No. 16-1264

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROBERTO TRUJILLO,
Plaintiff-Appellant,

v.

LANDMARK MEDIA ENTERPRISES, LLC, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF OF THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT FOR REVERSAL

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QUESTION PRESENTED

Whether section 510 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1140, prohibits retaliation against an employee who gives information regarding possible ERISA violations during the course of an independent ERISA plan audit required by law to be filed with the Department of Labor.

STATEMENT OF INTEREST

The Secretary of Labor has primary enforcement and regulatory authority for Title I of ERISA. 29 U.S.C. §§ 1134, 1135. The Secretary's interests include protecting beneficiaries, enforcing fiduciary standards, and ensuring the financial stability of employee benefit assets. See Sec'y of Labor v. Fitzsimmons, 805 F.2d 682, 689-94 (7th Cir. 1986) (en banc). The Secretary achieves these goals by, among other things, reviewing the annual financial reports, including the opinions of independent auditors, that ERISA plans must submit to the Department of Labor, and investigating potential violations and other concerns that arise from those reports and audits. 29 U.S.C. § 1134.

ERISA section 510, 29 U.S.C. § 1140, protects employees from retaliation for giving information in "any inquiry or proceeding" concerning potential ERISA violations. In this case, the district court dismissed plaintiff's claim that he was improperly discharged in retaliation for giving information in the course of two

independent ERISA plan audits that were necessary for preparing the plans' annual financial reports, in violation of section 510. The Secretary's participation in this appeal is important because the decision below, if upheld, will undermine the protection of employee benefit plans afforded by ERISA's mandatory reporting regime by inhibiting employees from giving information concerning ERISA violations during a plan's audit for fear of retaliation. In reaching its decision, the district court misread this Court's prior holding in King v. Marriott Int'l, Inc., 337 F.3d 421 (4th Cir. 2003), to remove the protections afforded by ERISA section 510 in the factual circumstances alleged here, which are distinguishable from those in King. While King rejected section 510 protection for unsolicited internal complaints to management, the decision did not foreclose protection where information is given during an ERISA-required plan audit. The Secretary therefore has a compelling interest in this Court's correction of the district court's error, and submits this brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE CASE

A. Factual Background[1]

In January 2015, plaintiff Robert Trujillo was hired by defendant Dominion Enterprises, Inc. to work as the Director of Benefits & Safety. Trujillo v.

[1] This is an appeal from the district court's grant of defendants' motion to dismiss. The Factual Background is therefore based on the district court's March 9, 2016 dismissal order and allegations from Trujillo's complaint.

Landmark Media Enters., LLC, No. 2:15-cv-518-RAJ-RJK, at 1 (E.D. Va. March 9, 2016) (order granting motion to dismiss) ("Order"). Dominion shares a headquarters with defendant Landmark Media Enterprises, LLC. Compl. ¶¶ 8-9. Dominion and Landmark also share a Chief Executive Officer, Chief Operating Officer, Chief Financial Officer ("Blevins"), and Vice President of Human Resources ("Blake"); Dominion has its own Vice President of Management Development, Training, Recruiting. Id. ¶¶ 11-15. Dominion, Landmark, and these various individuals are all co-defendants in this action. Order, at 1. Dominion and Landmark each sponsor ERISA-covered defined contribution pension plans ("Plans") for their employees that are administered by Vanguard. Compl. ¶¶ 8-9, 17. As part of his job, Trujillo became a fiduciary of the Plans with signatory authority over the Plans' assets, and he reported to defendants with respect to both Plans. Id. ¶¶ 17-18.

In May 2015, the Plans began their annual audits. Id. ¶¶ 18, 20. KPMG was initially retained to conduct the independent audits, but on September 10, 2015 (about one month before the audits were due) "the auditing task [was] removed from KPMG and given to the local firm of Wall, Einhorn & Chernitzer." Id. ¶ 21. Even though Wall Einhorn "had no prior working relationship" with defendants, it was "hired to handle the benefit plan audits on a trial basis" because the firm's "staff included a newly hired senior manager who was . . . a former executive" of

Dominion and Landmark. Id. These audits provided the information necessary for completing the Plans' Form 5500, an annual report that must be filed with the Department of Labor ("DOL") and the Internal Revenue Service ("IRS"). See id. ¶¶ 18, 21-22.

In connection with the Landmark Plan's audit, Trujillo "and his staff held a meeting with Vanguard" and gave Vanguard the necessary reports (which were not previously provided) to verify whether participants worked the hours necessary to vest, at "which [point] it was determined that Vanguard was improperly vesting participants in the plan." Id. ¶ 18. The "various vesting-related errors in the [Landmark] retirement plan," Order, at 1, resulted in "participants who should have been vesting los[ing] their vested benefit of employer contribution matches to their plan accounts." Compl. ¶ 18 (funds were instead "unlawfully diverted" to Landmark). As the Landmark Plan's audit progressed, Trujillo communicated the nature and extent of the improper vesting to Blevins and Blake, who responded by "order[ing Trujillo] not to determine the extent of the errors that occurred prior to 2009." Id. ¶ 19. In addition to the Landmark Plan's audit, Trujillo also "work[ed] on finalizing an audit" of the Dominion Plan. Id. ¶ 20. The Dominion Plan's audit revealed that Dominion's payroll department, managed by Blevins, "was not properly segregating plan participant employee contribution dollars in its 401(K) Plan." Order, at 1-2.

