encouraged to regularly award treble damages against employers that violate the WPCL when there is no bona fide dispute.

Cities 2 (2009).[4] Likewise, in Maryland, a survey of 286 domestic workers in 2006 found that 75 percent of them did not receive overtime pay to which they were entitled, and approximately half earned below minimum wage. CASA of Maryland, *Wage Theft: How Maryland Fails to Protect the Rights of Low-Wage Workers* 4 (2007).[5] Another survey, covering 75 South Asian workers in Baltimore City in 2006, found that 76 percent of them did not receive required overtime pay. *Id.* at 5. Wage theft obviously causes serious harm to workers like these, because they need every dollar of their paychecks to pay for food, shelter, and other basic necessities.

In light of the significant problem of wage theft, the deterrent effect of the WPCL's fee-shifting provision provides an important benefit to society. It even benefits those employers that would have voluntarily obeyed the law anyway, because it makes it harder for their competitors to undercut them by shortchanging their workers. *Cf. Friolo I*, 373 Md. at 515 (noting that a purpose of the Wage and Hour Law is "to safeguard employers . . . against unfair competition"). And, of course, it benefits workers and their families by increasing the likelihood that their employers will pay them on time and in full. The circuit court's decision in this case — which awarded the plaintiff nothing more than the wages his employer should have paid him in the first place, *see* E. 166-67 — undermines the WPCL's deterrent effect and harms the public interest.

[4] *Available at* http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf.

[5] *Available at* http://www.casademaryland.org/storage/documents/wagetheft.pdf.

B. Frequent enforcement of the WPCL through private litigation is a public good that will only be provided if courts regularly award attorneys' fees to successful plaintiffs.

Friolo I's requirement that "courts should exercise their discretion liberally in favor of awarding a reasonable fee," 373 Md. at 518, also creates a second important incentive for voluntary compliance with the WPCL: in addition to raising the potential cost of violating the law, it also greatly increases the likelihood that the law will actually be enforced. It does this by enabling low- and middle-income workers to enforce the law through private litigation — which would be practically impossible if such plaintiffs could not depend on the prospect of fee-shifting awards to attract private counsel. "[F]ee-shifting statutes were designed to level the playing field for individuals who would otherwise have little opportunity to insist on enforcement of existing laws . . . ." Md. Access to Justice Comm'n, *Fee-Shifting to Promote the Public Interest in Maryland* 6 (2010) [hereinafter *Fee-Shifting to Promote the Public Interest*].[6]

Laws that are known to be regularly enforced are much more likely to be obeyed.[7] If the WPCL is only rarely enforced, then many employers will find it economically rational to unlawfully withhold wages due to the low probability of ever being held liable for such behavior. Accordingly, every successful suit brought under the WPCL does not

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[6] *Available at* http://www.courts.state.md.us/mdatjc/pdfs/feeshiftingtopromotethepublicinterestinmaryland.pdf.

[7] "[Laws] are followed when the expected cost of noncompliance exceeds the expected benefit of noncompliance. Thus, compliance is a function of the benefit of breaking the rule, the probability that noncompliance will be detected, and the sanction for noncompliance." Note, *Rule Porousness and the Design of Legal Directives*, 121 Harv. L. Rev. 2134, 2135 (2008).

only benefit the plaintiff — it also benefits the general public by giving all employers a practical reason to follow the law. For this reason, the constant and thus anticipated enforcement of the WPCL is a public good.[8]

As one court has explained, "[t]he public interest in private civil rights enforcement is not limited to those cases that push the legal envelope; it is perhaps most meaningfully served by the day-to-day private enforcement of these rights, which secures compliance and deters future violations." *Quaratino v. Tiffany & Co.*, 166 F.3d 422, 426 (2d Cir. 1999). Successful plaintiffs under the WPCL are properly regarded as "private attorneys general" because, by pursuing private litigation, they vindicate the public interest. "The action of these private individuals provides a significant public benefit by enforcing the law, deterring future misconduct and promoting compliance with the law . . . ." *Fee-Shifting to Promote the Public Interest* at 1. "Those private actions put violators on notice that the law will be enforced, deterring future non-compliance. Under the private attorney general doctrine, this larger social benefit justifies the award of attorney's fees to the successful plaintiff." *Id.* at 4.

