RECORD NO. 14-11678-CC

In The
United States Court of Appeals
For The Eleventh Circuit

BOARD OF TRUSTEES OF THE NATIONAL ELEVATOR INDUSTRY HEALTH BENEFIT PLAN,

Plaintiff – Appellee,

versus

ROBERT MONTANILE,

Defendant – Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF APPELLANT

Peter K. Stris
Counsel of Record
Victor O'Connell
Lauren E. Martin*
STRIS & MAHER LLP
19210 South Vermont Avenue, Building E
Gardena, California 90248
(424) 212-7090

Counsel for Appellant ****Not admitted in this Circuit***
(Additional counsel listed on signature page)

Case No.: 14-11678-C
Board of Trustees Natl. Elev. v. Robert Montanile

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1, counsel for Appellant Robert Montanile, Stris & Maher LLP, hereby certifies that the following is a complete list of persons and entities who have or may have an interest in the outcome of this case:

Board of Trustees of the National Elevator Industry Health Benefit Plan, Appellee

King, Brian, counsel for Appellant

Kolb, John David, counsel for Appellee

Martin, Lauren E., counsel for Appellant*

Montanile, Robert, Appellant

O'Connell, Victor, counsel for Appellant

Pathak, Radha A., counsel for Appellant*

Stris, Peter K., counsel for Appellant

Stris & Maher LLP, counsel for Appellant

---

* Items marked with an asterisk have been added or amended since the prior filing of the certificate with this Court.

Tucker, John Vincent, counsel for Appellant

Tucker & Ludin PA, counsel for Appellant

STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument. This case presents two important legal issues arising under the Employee Retirement Income Security Act of 1974. The second issue presented is the subject of a widely acknowledged circuit split. Oral argument may aid the Court in resolving the issues presented in this appeal.

TABLE OF CONTENTS

TABLE OF CONTENTS

(continued)

TABLE OF CITATIONS

CASES Page(s)

**Chief authorities are denoted by an asterisk*

TABLE OF CITATIONS

(continued)

Page(s)

TABLE OF CITATIONS

(continued)

Page(s)

TABLE OF CITATIONS

(continued)

Page(s)

STATEMENT OF JURISDICTION

Plaintiff invoked the district court's jurisdiction under 28 U.S.C. § 1331. The district court entered final judgment on March 17, 2014. Defendant filed his notice of appeal on April 16, 2014. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether a single document prepared by the trustees of a billion dollar multiemployer welfare plan covered by the Employee Retirement Income Security Act of 1974 ("ERISA") can qualify as *both* a written instrument (as required by 29 U.S.C. § 1102) *and* a summary plan description (as required by 29 U.S.C. § 1022)?

2. Whether the trustees of an ERISA plan can enforce an equitable lien by agreement under 29 U.S.C. § 1132(a)(3) where they have not identified a particular fund that is currently in the defendant's possession and control?

PRELIMINARY STATEMENT

Robert Montanile suffered serious injuries when his car was struck by a drunk driver. His employer-sponsored health plan, the National Elevator Industry Health Benefit Plan ("National Elevator Plan" or "Plan"), paid his medical expenses as it was contractually obligated to do. The Board of Trustees of the National Elevator Plan ("Trustees") had the right to sue the tortfeasor directly to recover the monies paid for Mr. Montanile's medical care (about $120,000). But

the Trustees instead chose to sit back and wait to see how Mr. Montanile fared in his own litigation efforts.

With the assistance of personal injury attorneys, Mr. Montanile was able to eventually settle a negligence claim against the tortfeasor (and an underinsured motorist claim with his own insurer) for a total of $500,000. Out of that settlement: his attorneys received a contingency fee of $200,000, his attorneys were reimbursed for $63,788.48 in costs, and related debts were paid. Because of the serious nature of his injuries, the remainder of the settlement funds was insufficient to compensate Mr. Montanile for his uncovered past medical bills, future medical bills, and lost wages—let alone his significant intangible losses. Nevertheless, attorneys for the Trustees contacted Mr. Montanile asking him to reimburse the entirety of the $120,000 paid by the Plan without a deduction for any portion of the $263,788.48 in attorneys fees and costs that Mr. Montanile expended in order to obtain the personal injury settlement.