As the audits proceeded, Trujillo "kept [Dominion and Landmark] updated on the status of these two issues," Compl. ¶ 21, by "submitt[ing] weekly reports about these issues to the Vice President of Human Resources, coordinat[ing] strategy meetings with the Chief Financial Officer's staff, and discuss[ing] the matter with Defendants' ERISA Counsel." Order, at 2. Trujillo's information led to further internal inquiries regarding the extent of ERISA breaches and violations. Id. at 5. Prior to completing these audits for each Plan's Form 5500, however, Blevins "forced the internal management of the benefit plan audits for the Form 5500 audits away from the benefits department to her finance and accounting staff," Compl. ¶ 21, and then "threatened, with approximately one week left to file the Form 5500's, not to sign off on the financial statements required to complete the Form 5500 filings for the [Plans]," id. ¶ 22.

In order to ensure timely completion of the audits and filing of each Form 5500, as well as to fashion a proper remedy for the Plans, Trujillo scheduled and participated in an October 7, 2015 meeting with, among others, outside counsel and Landmark's Vice President of Tax and Audit; he also participated in a similar meeting on October 9, 2015. Id. ¶ 22. During the week of October 12, 2015, as Trujillo "was finalizing efforts to complete a timely filing of the Form 5500's," he further advised management that the "method of compensation for 401(k)

contribution purposes" had "undercut[ ] participant contributions and should be remedied." Id. ¶¶ 23-24.

Dominion's chief accounting officer advised Trujillo that defendants would follow Trujillo's "recommended strategy for completing the Form 5500 filings." Id. ¶¶ 26-27. Each Form 5500 was "filed by the October 15, 2015 deadline following [Trujillo] working directly with Wall Einhorn," the outside auditing firm. Id. ¶¶ 26-27. Before signing each Form 5500 for submission, Trujillo "made edits to the Rep Letters" that were attached. Id. ¶ 27.[2] Trujillo's edits were rejected, but each Form 5500 was submitted with his signature. Id. ¶¶ 27-28. Trujillo alleges that "Defendants gave [him] the impression that they would make the full and necessary corrections to the breaches in order to obtain [his] signature on the Rep Letters for the Form 5500 filings." Id. ¶ 28. Trujillo was terminated less than a week after each Form 5500 was filed. Id. ¶¶ 27-28.

B. Proceedings Below

In December 2015, Trujillo filed a pro se complaint alleging that he was terminated in retaliation for giving information to defendants regarding various ERISA violations during the course of the two plan audits described above, in violation of ERISA section 510, 29 U.S.C. § 1140. See Compl. ¶¶ 5, 16-28, 33.

[2] "Rep Letters" usually refers to the management representation letters that accompany the Form 5500 filing and confirm representations given to the independent auditor during the audit.

In March 2016, the district court dismissed Trujillo's complaint for failure to state a claim under ERISA section 510. Order, at 1-5. The district court held that Trujillo did "not allege that he testified (or was about to testify) in any 'inquiry or proceeding' or gave information in an 'inquiry or proceeding,'" as required by section 510. Id. at 5. The court found the outcome controlled by this Court's decision in King v. Marriott Int'l, Inc., 337 F.3d 421 (4th Cir. 2003), which held that ERISA section 510 does not provide a cause of action for employees who make unsolicited internal complaints to management concerning potential ERISA violations. Order, at 3-5. The district court construed Trujillo's complaint to allege only that he "provided information about ERISA violations to a number of individuals, who [then] initiated an 'internal inquiry'" not that he gave any information in an inquiry. See id. at 5. Accordingly, the court concluded that Trujillo only made unsolicited internal complaints and that King precluded Trujillo's cause of action.[3]

SUMMARY OF ARGUMENT

The district court improperly ignored the pro se plaintiff's allegations that defendants discharged him in retaliation for providing information about defendants' long-standing ERISA violations during two independent plan audits

[3] Trujillo also asserted a state law defamation claim. Order, at 1-2, 6. Upon dismissing the ERISA section 510 claim, the district court declined to exercise supplemental jurisdiction over this state law claim and ordered dismissal of the entire case. Id. at 6.

that were required under ERISA. The plain language of ERISA's anti-retaliation provision, contained in section 510, protects employees like Trujillo who provide information during the annual audit of an ERISA plan. Section 510 protects employees who provide information about ERISA violations in "any inquiry," and dictionary definitions and court decisions support reading "any inquiry" to include audits, such as the plan audits required by ERISA. This reading of section 510 not only protects ERISA plans by encouraging employees to identify and raise concerns during the plan's audit, but it also preserves the integrity of the audit, a statutory requirement necessary for the proper reporting and monitoring of ERISA plans. This reading also comports with ERISA's protective purposes and its emphasis on accurate plan reporting; absent such protection, employees like Trujillo cannot fulfill ERISA's mandate to provide accurate reporting about ERISA plans without risking their livelihoods. Based on the plain language and the purpose of section 510, plaintiff stated a claim that he was unlawfully terminated because he gave information in the course of independent plan audits required by ERISA.