The public interest in the enforcement of the WPCL through private litigation is particularly strong because, although the state government has the power to enforce the law, its efforts are hampered by a severe shortage of funding. The state government

[8] *See* William R. Mureiko, Note, *A Public Goods Approach to Calculating Reasonable Fees Under Attorney Fee Shifting Statutes*, 1989 Duke L.J. 438, 451-56 (1989) (explaining that the enforcement of civil rights laws through private litigation meets the standard definition of a public good because it confers public benefits that are nonexcludable and nonrivalrous).

agency responsible for enforcing the WPCL is the Department of Labor, Licensing, and Regulation (DLLR). Md. Code Ann., Lab. & Empl. § 3-507. The office within DLLR that investigates wage and hour complaints, the Employment Standards Service (ESS), was entirely stripped of funding in 1991, reestablished in 1994, defunded again in 2006, and restored in 2007. Eleanor M. Carey et al., *Report on the Department of Labor, Licensing and Regulation: Maryland Transition* 2-3 (2007).[9] ESS estimated in 2007 that it needed a minimum of eleven investigators "to just begin addressing enforcement mandates." *Id.* at 17. Yet, in fiscal years 2008-2010, the number of investigators at ESS fluctuated between two and four. DLLR, Business Regulation Group, *Fiscal Year 2012 Budget Hearing* 4 (2011).[10] In fiscal year 2009, ESS received 1,691 claims. *Id.* Two to four investigators are plainly not enough to effectively combat the widespread problem of wage theft in Maryland.[11]

Therefore, the only way to fulfill the important public need for regular and visible enforcement of the WPCL is through private litigation. Without fee shifting, it would be completely infeasible for many plaintiffs to bring meritorious suits to enforce the WPCL,

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[9] *Available at* http://www.governor.maryland.gov/documents/transition/Labor.pdf.

[10] *Available at* http://www.dbm.maryland.gov/agencies/operbudget/Documents/2012/budget_testimony/P00_DLLRBusRegulation.pdf.

[11] Moreover, it is unlikely that DLLR will be able to hire any more investigators in the foreseeable future. The Secretary of DLLR, Alexander M. Sanchez, stated at a recent meeting with the Maryland Alliance for the Poor that there is no chance of money being made available for more wage and hour investigators in the next budget cycle, and that there is a risk of funding being cut further. Alexander M. Sanchez, Secretary, DLLR, Remarks at Meeting with Maryland Alliance for the Poor (Dec. 7, 2011) (notes on file with the Public Justice Center).

because most claims involve dollar amounts that — while extremely significant to workers who need those sums to pay rent and buy food — are too low to make it economically viable for attorneys to represent such plaintiffs on a contingency-fee basis. *See Friolo III*, 403 Md. at 457-58 & n.13. This is true not only for low-wage workers, but even for middle-class professionals like the plaintiff in this case.[12] The jury awarded Mr. Barufaldi $60,000 in unpaid wages — yet that amount is greatly exceeded by his attorneys' fees which were necessarily incurred in obtaining the award because of the manner in which the defendants have litigated this case.[13] Thus, absent a fee-shifting award, Mr. Barufaldi will get absolutely no compensatory benefit from having

[12] With a base salary of $52,000, E. 144, Mr. Barufaldi may not have been eligible for legal aid under the Maryland Legal Services Corporation's income guidelines, depending on the size and total income of his household. *See* Md. Legal Servs. Corp., Client Income Eligibility Guidelines, http://www.mlsc.org/Income.Eligibility11.htm (last visited December 15, 2011). But even potential plaintiffs whose incomes are low enough to qualify for legal aid are very often unable to obtain representation. A 2009 study by the Legal Services Corporation determined that nationwide, "roughly one-half of the people who seek help from LSC-funded legal aid providers are being denied service because of insufficient program resources." Legal Servs. Corp., *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* 12 (2009), *available at* http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf. Likewise, a 2006 report of the Maryland Court of Appeals' Committee on Pro Bono Legal Service cited several studies showing that considerably less than half of low-income Marylanders with legal needs were able to obtain representation. Standing Comm. of the Court of Appeals on Pro Bono Legal Serv., *State Action Plan & Report* 3-5 (rev. 2006), *available at* http://www.courts.state.md.us/probono/pdfs/stateactionplan12-18-06.pdf.