Mr. Montanile retained Brian S. King, a prominent ERISA attorney. For eight months, Mr. King attempted to negotiate a settlement whereby Mr. Montanile would pay a reasonable portion of the $120,000 to the Trustees. It eventually became clear that the parties could not reach a deal, and Mr. King asked the Trustees to file a lawsuit against Mr. Montanile within 14 days. When the Trustees neither responded nor filed suit, the remaining funds (held back to cover the

asserted lien) were released to Mr. Montanile who spent the money to care for himself and his 12 year old daughter, and to pay the bills incurred for Mr. King's services. After most of the money had been spent, the Trustees filed this lawsuit.

What the Trustees are seeking to enforce is commonly referred to as a "first dollar reimbursement provision." Such provisions can be terribly unfair. *See*, *e.g.*, Vanessa Fuhrmans, *Accident Victims Face Grab for Legal Winnings,* WALL ST. J., Nov. 7, 2007, http://online.wsj.com/news/articles/SB119551952474798582. As such, they are unenforceable under the law of virtually every state. *See generally* Brendan S. Maher & Radha A. Pathak, *Understanding and Problematizing Contractual Tort Subrogation*, 40 LOY. U. CHI. L.J. 49 (2008).

Although ERISA permits first dollar reimbursement provisions, it imposes at least two strict limits on their enforceability. First, the provision must be included in a "written instrument"—a document (or collective group of documents) that is (or are) the physical embodiment of the employee benefit plan. The term "written instrument," which appears in the statute, is often colloquially referred to as the "written plan," the "plan document," or the "formal plan document." To be enforceable, a reimbursement provision must be included in the written plan. It cannot merely be inserted in a summary plan description—a shorter document required by ERISA that explains the material terms of the plan in language designed for the average participant. Second, the provision may only be enforced

through an equitable lien on specific funds received by an insured from a third party and *not* on the insured's general assets.

Neither of those two critical requirements is satisfied in this case. The reimbursement provision on which the Trustees rely is found only in the National Elevator Industry Health Benefit Plan *Summary Plan Description* ("National Elevator Summary Plan Description"); it was never included in a formal plan document. As such, it is unenforceable. Even if it were enforceable, however, the relief sought by the Trustees is not available under ERISA. Because there are insufficient (if any) funds remaining from his settlement to reimburse the amounts paid by the Plan, the Trustees are seeking to impose personal liability on Mr. Montanile. The Supreme Court has made clear that such "legal" relief is not available under 29 U.S.C. § 1132(a)(3). Thus, for two independent reasons, the district court's entry of judgment in favor of the Trustees must be reversed.

STATEMENT OF THE CASE

A. Defendant's Injury and the Reimbursement Dispute

On December 1, 2008, Robert Montanile was seriously injured on the job when a drunk driver ran a stop sign and struck his automobile. Vol. 2, Dkt. No. 39-3, 1.[1] Mr. Montanile sustained severe injuries to his neck and lower back, requiring

[1] All record citations correspond to the two volume appendix submitted by Appellant in connection with this brief.

lumbar spinal fusion surgery and other medical treatment to reduce his pain and loss of function. Vol. 2, Dkt. No. 39-3, 1. He requires ongoing medical care and an additional spinal fusion surgery that cannot be performed due to complications with his comorbid heart condition. Vol. 2, Dkt. No. 39-3, 1. He continues to suffer from pain and physical limitations. Vol. 2, Dkt. No. 39-3, 1. Mr. Montanile's initial medical expenses were paid by his employer-sponsored health plan, the National Elevator Plan. Vol. 1, Dkt. No. 1, 2.

After the accident, Mr. Montanile retained counsel to sue the drunk driver for negligence. Vol. 2, Dkt. No. 39-3, 2. He eventually settled his case against the driver (and an underinsured motorist claim with his own insurer) for $500,000. Vol. 2, Dkt. No. 39-3, 2. Out of that settlement, he paid his attorneys a $200,000 contingency fee and $63,788.48 to reimburse expenses. Vol. 2, Dkt. No. 39-3, 5. From the remaining amount, Mr. Montanile paid various creditors to whom he had incurred debts as a result of his injuries. Vol. 2, Dkt. No. 39-3, 5. In addition, the Trustees that Mr. Montanile pay them $121,044.02 as reimbursement for medical benefits paid to his health providers by the National Elevator Plan. Vol. 1, Dkt. No. 1, 1. The Trustees sought such reimbursement on a "first dollar" basis—i.e., they proposed no adjustment to account for the significant attorney's fees and costs ($263,788.48) that Mr. Montanile spent to obtain his settlement or the inadequacy of the limited recovery in making Mr. Montanile whole. The provision that the