ARGUMENT

ERISA Section 510 Protects Employees Who Give Information in an ERISA Plan Audit

"ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." Shaw v. Delta Air

Lines, Inc., 463 U.S. 85, 90 (1983). The statute's "closely integrated regulatory system . . . included various safeguards to preclude abuse and 'to completely secure the rights and expectations brought into being by this landmark reform legislation.'" Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 137 (1990) (quoting S. Rep. No. 93-127, p. 36 (1973)). "[P]rominent among the[ ] safeguards" included by Congress is ERISA section 510, id. at 137, the statute's anti-retaliation provision, which reads, in relevant part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to [ERISA].

29 U.S.C. § 1140 (emphasis added).

This Court analyzed ERISA's anti-retaliation provision on one prior occasion in King v. Marriott. The employee in King alleged "that she was discharged for complaining about and for refusing to violate" ERISA when she objected to various proposed asset transfers involving Marriott's ERISA-covered medical plan. 337 F.3d at 423. The King Court considered whether ERISA section 510 provides a cause of action for an employee such as King who is terminated for making unsolicited "internal" complaints to management concerning potential ERISA violations. Id. at 426-28.

In order to decide the issue, the Court examined the scope of the phrase "inquiry or proceeding" contained in section 510's anti-retaliation provision. Id.

The Court first found that the term "proceeding" means "legal or administrative" proceedings. Id. at 427-28. In support, the Court referenced its prior interpretation of the word "proceeding" in the Fair Labor Standards Act (FLSA), as well as the comparatively broader "equivalent anti-retaliation provisions in" other federal statutes, such as Title VII of the Civil Rights Act of 1964. Id. at 427 (citation omitted). The Court then held that the more expansive phrase "inquiry or proceeding" in ERISA section 510 encompassed "the legal or administrative, or at least something more formal than written or oral complaints made to a supervisor." Id. (emphasis added).

Applying this definition, the Court held that King's claim could not proceed under section 510. Id. at 427-28. There were no allegations about a proceeding: "Nowhere in the complaint does there appear any allegation that King had testified [or was about to testify] in any proceeding (legal, administrative, or otherwise), . . . [n]or is there any allegation that she had given information in such a proceeding." Id. There was also nothing "more formal than written or oral complaints made to a supervisor," because King only alleged she had made "internal complaints [to] some of her co-workers, her supervisor, and some of Marriott's attorneys." Id. at 428. King's complaints therefore "d[id] not bring her within the ambit of section 510." Id.

The King decision left unanswered what qualifies as "something more formal" than internal complaints to management – yet short of legal or administrative proceedings – for the purpose of establishing an "inquiry." This case presents an opportunity for this Court to decide that open question. As discussed below, Trujillo's allegations that he provided information concerning possible ERISA violations during an ERISA-required independent plan audit fall within the protective scope of section 510.

A. The District Court Misconstrued Trujillo's Pro Se Complaint

Dismissal of a complaint "is proper only if the plaintiff has failed 'to present factual allegations that state a claim to relief that is plausible on its face.'" Jehovah v. Clarke, 798 F.3d 169, 176 (4th Cir. 2015) (quoting Jackson v. Lightsey, 775 F.3d 170, 178 (4th Cir. 2004)). Thus, in reviewing a dismissal for failure to state a claim, this Court "must assume all well-pled facts to be true and draw all reasonable inferences in favor of the plaintiff." SD3, LLC v. Black & Decker (U.S.) Inc., 801 F.3d 412, 418 (4th Cir. 2015) (citation omitted). Where, as here, plaintiff proceeds pro se, any "document filed pro se 'is to be liberally construed' . . . and a 'pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.'" Erickson v. Pardus, 551 U.S. 89, 94 (2007) (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)); Noble v. Barnett, 24 F.3d 582, 587 n.6 (4th Cir. 1994).

The district court failed to follow these principles, resulting in a misreading of Trujillo's claims and erroneous dismissal of his case. Rather than liberally construe Trujillo's pro se allegations, the court focused on Trujillo's single allegation that he gave information that "led to an internal inquiry." Order, at 5. According to the district court, that lone allegation established that Trujillo merely triggered an inquiry, like the plaintiff in King, and did not give information or participate "in any inquiry" under section 510. Id. The court's reading of that allegation in isolation from the rest of the allegations is contrary to this Court's instruction that "[d]etermining whether the complaint satisfies th[e pleading] standard necessarily entails a case-by-case assessment of the complaint as a whole." Teachers' Ret. Sys. of La. v. Hunter, 477 F.3d 162, 174 (4th Cir. 2007) (emphasis added); see Tobey v. Jones, 706 F.3d 379, 387 (4th Cir. 2013) (same); cf. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322-23 (2007) ("inquiry is whether all of the facts alleged, taken collectively, give rise [to a claim], not whether any individual allegation, scrutinized in isolation, meets that standard").