[13] It is noteworthy that the defendants did not challenge either the reasonableness of the rates sought or the time expended by Mr. Barufaldi's counsel; indeed, they did not take issue with a single one of the time entries submitted in support of Mr. Barufaldi's motion for attorneys' fees and costs. E. 87.

successfully enforced the WPCL in this case.[14] For people like Mr. Barufaldi, as well as for workers who are far less well-paid, the only thing that enables them to attract private attorneys to represent them is "the statutory assurance that [the attorney] will be paid a reasonable fee" through the fee-shifting provision. *Friolo I*, 373 Md. at 526 (quoting *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986)).

The Maryland Access to Justice Commission has eloquently described how fee-shifting enables meritorious litigation and encourages compliance with the law:

> The ideal scenario is one in which the legislature passes laws to express its values and priorities. While the legislature may not have the means to police enforcement, private citizens are able to secure counsel, and counsel are willing to take those cases precisely because they know that, even if their client has limited means, their fee will be covered by a fee award. Attorneys still bear the risk of losing their fee should they not prevail at trial, and thus, have an incentive to only accept meritorious cases. Potential defendants know that should they fail to comply with the law, the aggrieved will have few barriers in seeking redress. Thus rational defendants have a strong incentive to comply with the law in the first place. It follows that few cases will be brought, and when they are brought, they will be cases of merit.

Fee-Shifting to Promote the Public Interest at 8.

In sum, the consistent enforcement of the WPCL provides a substantial benefit to the general public by giving all Maryland employers a strong reason to pay their workers

[14] Mr. Barufaldi might conceivably have been able to ensure himself some economic benefit from this case by entering into a contingency fee arrangement with counsel instead of agreeing to pay by the hour. But it would have been economically unwise for any attorney to agree to represent Mr. Barufaldi on a contingency fee basis because, absent a fee-shifting award, the attorney would have ended up receiving a very low effective hourly rate for his or her services. Thus, this case aptly demonstrates the precise reason for the existence of the fee-shifting provision and the public need for fee awards to be routine rather than unpredictable.

on time and in full. Every plaintiff who successfully enforces the WPCL contributes to that public good. The only way for the WPCL to be enforced consistently is if workers who have suffered wage theft can attract private counsel based on the expectation of fee awards for successful litigation. That is the purpose of the fee-shifting provision, as the Court of Appeals recognized in *Friolo I* and *III*. The decision of the circuit court in this case — denying attorneys' fees without any case-specific good reason for doing so — undermines that purpose and encourages all employers to believe that they can get away with violating the WPCL.

C. Fee-shifting under the WPCL also gives defendants an appropriate incentive not to drive up the cost of litigation.

Another benefit of *Friolo I* and *III*'s presumption that losing defendants should bear the cost of litigation under the WPCL is that it gives defendants an incentive not to use tactics that unnecessarily increase the cost of litigation and waste the courts' time and resources.[15] The prospect of a fee award creates a strong incentive for the defendant to end the litigation early by settling before substantial fees have been incurred. Likewise, it gives the defendant good reason to refrain from tactics like resisting discovery and filing unnecessary motions which require the plaintiff to incur additional fees in responding. And it gives the defendant an incentive not to make specious arguments that invite legal errors on the part of the trial court which then require correction on appeal (or even

[15] This is especially true in the WPCL context, because unlike other fee-shifting statutes, the WPCL allows courts to award attorneys' fees "only in those situations where the employer acted wilfully — in the absence of a bona fide dispute." *Friolo I*, 373 Md. at 518. Thus, a defendant that is subject to a fee award under the WPCL is one that has deliberately violated the law.

multiple appeals, as in the present case), incurring further fees. In short, "the prospect of attorney's fees . . . deters dilatory tactics and discourages deep pocket defendants from over-litigating small cases to intimidate opposing parties." *Fee-Shifting to Promote the Public Interest* at 7.