Trustees sought enforcement of is contained in the National Elevator Industry Health Benefit Plan Summary Plan Description, and it provides that:

> The Plan has a right to first reimbursement out of any recovery. Acceptance of benefits from the Plan for an injury or illness by a covered person, without any further action by the Plan and/or the covered person, constitutes an agreement that any amounts recovered from another party by award, judgment, settlement or otherwise, and regardless of how the proceeds are characterized, will promptly be applied first to reimburse the Plan in full for benefits advanced by the Plan due to the injury or illness and without reduction for attorneys' fees, costs, expenses or damages claimed by the covered person, and regardless of whether the covered person is made whole or recovers only a part of his/her damages.

Vol. 2, Dkt. No. 36-4, 26 (the "Reimbursement Provision").

Mr. Montanile then retained Brian S. King, a prominent ERISA attorney, who attempted to negotiate a settlement of the reimbursement claim with the Trustees. Vol. 1, Dkt. No. 35-2, 2. After eight months, however, the parties were unable to reach an agreement. Vol. 1, Dkt. No. 35-2, 2. After the parties exchanged final settlement offers, Mr. King formally requested that the Trustees either accept his offer or file a lawsuit so that Mr. Montanile could present to the court his arguments about why he believed the Trustees were not entitled to reimbursement. Vol. 1, Dkt. No. 35-2, 2; Vol. 2, Dkt. No. 39-3, 2. Mr. King informed the Trustees that if they failed to respond to his request within 14 days, he would release the remaining settlement funds to Mr. Montanile. Vol. 1, Dkt. No. 35-2, 2. After nearly a month passed with no response from the Trustees, Mr. Montanile requested that

Mr. King distribute to him the remainder of the settlement funds, and Mr. King complied. Vol. 2, Dkt. No. 39-3, 2. Mr. Montanile spent the money that he received to care for himself and his 12 year old daughter, for whom he has been the sole caretaker and custodian since she was one year old. Vol. 2, Dkt. No. 39-3, 2. In addition, Mr. Montanile paid legal fees to Mr. King for the work he performed in connection with this dispute. Vol. 1, Dkt. No. 35-2, 2. After most of the money had been spent, the Trustees filed this lawsuit seeking to enforce the Reimbursement Provision. Vol. 2, Dkt. No. 39-3, 3.

B. The National Elevator Industry Multiemployer ERISA Plan

Before describing the procedural history of this case, it is necessary to describe the National Elevator Plan, a billion dollar multiemployer ERISA plan. Vol. 1, Dkt. No. 1, 1; National Elevator Industry Health Benefit Plan: Form 5500 Annual Report at *48–50 (2009), *available at* https://www.efast.dol.gov/portal/app/disseminate?execution=e1s1 (to access the relevant document, use the Form 5500 Filing Search and search for Acknowledgment ID: 20101027094142P040000622343003) ("National Elevator Plan Form 5500") (listing approximately $1 billion in assets and over 500 participating employers).[2]

[2] A multiemployer plan is "a collectively bargained plan maintained by more than one employer, usually within the same or related industries, and a labor union. Pension Benefit Guaranty Corporation, *Introduction to Multiemployer Plans* (last

The National Elevator Plan was established by a trust instrument dated May 19, 1952 between the International Union of Elevator Constructors ("Union") and contributing employers. Vol. 1, Dkt. No. 36, 1. It was originally named the National Elevator Industry Welfare Plan. Vol. 1, Dkt. No. 36-2, 1. In 1992, the Plan was renamed the National Elevator Industry Health Benefit Plan. Vol. 1, Dkt. No. 36-2, 66.

Between 1952 and 1975 the Plan was amended and restated several times, culminating in the Restated Agreement and Declaration of Trust ("Trust"), which went into effect on December 31, 1975. Vol. 1, Dkt. No. 36-2, 2. It is no coincidence that this critical amendment occurred in 1975 because ERISA was passed just one year prior and it established specific requirements with which a large multiemployer plan must comply. Vol. 1, Dkt. No. 36-2, 8 ("[T]his Trust [is] a multi-employer plan as that term is defined in Section 3(37) of [ERISA]."). Since 1975, the Trust has been restated and amended multiple times. Vol. 1, Dkt. No. 36-2, 47–95. The Plan is operated and administered by the Trustees. Vol. 1, Dkt. No. 36-2, 9.