Consideration of the whole complaint belies the district court's narrow reading of Trujillo's claims. In particular, the court ignored Trujillo's allegations that he had participated and provided information in two formal plan audits by an outside, independent auditor. See, supra, at 2-6. For example, Trujillo alleges

that he gave information during the course of the Dominion Plan audit that revealed improprieties with employee contributions to that 401(k) plan, and that he gave Vanguard the necessary information to determine that participants were not being properly vested in the Landmark Plan. Compl. ¶¶ 18, 22, 24. With respect to both Plans' audits, Trujillo provided information to the auditors, to defendants, and to outside counsel, and participated in strategy meetings with them, in order to keep them "updated on the status of these two issues" with the respective Plans. Id. ¶¶ 21, 22. Trujillo ultimately signed each Form 5500 submitted with the audits, though the attached Rep Letters did not include his edits detailing the errors concerning the Plans; shortly thereafter, Trujillo was terminated. Id. ¶¶ 21, 22, 27-28.

The court acknowledged that Trujillo met section 510's requirement to "give information." Order, at 2. In its factual recitation, the court acknowledged that Trujillo "g[ave] information" by: "submitt[ing] weekly reports about the [Plans'] issues to the Vice President of Human Resources, coordinat[ing] strategy meetings with the Chief Financial Officer's staff, and discuss[ing] the matter with Defendants' ERISA Counsel"; "advis[ing] the Defendants that numerous ERISA violations occurred for years"; and "attempting to coordinate a suitable remedy to protect the plan, participants, beneficiaries and the fiduciaries." Order, at 2.

Construed liberally and read in its entirety, the complaint alleges that Trujillo was terminated in retaliation for participating and giving information to independent auditors and defendants during the Plans' audits regarding "numerous ERISA violations [that] occurred for years and [for purposes of] coordinat[ing] a suitable remedy." See Compl. ¶¶ 28, 33-24. Instead, the district court perfunctorily dismissed Trujillo's claims without even mentioning the Plans' audits, and ignored Trujillo's extensive alleged actions and his provision of information in the context of those audits. Order, at 5.[4]

The district court's disregard of these allegations was error because, as discussed below, audits are a type of "inquiry" under section 510. These allegations distinguish the claims here from those in King. The district court is correct that Trujillo may have given information that led to an internal inquiry, but the complaint also alleges that Trujillo gave the information during the two formal,

[4] Trujillo advanced this reading of the complaint in his briefing below. In his response to defendants' dismissal motion, Trujillo stated: "For the Defendants' [sic] to claim that all of the formality in the Present Case's audit process and all the representatives involved in the Present Case's audit process, which included the Defendants' executive team, numerous department directors, two law firms, an outside auditing firm and the Defendants' acknowledging the audit's existence on a federal filing, does not meet the King threshold of: 'something more formal than written or oral complaints made to a supervisor' is hogwash." Pls.' Mem. Resp. in Supp. of Denying the Defs.' Mot. to Dismiss Pursuant to Rule 12(b)(6), at 6 (filed Feb. 26, 2016); see id. at 5 ("Complaint expressly establishes that the required level of formality was met through a formal audit review" of the Plans' errors, with "executives, directors and systemic administrators involved in the formal audit review [and a] review of the audit's status and remedy options . . . presented to the outside auditing firm").

independent audits and the internal inquiries, including information to "coordinate a suitable remedy to protect the plan." Order, at 2. Even if Trujillo's allegations were "inartfully pleaded," the district court and this Court have a heightened obligation to liberally construe a pro se litigant's allegations, see Erickson, 551 U.S. at 94; the claims here describe a series of events and a context that are distinct from King and within the ambit of section 510's protection.

B. An ERISA Plan Audit is a Type of "Inquiry" under Section 510

ERISA does not define the term "inquiry," and "[w]hen a statute does not define a term, we typically give the phrase its ordinary meaning." FCC v. AT&T, Inc., 562 U.S. 397, 403 (2011) (internal quotations omitted). Dictionaries define an "inquiry" as "[a] request for information, either procedural or substantive." Black's Law Dictionary (10th ed. 2014); The Oxford English Dictionary (2d ed. 1987) ("action of seeking, esp. (now always) for truth, knowledge, or information concerning something; search, research, investigation, examination"); see Sexton v. Panel Processing, Inc., 754 F.3d 332, 335 (6th Cir. 2014) (noting dictionary definition of "inquiry"); George v. Junior Achievement of Cent. Ind., Inc., 694 F.3d 812, 815-16 (7th Cir. 2012) (same); Nicolaou v. Horizon Media, Inc., 402 F.3d 325, 329 (2d Cir. 2005) (same). In King, this Court held that while an "inquiry" under section 510 need not be "legal or administrative," it must be

"something more formal than written or oral complaints made to a supervisor." 337 F.3d at 427.