Amici do not mean to imply that plaintiffs' attorneys never engage in tactics that unnecessarily increase the cost of litigation. But concerns about rewarding such behavior are fully taken into account by the usual method of determining the amount of attorneys' fees (as distinct from the question of whether to award fees at all, which is at issue in this appeal). The lodestar method, as described in *Friolo I* and *III* and a host of federal cases, compensates a successful plaintiff only for "the number of hours reasonably expended on the litigation." *Friolo I*, 379 Md. at 523. "[H]ours that [a]re 'excessive, redundant, or otherwise unnecessary' should be excluded . . . ." *Id.* at 524 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)). Defendants can, and often do, challenge fee petitions that seek payment for hours of work that they view as excessive.

II. Defendants' claims of inability to pay are irrelevant when deciding whether to award attorneys' fees to successful plaintiffs.

The circuit court in this case uncritically accepted the defendant's self-serving affidavit asserting that any award of attorneys' fees would likely render it insolvent. Courts should not consider such protestations of insolvency when deciding whether to award attorneys' fees (or how much to award) for several reasons: First, doing so gives defendants a perverse incentive to drive up the costs of litigation. Second, an award of attorneys' fees is a form of compensatory damages — requiring the defendant to bear

costs that were incurred as a result of its actions — and courts traditionally do not consider a defendant's ability to pay when awarding compensatory damages. Third, for a court to actually test the truth of a defendant's assertion of inability to pay, it would be necessary to conduct a second major litigation at the fee award stage. Instead, any issues related to a defendant's ability to pay should be resolved, in the first instance by the defendant in determining whether to engage in wage theft and scorched-earth litigation, and otherwise only when the plaintiff seeks to collect the judgment.

Accordingly, it is with good reason that courts around the country, applying analogous fee-shifting statutes, have held that defendants' assertions of inability to pay are not to be considered. *E.g.*, *Simpson v. Sheahan*, 104 F.3d 998, 1003 (7th Cir. 1997) ("The defendant's perceived ability to pay an attorney's fee award is not relevant to the determination of a reasonable fee."); *Inmates of Allegheny Cnty. Jail v. Pierce*, 716 F.2d 177, 180 (3d Cir. 1983) (holding that "the losing party's financial ability to pay is not a 'special circumstance'" justifying denial or reduction of a fee award); *Entm't Concepts, Inc., III v. Maciejewski*, 631 F.2d 497, 507 (7th Cir. 1980) ("[A]bility to pay is not a 'special circumstance' that will bar an award of attorneys' fees to a successful plaintiff."); *Johnson v. State of Mississippi*, 606 F.3d 635, 637 (5th Cir. 1979) (rejecting the argument that attorneys' fees should be denied because "the fee award must be paid from the limited budget of the State Board of Education and the financial burden will fall on the taxpayers of Mississippi"); *Disabled Patriots of Am., Inc. v. Taylor Inn Enters., Inc.*, 424 F. Supp. 2d 962, 967 n.8 (E.D. Mich. 2006) ("While the Court is not unsympathetic to the plight of small business owners such as the Defendant, his ability to pay attorney fees is

irrelevant to the question before this Court."); *Coppedge v. Franklin Cnty. Bd. of Educ.*, 345 F. Supp. 2d 567, 570 (E.D.N.C. 2004) ("Although sympathetic to the [defendant] school system's precarious financial condition, the court will not deny the award of attorney's fees on that basis."); *NAACP, Frederick Cnty. Chapter v. Thompson*, 671 F. Supp. 1051, 1054 (D. Md. 1987) ("[T]his Court is of the view that 'ability to pay is not a "special circumstance"' warranting a reduction or denial o[f] attorneys' fees." (quoting *Entm't Concepts*, 631 F.2d at 507)).