The Trust contemplates that it will be used "for the purpose of providing … welfare benefits under a Plan of Welfare Benefits adopted by the Trustees …." Vol.

---

visited May 27, 2014), http://www.pbgc.gov/prac/multiemployer/introduction-to-multiemployer-plans.html.

1, Dkt. No. 36-2, 8.[3] In other words, it contemplates the adoption of a *second* written plan document. The Trust and the contemplated Plan of Welfare Benefits would then work in tandem to ensure that the National Elevator Plan complied with ERISA, which requires that every covered plan, *inter alia*, (1) "provide a procedure for establishing and carrying out a funding policy"; (2) "describe the plan's procedures for the allocation of responsibilities for its operation and administration"; (3) "provide a procedure for amending the plan, and for identifying the persons who have authority to amend the plan"; and (4) "specify the basis on which payments are made to and from the plan." 29 U.S.C. § 1102.[4]

Rather than prepare the formal "Plan of Welfare Benefits" envisioned by the Trust, however, the Trustees decided to organize the provision of benefits around various contracts entered into between the Plan and third-party service providers.

[3] It also vests the Trustees with "full discretionary authority to adopt a Plan of Welfare Benefits" and "the power and authority to use and apply the Trust Fund to pay or provide for the payment of … benefits to eligible employees and beneficiaries …." Vol. 1, Dkt. No. 36-2, 15. Indeed, the Trust specifically mandates that the Plan of Welfare Benefits set forth "eligibility requirements, type, amount, and duration of benefits …." and "[t]he detailed basis on which payment of benefits is to be made pursuant to this Trust." Vol. 1, Dkt. No. 36-2, 33–37.

[4] The collective bargaining agreement between the Union and the contributing employers similarly contemplates the adoption of a second written instrument, which it refers to as the "Health Benefit Plan." Vol. 1, Dkt. No. 36-2, 1; Vol. 1, Dkt. No. 35-3, 42 ("The Health Benefit Plan covering life insurance, sickness and accident benefits, and hospitalization insurance, or any changes thereto that are *in accordance with the National Elevator Industry Health Benefit Plan* and Declaration of Trust, shall be part of this Agreement …." (emphasis added)).

See National Elevator Plan Form 5500 at *151. The Plan contracted with such providers to offer a wide variety of welfare benefits, including "hospitalization, major medical, surgical, dental, medical prescription, mental health, alcoholism and substance abuse, vision and hearing benefits to eligible participants and their dependents, and weekly income, accidental death and dismemberment and life benefits to eligible participants." *Id.* In particular, the Plan's arrangements with third-party service providers are comprised of: (1) an arrangement with MetLife, Inc. to provide life and accidental death and dismemberment insurance; (2) an arrangement with "Blue Cross Blue Shield of Illinois … to provide a network of physicians and hospitals," and other health-related administrative services; and (3) arrangements with various administrative services only providers for the provision of all other benefits offered by the plan. *Id.* The benefits offered under the contracts with these providers have ostensibly been summarized in a 95-page document that the Trustees named The National Elevator Industry Health Benefit Plan *Summary Plan Description*. Vol. 1, Dkt. No. 1, 1 (emphasis added). Required by ERISA, a summary plan description must summarize all of the material provisions of an ERISA plan's written instruments in a manner that may be understood by the average plan participant or beneficiary. 29 U.S.C. § 1102.[5]

[5] Because the summary plan description is the primary document on which participants and beneficiaries rely to understand the terms of the plan, the summary plan description must conform to stringent requirements established by the United

The National Elevator Summary Plan Description expressly states that it summarizes the terms of the "Health Benefit Plan"—the formal written instrument referenced in the collective bargaining agreement. Vol. 2, Dkt. No. 36-3, at 2. ("The Board of Trustees of the National Elevator Industry Health Benefit Plan is pleased to issue this revised Summary Plan Description. *This handbook has been written to reflect the changes in the Health Benefit Plan* since the last version was printed." (emphasis added)). The Trustees, however, have never produced a document called the "Health Benefit Plan." Rather, the Trustees have maintained throughout this litigation that the National Elevator Summary Plan Description has always functioned as both a "written plan and summary plan description." Vol. 1, Dkt. No. 1, at 1. If that is true, then the trustees appear to have merely summarized the key terms of the third-party provider service agreements, while occasionally adding terms not found in those contracts. One of those added terms is the Reimbursement Provision.