Trujillo alleges that he provided information in the course of independent plan audits conducted by Wall Einhorn and that its auditor's opinions were attached to the Form 5500 filed by the Plans on October 15, 2015. Compl. ¶¶ 21, 27. A plan audit is an examination of an ERISA plan's financial records that must be conducted before the plan files its Form 5500 annual financial report with the DOL and IRS. ERISA sections 103, 104, 29 U.S.C. §§ 1023, 24; see Fink v. National Sav. & Trust Co., 772 F.2d 951, 956 (D.C. Cir. 1985) (discussing annual filing requirements); see also Selecting An Auditor For Your Employee Benefit Plan, U.S. Dep't of Labor Emp. Benefits Sec. Admin., http://www.dol.gov/ebsa/publications/selectinganauditor.html (last visited May 5, 2016) ("Federal law requires employee benefit plans with 100 or more participants to have an audit as part of their obligation to file an annual return/report (Form 5500 series).").[5] Preparation of the annual report therefore requires retention of "an independent qualified public accountant [IQPA], who shall conduct such an examination of the financial statements of the plan, and of other books and records of the plan, as the accountant may deem necessary [to determine] whether the financial statements and schedules [comply] with generally accepted accounting

[5] The reporting requirements are subject to certain waivers and exceptions not applicable here. See, e.g., 29 C.F.R. § 2520.104-46 (small plan waiver).

principles." ERISA section 103(a)(3)(A), 29 U.S.C. § 1023(a)(3)(A); see also ERISA section 103(b)(2), (3), 29 U.S.C. § 1023(b)(2), (3) (detailing information that "annual report . . . shall include in a financial statement"). The IQPA "shall also offer an opinion as to whether" the requisite information "present[s] fairly and in all material respects the information contained therein when considered in conjunction with the financial statements taken as a whole," and this opinion "shall be made a part of the annual report." ERISA section 103(a)(3)(A), 29 U.S.C. § 1023(a)(3)(A). Once filed, the Secretary of Labor "shall make copies of such annual reports available for [public] inspection," ERISA section 104(a)(1), 29 U.S.C. § 1024(a)(1), and the plan administrator must provide a copy to any participant or beneficiary upon written request, ERISA section 104(b)(4), 29 U.S.C. § 1024(b)(4). This requirement to produce a report with an audit for the government is akin to a standing government "inquiry" into the plan, and Trujillo also provided information to the government in that "inquiry."

With its specific and detailed statutory requirements, an ERISA-required plan audit has the requisite formality to qualify for section 510 protection under King's interpretation of section 510 and the dictionary definitions of "inquiry." Moreover, an ERISA plan's statutorily-required plan audit falls within the dictionary definition of an "audit," which is defined as an "official examination and verification of accounts and records, esp[ecially] of financial accounts." See

Webster's Unabridged Dictionary (2d ed. 1987) (emphasis added); see also Black's Law Dictionary (10th ed. 2014) (defining "audit" as "[a] formal examination of an individual's or organization's accounting records, financial situation, or compliance with some other set of standards") (emphasis added). These dictionary definitions of "audit" are consistent with the explicit formal nature of ERISA-required plan audits.

Reading "audits" as a form of "inquiry" within the ambit of section 510 is also consistent with Supreme Court and this Court's decisions. Courts commonly refer to an "audit" as a type of "inquiry." See New York v. Cathedral Academy, 434 U.S. 125, 132 (1977) (describing "audit" as one "sort of detailed inquiry"); United States v. Head, 641 F.2d 174, 180 (4th Cir. 1981) (using "audit" and "inquiries" interchangeably). Both the Supreme Court and the Fourth Circuit treat an audit as an example of an inquiry, especially with respect to investigations under the tax code. In United States v. Bisceglia, the Supreme Court explained that the Internal Revenue Code gives the IRS "a broad mandate to investigate and audit 'persons who may be liable for taxes,'" by summoning individuals to testify and examining records as may be "'relevant or material to such inquiry.'" 420 U.S. 141, 145 (1975) (quoting 26 U.S.C. §§ 7601, 7602) (emphasis added); United States v. Rosinsky, 547 F.2d 249, 252 (4th Cir. 1977) (same); see United States v. Thorson, 633 F.3d 312, 333-34 (4th Cir. 2011) (Gregory, J., dissenting)