If courts were to allow defendants to avoid liability for attorneys' fees under the WPCL by complaining of poverty, then many defendants would have a strong incentive to engage in dilatory tactics to drive up the costs of litigation. The higher the fees incurred by the plaintiff in responding to such tactics, the more likely the court would let the defendant off the hook for paying those fees. (In addition, of course, those tactics serve to discourage the plaintiff by delaying any recovery and by creating the threat that the recovery will be wiped out by attorneys' fees if the court fails to properly award fees to the plaintiff.) It is hypocritical for a losing defendant — whose unlawful withholding of wages created the need for the litigation in the first place — to pay its own attorney to spend many hours defending a suit, only to then claim to be unable to pay the fees that the plaintiff has incurred in response. As the Supreme Court said in *City of Riverside v. Rivera*, "[t]he [defendant] cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response." 477 U.S. 561, 580 n.11 (1986) (quoting *Copeland v. Marshall*, 641 F.2d 880, 904 (D.C. Cir. 1980) (en banc)) (internal

quotation marks omitted). Maryland courts should not be permitted to give defendants a perverse incentive to engage in such behavior.

Moreover, an award of attorneys' fees is a type of compensatory damages.[16] The award covers the fees that were incurred by the plaintiff because of the defendant's unlawful actions which made the litigation necessary in the first place.[17] The amount of a fee award, as determined by the lodestar method, is based on the plaintiff's attorney's hourly rate and the number of hours of work that were reasonably expended on the case. *Friolo III*, 403 Md. at 453-54. Thus, a fee award is just like any other award of compensatory damages — it makes the defendant bear the costs generated by its actions, and thereby makes the plaintiff whole.

Courts traditionally do not consider a defendant's ability to pay when assessing compensatory damages, because that would be a logically irrelevant factor: ability to pay has nothing to do with whether the defendant has acted unlawfully, nor with how much

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[16] A fee award also has a deterrent effect, as discussed above. However, it is not a form of punitive damages. "[A]n award of attorney's fees is not intended to punish defendants. The penalty the defendant is obligated to pay is the damages award that results from litigating the underlying claim." *Simpson*, 104 F.3d at 1003. Both compensatory and punitive damages can have deterrent effects. Thus, punishment and deterrence are separate and distinct purposes. *See Bennis v. Michigan*, 516 U.S. 442, 452 (1996) ("[F]orfeiture . . . serves a deterrent purpose distinct from any punitive purpose."); *One 1984 Ford Truck, VIN No. 1FTCF15F1ENA87898 v. Balt. Cnty.*, 111 Md. App. 194, 207 (1996) (same).

[17] "An individual who has been harmed can point to two sources of injury — the damages she suffered in enduring the initial harm, and the amount she expended to redress the wrong by bringing the suit. If the latter must be deducted from the former, she will feel acutely that she has not been 'made whole.'" *Fee-Shifting to Promote the Public Interest* at 6.

harm the plaintiff has suffered as a result. *See, e.g., United States v. Charles George Trucking, Inc.*, 34 F.3d 1081, 1087 (1st Cir. 1994) ("As is true of any assessment of compensatory damages, the liable party's ability to pay should not influence the amount of the assessment."); *Vasbinder v. Ambach*, 926 F.2d 1333, 1344 (2d Cir. 1991) ("[Evidence of] the defendant's ability to pay . . . is not admitted or desirable during the liability and compensatory damages phase of the case."); *Darcars Motors of Silver Spring, Inc. v. Borzym*, 379 Md. 249, 274 (2004) ("[T]he general practice has been to withhold evidence of a defendant's ability to pay punitive damages 'until and unless the jury awards compensatory damages and decides to award punitive damages.'" (quoting *Montgomery Ward Stores v. Wilson*, 101 Md. App. 535, 551 (1994))). Poverty does not absolve a defendant of legal responsibility for its actions. If a defendant is effectively judgment-proof because it has no assets, then a plaintiff may of course be unable to collect on the judgment, but that does not stop courts from awarding compensatory damages in the first place. There is simply no reason to depart from this time-honored and sensible approach when dealing with the particular type of compensatory damages that is at issue here.