C. Course of Proceedings and Dispositions in the Court Below

The Trustees brought a one-count complaint under 29 U.S.C. § 1132(a)(3) against Mr. Montanile seeking reimbursement of $121,044.02 for medical benefits

---

States Department of Labor. *See, e.g.*, 29 C.F.R. § 2520.102-3. If a summary plan description fails to meet such requirements, various equitable remedies may be sought by a participant to redress injuries caused by the defective disclosure. *See CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011) ("*Amara*").

paid to Mr. Montanile's medical providers by the National Elevator Plan. Vol. 1, Dkt. No. 1, 4–5. The statute authorizes an ERISA plan fiduciary to seek "appropriate equitable relief" to, *inter alia*, "enforce … the terms of the [ERISA] plan." 29 U.S.C. § 1132(a)(3).

As fiduciaries for the National Elevator Plan, the Trustees sought to enforce the Reimbursement Provision found in the National Elevator Summary Plan Description. Vol. 1, Dkt. No. 1, 3. Although the National Elevator Summary Plan Description is unmistakably self-described as *only* a summary plan description, Vol. 2, Dkt. No. 36-3, 1–2, the Trustees alleged that the document operates as both "written plan and summary plan description." Vol. 1, Dkt. No. 1, 3. Consequently, the Trustees sought reimbursement in accordance with *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356 (2006) ("*Sereboff*") in the form of an equitable lien by agreement to "enforce … the terms of the [National Elevator Plan]."

After the parties exchanged Rule 26(a) disclosures, Mr. Montanile moved for summary judgment on the grounds that "the governing plan documents do not provide the plan with any rights of … reimbursement." Vol. 1, Dkt. No. 35, 5. The district court denied his motion on the grounds that "the Summary Plan Description functioned as both the governing Plan document and the summary plan description mandated by ERISA." Vol. 2, Dkt. No. 45, 8. That holding was wrong and constitutes reversible error. *See infra* pp. 15–28 (Argument Section I).

Plaintiff cross-moved for summary judgment. Vol. 1, Dkt. No. 36. In opposing the motion, Mr. Montanile argued that the reimbursement sought by the Trustees in this case did not constitute "appropriate equitable relief" because the funds on which the they wished to assert an equitable lien by agreement had been dissipated. Vol. 2, Dkt. No. 39, 8–9. The district court candidly acknowledged that "Sereboff did not address the issue of a beneficiary's dissipation of assets because the funds there were placed in a separate account through the duration of the case." Vol. 2, Dkt. No. 45, 18. It also acknowledged that "[t]he Eleventh Circuit has similarly not had occasion to address this issue of dissipation." Vol. 2, Dkt. No. 45, 18. But, believing that it was following "the overwhelming majority of circuit courts," it rejected Mr. Montanile's argument. Vol. 2, Dkt. No. 45, 18.

To be sure, there is an intractable circuit split over this important legal question. As explained recently by the United States in an *amicus* filing with the Supreme Court, the correct interpretation of 29 U.S.C. § 1132(a)(3) and *Sereboff* is the position advanced by Mr. Montanile (which has been adopted by the Eighth and Ninth Circuits). The district court's holding (which Mr. Montanile acknowledges has also been adopted by the First, Second, Third, Sixth, and Seventh Circuits) is based on a fundamental misinterpretation of *Sereboff* and constitutes reversible error. *See infra* pp. 28–36 (Argument Section II).

On April 16, 2014, Mr. Montanile filed this appeal, seeking review of the Court's Order on Cross-Motions for Summary Judgment and Final Judgment. Vol. 2, Dkt. No. 47, 1.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment *de novo*, viewing all evidence and drawing all reasonable factual inferences in favor of the nonmoving party. *Chapman v. AI Transp.*, 229 F.3d 1012, 1023 (11th Cir. 2000) (en banc).

SUMMARY OF THE ARGUMENT

I. ERISA prohibits the enforcement of a term found in a summary plan description that is not also found in the legally binding plan document that constitutes the ERISA plan. The magistrate judge erred when he held, in contravention of the plain meaning of ERISA and the teachings of two recent Supreme Court decisions, that a summary plan description and a plan document could exist in the same written form. The magistrate judge also erred when he held that, as a factual matter, the National Elevator Summary Plan Description constituted a plan document. As the plain text of the National Elevator Summary Plan Description and the internal records of the Trustees show, the National Elevator Summary Plan Description was intended to be exactly what it is self-described as: a summary plan description. The magistrate judge also erred when he

held that the National Elevator Summary Plan Description adequately disclosed the Reimbursement Provision. The National Elevator Summary Plan Description fails to meet the statutory requirements established by Congress and the regulatory requirements established by the United States Department of Labor for a proper summary plan description. Each of these are reversible errors.