(referencing the same IRS investigation as both an "official civil inquiry" and "civil audit"); United States v. Browney, 421 F.2d 48, 52 (4th Cir. 1970) (Sobeloff, J., concurring) (making no distinction between a "tax audit" and "tax inquiry"). The Courts' use of "audit" and "inquiry" as substitutes in the tax context carries particular weight in this case, because Form 5500 reports are filed with both the DOL and the IRS in order to ensure compliance with ERISA and the tax code, respectively. See 29 U.S.C. § 1023; see also 26 U.S.C. §§ 6058, 6059, 29 U.S.C. § 1365 (describing the information reported to IRS); Tupper v. United States, 134 F.3d 444, 446 (1st Cir. 1998) (Form 5500 "must be filed annually with the IRS"). Just as the courts generally consider an audit to be one kind of inquiry, the term "inquiry" in section 510 is best read to encompass plan audits. See George, 694 F.3d at 815-16 (analyzing whether the phrase at issue could be "substituted for 'inquiry' in § 510"); Grant Thornton, LLP v. FDIC, 435 F. App'x 188, 207 (4th Cir. June 17, 2011) (noting, in support of proposed definition, that "[w]e could easily substitute those definitional words . . . and the statute would continue to mean" the same thing).[6]

[6] To be clear, while "inquiry" and "audit" can be substitutes, they are not synonyms because the former term is much broader than the latter. For example, the Sixth Circuit recognized that "any inquiry" may include a simple question, Sexton, 754 F.3d at 340, but it is unlikely that a simple question would meet the relatively more formal requirements of an audit.

This construction of "inquiry" is also consistent with this Court's prior decision in King. As explained earlier, supra at 9-11, the King decision construed "proceeding" in section 510 as referring to "administrative or legal proceedings" and then construed the phrase "'inquir[ies] or proceeding[s]' referenced in section 510 [a]s limited to the legal or administrative, or at least to something more formal than written or oral complaints made to a supervisor." (emphasis added). Defendants argued below that King limited the term "inquiry" to an "audit initiated by a government entity," and excluded "internal review[s] of one's [own] retirement plan . . . ." See Defs.' Reply Br. in Supp. of Their Mot. to Dismiss Pursuant to Rule 12(b)(6), at 2-3 (filed Mar. 3, 2016). Defendants mischaracterize Trujillo's claim. Trujillo provided information during independent audits of the plans. An audit is more than just an "internal review," it is a formal examination by an independent outside auditor (here, Wall Einhorn) that is specifically required by ERISA. More importantly, defendants provide no support for their cramped reading of King or the term "inquiry" in section 510 – nor could they – because the King decision contains no reference to the arbitrary line that defendants wish to draw.[7] Instead, the King Court intentionally left open the possibility that anything

[7] Likewise, nothing in King suggests that "proceeding" must be governmental or external, and that, for example, a company's or a plan's internal administrative proceedings would not qualify for section 510 protection. 337 F.3d at 427-28. For example, the Supreme Court has called the plan's claim decision-making processes

more formal than unsolicited internal complaints to a supervisor could be an "inquiry," 337 F.3d at 427, and a broad reading of "any inquiry" to include plan audits is more consistent with Congress' use of the statutory phrase "any inquiry" in section 510. See Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 9-10 (2011) (FLSA's anti-retaliation provision's inclusion of "any" alongside a term "suggests a broad interpretation") (quoting Republic of Iraq v. Beaty, 556 U.S. 848, 856 (2009) ("Of course the word 'any' . . . has an 'expansive meaning.'") (citation omitted)).

Trujillo participated in the Plans' mandatory audits, supplied information during those audits, and signed the required public filings. He raised questions within the context of the audits about ERISA violations that led to further internal discussions with company management. These actions more than suffice, under ERISA section 510, as "giv[ing] information" in "any inquiry," and clear the bar set by King for "something more formal than written or oral complaints made to a supervisor."

C. The Remedial Purposes of ERISA Warrant Including Plan Audits Within the Scope of Section 510 Inquiries

Even apart from the plain language, basic principles of statutory construction support an interpretation of "any inquiry" that includes plan audits. As a remedial

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"internal administrative proceedings." Conkright v. Frommert, 559 U.S. 506, 517 (2010).

statute, ERISA "should be liberally construed in favor of protecting the participants in employee benefits plans," Teamsters Joint Council No. 83 v. Centra, Inc., 947 F.2d 115, 123 (4th Cir. 1991), and this Court applied this interpretive principle in construing section 510. See Conkwright v. Westinghouse Elec. Corp., 933 F.2d 231, 236-37 (4th Cir. 1991). ERISA's anti-retaliation provision is critical to achieving the protective purposes of the entire statutory scheme, as the Supreme Court has noted that section 510 was "prominent among the[ ] safeguards" that were included "to preclude abuse and 'to completely secure the rights and expectations'" that ERISA established. See Ingersoll-Rand, 498 U.S. at 137.