Furthermore, it is very easy for a defendant to make a self-serving assertion that a fee award would render it insolvent. Even if it were at all appropriate for courts to consider such protestations, surely it should go without saying that courts must allow their veracity to be tested through the usual adversarial process, and not simply accept them at face value. Thus, the plaintiff must have the opportunity to investigate and conduct discovery regarding the defendant's finances. Testimony and cross-examination

may be necessary to resolve disputed facts. There may be a need for expert testimony regarding the defendant's accounting practices or its projected future earnings. All in all, testing the truth of a defendant's claim of insolvency is likely to give rise to a second major round of litigation at the fee award stage — something that courts have often cautioned against. *E.g.*, *Fox v. Vice*, 131 S. Ct. 2205, 2216 (2011); *Cody v. Caterisano*, 631 F.3d 136, 145 (4th Cir. 2011). Rather than uncritically accepting defendants' self-serving assertions or commencing another round of litigation to verify them, courts must simply leave defendants to consider their finances when determining whether to try to get away with wage theft and whether to drive up the costs of litigation, by regularly awarding successful plaintiffs judgments reflecting defendants' liability, including liability for attorneys' fees.

III. The five-factor test sometimes used in ERISA cases should not be incorporated into fee determinations under the WPCL.

In evaluating whether to award attorneys' fees, the circuit court utilized a five-factor test, developed from trust law, that has been used in cases under the Employee Retirement Income Security Act (ERISA).[18] That five-factor test is inappropriate in any

[18] Those factors 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 attorneys' fees against the opposing parties would deter other persons acting under similar circumstances; (4) whether the parties requesting attorneys' 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. *See Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1028-29 (4th Cir. 1993) (en banc); s*ee also Eddy v. Colonial Life Ins. Co. of Am.*, 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'y of Dep't of Labor v. King*, 775 F.2d 666, 669 (6th Cir. 1985).

WPCL case because it is based on very different statutory language, it arises from traditional principles of trust law which have no relevance to the WPCL, and it was intended to serve different public policies.

First, the statutory language within the relevant fee provisions of the WPCL and ERISA is substantially different. The WPCL provides that a court "may award *the employee*" treble damages for a violation and "reasonable counsel fees and other costs" upon a finding that no bona fide dispute existed. Md. Code, Lab. & Empl. § 3-507.2(b) (emphasis added). *See also Programmers' Consortium, Inc. v. Clark*, 409 Md. 548, 564 (2009) (holding jury decides fact issue of bona fide dispute). That is, the people of Maryland have decided that as a matter of fundamental public policy, statutory attorneys' fees shall not be awarded to an employer and against an employee in a WPCL action, even when the employer is the victor. By sharp contrast, ERISA's statutory fee provision under which the five-factor test was developed allows fees to be awarded "to either party" to the action. 29 U.S.C. § 1132(g)(1) ("In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the [district court] in its discretion may allow a reasonable attorney's fee and costs of action to either party."). This, in part, reflects that fiduciaries may have a statutory obligation to bring ERISA suits against other fiduciaries. *See, e.g.*, 29 U.S.C. § 1105(a)(3) ("In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances: . . . (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts

under the circumstances to remedy the breach."). It also reflects that, at times, a case may involve common plan funds, which are for the benefit of many persons, and that a beneficiary may be sued by plan fiduciaries to recoup plan proceeds. *See Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356 (2006) (involving plan fiduciary suing beneficiary for reimbursement under plan). The five-factor test was developed in these ERISA-specific circumstances to ensure that equity is served in these various situations. It is inappropriate to incorporate ERISA's five-factor test into WPCL jurisprudence given that these two fee-shifting statutes contain quite different language and allow fees in different contexts.

Second, the five-factor test was developed from trust law and serves purposes different from those of the fee-shifting provision of the WPCL. One of ERISA's purposes was to establish federal standards of trust law and apply them to fiduciary conduct, especially with regard to plan administration. *See, e.g., Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989). Much of ERISA reflects a policy choice that employee plans be "operated under traditional trust law principles," in order to serve the same kinds of protective goals. *Central States, Se. & Sw. Areas Pension Fund* v. *Central Trans.*, 472 U.S. 559, 570 n.10 (1985). Courts have thus "drawn" on "the law of trusts that 'serves as ERISA's backdrop.'" *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 871 (2009) (quoting *Beck v. Pace Int'l Union*, 551 U.S. 96, 101 (2007)).

Fee awards have long been allowed in trust cases in the exercise of a court's equitable discretion. *See, e.g., Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S.

240, 257-58 (1975); *Dardovitch v. Haltzman*, 190 F.3d 125, 145 (3d Cir. 1999). Courts in trust cases traditionally taxed a "common fund" for attorney's fees and costs. *See Alyeska Pipeline*, 421 U.S. at 257; *Trustees v. Greenough*, 105 U.S. 527, 536 (1882) (recognizing the Court of Chancery's "long-established control over the costs and charges of the litigation, to be exercised as equity and justice may require, including proper allowances to those who have instituted proceedings for the benefit of a general fund"); *cf. Garcia v. Foulger Pratt Dev., Inc.*, 155 Md. App. 634, 663 (2003) ("In Maryland, the common-fund doctrine is a clearly accepted exception to the American Rule, though it is infrequently invoked.").

Trust law, however, also allowed courts to exercise equitable discretion and allocate the obligation to pay fees and costs to a litigant in appropriate circumstances. *See, e.g.*, *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 165-66 (1939) ("The sources bearing on eighteenth-century English practice — reports and manuals — uniformly support the power . . . to give . . . as much of the entire expenses of the litigation [including attorneys' fees] of one of the parties as fair justice to the other party will permit . . . ."); *Dardovitch*, 190 F.3d at 145-46; George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 871, at 195-98 & nn.53-54 (2d ed. rev. 1995) (listing authorities). Consistent with the principle that a court may award fees to protect trust funds and their beneficiaries pursuant to the flexible "power of equity in doing justice," *Sprague*, 307 U.S. at 167, ERISA expressly provides for an award of attorney's fees "to either party" in ERISA cases.

Indeed, courts in equity, in certain trust cases, have awarded fees even when the plaintiff did not receive the relief sought. *See, e.g.*, *Dardovitch*, 190 F.3d at 146 ("[A] trustee may be found liable for a beneficiary's attorney's fees when the trustee has acted wrongfully, . . . [i]n spite of the fact that the beneficiaries did not receive the relief they sought . . . .") (citing *In re Catell's Estate*, 38 A.2d 466 (Del. Ch. 1944)); *Daniel v. White*, 252 S.E.2d 912, 915 (S.C. 1979) (awarding attorneys' fees to losing plaintiff because he "spent much time and effort in the location of these heirs" to the estate). Trust cases even go so far as to explicitly state that courts may award fees "regardless of the outcome," *Hurley v. Noone*, 196 N.E.2d 905, 910 (Mass. 1964), or even to "an unsuccessful litigant," *In re Bittson's Trust*, 244 N.Y.S.2d 926, 931 (N.Y. Sup. Ct. 1963). These trust cases recognize the availability of awards to parties who did not receive a favorable judgment where the suit conferred some benefit to the trust or person related to it. *See Hurley*, 196 N.E.2d at 910; *In re Bittson's Trust*, 244 N.Y.S.2d at 931-33; *In re Catell's Estate*, 38 A.2d 466 (awarding fees on ground that the suit arose from trustee's failure to abide by trust terms, even though the party was unsuccessful in his claim to remove the trustee); *Daniel*, 252 S.E.2d at 914-15 (awarding fees to losing plaintiff because he performed a service to the trust and benefited others); *Old Colony Trust Co. v. Rodd*, 254 N.E.2d 886, 890 (Mass. 1970) (permitting consideration of fee award despite affirming lower court decree against the plaintiff); *see also, e.g.*, *Grein v. Cavano*, 379 P.2d 209, 214 (Wash. 1963) ("The party whose participation in the litigation brings benefit to the common fund is entitled to an award of reasonable attorney's fees regardless of his success in litigation.").

In fact, like its trust law precursor cases, the ERISA five-factor test has led to fees being considered even where a plaintiff was not entitled to relief on the merits. *See Antolik v. Saks, Inc.*, 463 F.3d 796, 803 (8th Cir. 2006) (leaving as "an open issue" whether defendant's "deceptive behavior and flagrant disregard of its ERISA disclosure duties may make this the rare case where some modest award is appropriate" even though plaintiffs were not entitled to relief on the merits).