Part of ERISA's protective regime is "seek[ing] to make the benefits promised by an employer more secure by mandating certain oversight systems and other standard procedures." Gobeille v. Liberty Mut. Ins. Co., 136 S. Ct. 936, 943-44 (2016). To that end, ERISA imposes "extensive . . . reporting, disclosure, and recordkeeping requirements" on ERISA-covered plans. Id. at 944. These requirements fulfill "[o]ne of the basic goals of ERISA," which is "the protection of interests of pension plan participants through mandatory disclosure of financial information." United States v. Nolan, 136 F.3d 265, 271 (2d Cir. 1998) (citing 29 U.S.C. § 1001(b)); accord United States v. Sarault, 840 F.2d 1479, 1484 (9th Cir. 1988) ("One of the forces behind the enactment of ERISA was the need to have more information available to plan beneficiaries so they can enforce their own

rights."). To ensure compliance by ERISA plans with the statute's reporting, disclosure, and recordkeeping requirements, Congress chose to rely on annual Form 5500 reports and plan audits. See ERISA sections 103, 104, 29 U.S.C. §§ 1023, 1024. The Form 5500 is so important that Congress made it a crime to purposefully fail to file the report, United States v. Blood, 806 F.2d 1218, 1219, 1222 (4th Cir. 1986) (conviction for failure to file annual financial reports), or to make any false statement or knowingly concealing any material facts in such filing, United States v. Wiseman, 274 F.3d 1235, 1242-43 (9th Cir. 2001) (criminal liability for false Form 5500 statement, and citing similar cases); see ERISA sections 501, 519, 29 U.S.C. §§ 1131, 1149.

Congress's objectives would go unrealized in several important respects if employees such as Trujillo could face retaliation for giving information concerning potential ERISA violations during the course of these statutorily-mandated plan audits. As an initial matter, protecting employees who participate and give information about potential ERISA violations in a statutorily-mandated plan audit should result in earlier detection and resolution of errors. As a result of information provided to Vanguard during the 2015 Landmark audit, for example, defendants learned that employees had been improperly vested since 2006, resulting in almost a decade of errors. Compl. ¶ 19. ERISA's primary objective of protecting participants' promised benefits would be better achieved if, as here, a

plan's issues are discovered sooner rather than later through openly giving information during a plan audit without fear of termination. In order to protect the participants in employee benefits plans as Congress intended, section 510's "any inquiry" language should be "liberally construed" to encompass ERISA-required plan audits.

In construing anti-retaliation provisions like ERISA section 510, this Court took a similar interpretative approach in defining the scope of Title VII's anti-retaliation provision. In Crawford v. Metropolitan Government of Nashville, the Supreme Court favored a broad interpretation of Title VII's anti-retaliation protections in recognition that anti-retaliation provisions should be construed to achieve the "primary objective of avoiding harm to employees," because "fear of retaliation is the leading reason why people stay silent instead of voicing their concerns." 555 U.S. 271, 277-79 (2009) (internal quotations omitted). This Court, following Crawford, overturned circuit precedent that had construed Title VII's anti-retaliation provision in a manner that "deter[red] harassment victims from speaking up by depriving them of their statutory entitlement to protection from retaliation," finding that "[s]uch a lack of protection [from retaliation] is no inconsequential matter." Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264, 283 (4th Cir. 2015) (en banc) (citing Crawford, 555 U.S. at 279).

Likewise, employees giving information concerning ERISA violations during a plan audit would be forced between a rock and hard place if they are unprotected from retaliation. See, e.g., Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960) ("For it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees to quietly accept [unlawfulness]."). Employees would be in a particular bind here because of the potential criminal liability for filing false reports as well as the likelihood that the individual with information about ERISA violations is a fiduciary with a heightened obligation to report issues and file accurate reports with respect to his employee benefit plan. See Griggs v. E.I. DuPont de Nemours & Co., 237 F.3d 371, 379-81 (4th Cir. 2001) (recognizing fiduciary's affirmative duty to inform participants about material issues concerning benefits); see also Nicolaou, 402 F.3d at 330-32 (Pooler, J., concurring) (noting the importance of protecting fiduciary actions under section 510 because they are obligated to protect the plan); ERISA § 404, 29 U.S.C. § 1104 (fiduciary duties of loyalty and prudence). Trujillo, as an employee-fiduciary who signed the filings, was caught in such a bind. Section 510 should not be construed to force an employee like Trujillo to choose between fulfilling his statutory obligations and losing his job, on the one hand, and keeping his job and facing civil and criminal liability, on the other.

Moreover, the annual Form 5500 is a critical component of the Department of Labor's oversight over ERISA plans and enforcement of Title I's directives. See Targeting And Limited Review, U.S. Dep't of Labor Emp. Benefits Sec. Admin., https://www.dol.gov/ebsa/oemanual/cha53.html (last visited May 5, 2016) (discussing enforcement program's targeting approach, including through "detailed review and analysis of annual reports [and] supporting financial statements"); cf. United States v. Eichholz, 395 F. App'x 532, 534 (11th Cir. Aug. 31, 2010) (DOL began civil investigation based on Form 5500 filings). In many cases, the Secretary learns of ERISA violations from the filing of a Form 5500, because these forms and accompanying audits provide a quick means of evaluating an ERISA plan's financial condition and transactions during the year. As the Supreme Court observed in examining the FLSA's anti-retaliation provision, "[w]hy would Congress want to limit the enforcement scheme's effectiveness by inhibiting use of" a means of learning about statutory violations? See Kasten, 563 U.S. at 11-12. Congress would not, and here it mandated those means – i.e., the annual reports and audits. Cf. NLRB v. Scrivener, 405 U.S. 117, 122 (1972) (adopting interpretation of NLRA that would "prevent [NLRB's] channels of information from being dried up"). Moreover, viewing the annual report like a standing "inquiry" by DOL aligns with dictionary definitions of "inquiry," and the signature under penalty of perjury (like Trujillo's signature in this case) resembles the type of