ERISA's five-factor test rooted in trust law, of course, runs counter to the WPCL, which requires that a plaintiff prevail on a wage claim and that a jury find that the employer's failure to pay wages not be the result of a bona fide dispute. Also, unlike ERISA, under the WPCL, only employees and not employers can get fees. ERISA's five-factor test should not be incorporated into fee jurisprudence under the WPCL since the underlying statutory schemes are fundamentally different. The numerous reasons for the limiting principles in the ERISA test do not exist in wage payment cases, which, according to well-established law, warrant liberal awarding of fees to prevailing plaintiffs, as explained above.

Third, the ERISA five-factor test is inconsistent with binding precedent from the Court of Appeals and the language of the WPCL. In *Friolo I*, the Court of Appeals adopted the standard from *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983), in determining whether to award a fee:

> When such a [no bona fide dispute] finding is made in an action under [the WPCL] or when recovery is allowed under the Wage and Hour Law, courts should exercise their discretion liberally in favor of awarding a reasonable fee, unless the circumstances of the particular case indicate some good reason why a fee award is inappropriate in that case.

373 Md. at 518 (citing *Hensley*). *Friolo I*, following *Hensley*, created a presumption in favor of awarding fees, absent special circumstances. Yet the five-factor test used in ERISA cases has been determined to be a "more exacting" test than that set forth in *Hensley* because it does not contain such a presumption. *See Grand Union Co. v. Food Emp'rs Labor Relations Ass'n*, 808 F.2d 66, 71 (D.C. Cir. 1987) (acknowledging that the award of ERISA attorneys' fees could be governed by either the "less demanding" standard of *Hensley*, which presumes that attorneys' fees should be awarded absent exceptional circumstances, or the "more exacting" five-factor test, which does not contain a presumption that such fees should be awarded). The five-factor test not only undermines *Friolo I* and *Hensley*'s presumption in favor of an award of fees, but also impermissibly encourages the court to invade the province of the jury. This is because the first and fifth factors of the ERISA test — the degree of opposing parties' culpability or bad faith and the relative merits of the parties' positions — have already been decided by the jury when determining whether there was a bona fide dispute.

In sum, the circuit court should not have imported the five-factor ERISA test into a WPCL case. The policies served by ERISA's two-way fee-shifting provision and by the five-factor test associated with it are importantly different from the policies behind the WPCL's one-way, pro-plaintiff fee-shifting provision. The ERISA test, based on traditional equitable principles originating in the law of trusts, allows fees to be awarded to either party according to the court's sense of equity. The WPCL allows fees to be awarded only to a prevailing plaintiff, not a

defendant, and only when a jury has made a finding of no bona fide dispute; its purposes are to encourage voluntary compliance with the law and to enable employees who have suffered wage theft to enforce the law and recover their wages, by "providing a mechanism, here, the fee shifting statute, and an incentive, based on a realistic expectation of reasonable compensation, for attorneys to agree to take on wage dispute cases, even where the dollar amount of the potential recovery may be relatively small." *Friolo III*, 403 Md. at 457-58. Attempting to incorporate the inapposite principles of the ERISA test into cases under the WPCL is a misguided endeavor which undermines the important and distinct public policies animating the WPCL.

CONCLUSION

For the reasons stated above, this Court should reverse the circuit court's decision denying attorneys' fees to the plaintiff in this case. The Court should make it clear that trial courts must apply *Friolo I*'s presumption in favor of awarding fees to successful WPCL plaintiffs, and that neither defendants' self-serving claims of insolvency nor the five-factor ERISA test have any relevance to whether courts should award attorneys' fees under the WPCL.

Respectfully submitted,

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STATUTORY EXCERPTS

29 U.S.C. § 1105. Liability for breach of co-fiduciary

(a) Circumstances giving rise to liability
In addition to any liability which he may have under any other provisions of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

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29 U.S.C. § 1132. Civil enforcement

(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 action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title 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 Title 26.

STATEMENT OF TYPE STYLE AND POINT SIZE

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December, 2011, two copies of the foregoing brief were served by first class mail, postage prepaid, on:

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