"testi[mony]" that triggers section 510 protection. See 2015 Form 5500 Annual Report of Employee Benefit Plan, U.S. Dep't of Labor Emp. Benefits Sec. Admin., https://www.dol.gov/ebsa/pdf/2015-5500.pdf (last visited May 5, 2016) (plan administrator signs under penalty of perjury). ERISA's remedial scheme and its protection of participants would be undermined if individuals who participate and give information in the preparation of annual Form 5500 reports and audits are not protected from retaliation, because the threat of retaliation makes it less likely that the Form 5500 will be complete and accurate. See Kasten, 563 U.S. at 11-12 (FLSA's "antiretaliation provision makes [its] enforcement scheme effective by preventing 'fear of economic retaliation'").

"It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.' . . . A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme,' . . . and 'fit, if possible, all parts into an harmonious whole.'" FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-33 (2000) (citations omitted). Narrowly construing section 510 to exclude information given in an audit undermines the purpose and operation of both ERISA's anti-retaliation provision and its formal reporting regime. See Crawford, 555 U.S. at 277-78; see also Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67 (2006) (anti-retaliation provision must be interpreted "to provide

broad protection from retaliation" because statute "depends for its enforcement upon the cooperation of employees"). Therefore, section 510's "any inquiry" requirement must be read in harmony with ERISA's formal reporting requirements. This Court should refuse to endorse an interpretation of section 510 that fails to protect employees such as Trujillo who participate and give information during a plan audit, because doing so would be inconsistent with ERISA's protective goals, such as ensuring the effectiveness of the statute's reporting regime.

D. Other Circuits' Interpretations of Section 510 Are Consistent With Including a Plan Audit Within the Scope of "Any Inquiry"

While other circuits have not addressed this precise scenario involving retaliation for participation in a plan audit, their analyses of King and section 510 support the Secretary's position. In Nicolaou, the Second Circuit held that an employee's participation in a meeting with the company president, initiated by the company's attorney, in order to discuss the employee's findings of ERISA violations would be an "inquiry" protected under section 510. 402 F.3d at 330. In reaching this conclusion, the Nicolaou court considered King and determined that there was no conflict between the two decisions, because the meeting in Nicolaou would qualify as "something more formal than written or oral complaints made to a supervisor" under King. Id. at 330 & n.3 (quoting King, 337 F.3d at 427). Here, information was provided as part of statutorily-mandated plan audits, which require a specific examination of the plan before reporting to the government. 29

U.S.C. §§ 1023-24. There is little doubt that the Second Circuit would find that the plan audit here is a more formal inquiry than a single internal meeting about the plan with the company president initiated by the corporate counsel and, therefore, that it would qualify as an "inquiry" under King's analysis of section 510.

Circuits that follow King have also left open the possibility that something more formal than internal complaints, like plan audits, can trigger section 510 protection. The Third Circuit stated that "'inquiry or proceeding' is limited to more formal actions" including "[a]t the very least . . . information given in legal and administrative proceedings," but otherwise "decline[d] to elaborate on the level of formality required for protection under Section 510." Edwards v. A.H. Cornell & Son, Inc. 610 F.3d 217, 223 (3d Cir. 2010). The Sixth Circuit interpreted section 510 consistent with this Court's view in King when it rejected protection for unsolicited internal complaints. Sexton, 754 F.3d at 340 (citing King, 337 F.3d at 427). The Sixth Circuit, however, acknowledged that the phrase "any inquiry" is broad enough to permit a range of interpretations, from an official investigation to a simple question; this range includes plan audits. See id. at 335. Thus, no circuit has adopted an interpretation of section 510 that forecloses Trujillo's claim.[8]

[8] Other circuits that adopt a reading of "any inquiry" in section 510 broader than King to encompass unsolicited complaints would also necessarily include providing information given during a plan audit. See, e.g., George, 694 F.3d at 815. The Secretary agrees that section 510 protects unsolicited internal complaints. See, e.g., Sec'y's Am. Br. in George, at 8-29.

CONCLUSION

Based on the plain language of section 510 and its statutory context and purpose, Trujillo's claim that defendants retaliated in response to his provision of information during ERISA plan audits clearly falls within the ambit of ERISA section 510's protections. For the reasons stated above, the district court's opinion should be reversed.

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(d) because it contains 6982 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: May 6, 2016

s/ Stephen Silverman
STEPHEN SILVERMAN

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2016 the foregoing was served on all parties or their counsel of record through the CM /ECF system.

s/ Stephen Silverman
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