II. 29 U.S.C. § 1132(a)(3) authorizes equitable relief only to the extent such relief was available at common law. At common law, an equitable lien by agreement (the only relief sought by the Trustees) could be enforced against specific property within the current possession and control of a debtor, but not against his general assets. The property at issue in this case, Mr. Montanile's settlement fund, was dissipated in good faith prior to the initiation of this lawsuit. As a result, the magistrate judge could not offer the Trustees relief and should have entered judgment against them. Instead, the magistrate judge improperly granted legal relief to the Trustees, imposing an equitable lien by agreement under section 1132(a)(3) on the general assets of Mr. Montanile. Reversal is warranted.

ARGUMENT

I. The District Court Erred in Holding that the Reimbursement Provision Is an Enforceable Term of the National Elevator Plan.

ERISA governs employee benefit plans, 29 U.S.C. § 1101(a). And 29 U.S.C. § 1132(a)(3) authorizes a fiduciary of an ERISA plan to bring a civil action against

a participant or beneficiary "to obtain other appropriate equitable relief" to, *inter alia*, "enforce … the terms of the [employee benefit] plan." To be clear: 29 U.S.C. § 1132(a)(3) does *not* authorize a fiduciary to bring a civil action to enforce a term that is *not* found in an employee benefit plan. *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537, 1541 (2013) ("*McCutchen*") (explaining that "[section 1132(a)(3)] countenances only such relief as will enforce '*the terms of the plan*' or the statute …." (emphasis in original)).

Where may the "terms of the plan" be found? This question can be answered only by understanding that, for *any* valid ERISA plan, there must exist at least two documents: (1) a "written instrument" that "establishe[s] and maintain[s]" the plan, 29 U.S.C. § 1102(a)(1), and (2) a summary plan description that is "furnished to participants and beneficiaries" in order to "reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a). In order for a fiduciary to enforce a provision against a participant, the provision cannot be located exclusively within the summary plan description. If a provision is located exclusively within the summary plan description, it will not be enforceable under 29 U.S.C. § 1132(a)(3) as a "term" of the employee benefit plan.

Here, the Trustees seek to enforce a Reimbursement Provision found in the National Elevator Summary Plan Description. That document is *not* a "written instrument" of the National Elevator Plan; it is (at best) an summary plan

description. The magistrate judge erred in holding that the Trustees could enforce the Reimbursement Provision because a summary plan description can never double as a "written instrument." *See infra* pp. 17–21 (Argument Section I.A). And in any event, the undisputed facts of this case make clear that the National Elevator Summary Plan Description is not a "written instrument" of the National Elevator Plan. *See infra* pp. 21–28 (Argument Section I.B).

A. A Summary Plan Description Cannot Also Be a Plan Document.

ERISA's text simply cannot be read to allow one document to serve as both the "written instrument' and the "summary plan description." And for good reason: these documents perform very different functions and achieve quite different—albeit related—statutory purposes. It would be nearly impossible to effectively achieve these disparate goals with only one document. The district court thus erred in holding that the National Elevator Summary Plan Description is *both* a summary plan description *and* a part of the "written instrument."[6] It can be only one or the other.

Every ERISA-governed employee benefit plan must be "established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). Even though "instrument" is singular, a group of documents may collective comprise the

[6] The district court did not use the phrase "written instrument." Instead, it referred to the "governing Plan document." Vol. 2, Dkt. No. 45, 8. The meaning of these two phrases, as explained below, is the same.

"written instrument," and in the ERISA community, the "written instrument" is colloquially referred to as a "written plan" or "plan document" or "formal plan document." Plan documents contain long, tedious explanations covering every detail about a plan and its operation. That is because, under ERISA, the "written instrument" must, *inter alia*, (1) "provide a procedure for establishing and carrying out a funding policy"; (2) "describe the plan's procedures for the allocation of responsibilities for its operation and administration"; (3) "provide a procedure for amending the plan, and for identifying the persons who have authority to amend the plan"; and (4) "specify the basis on which payments are made to and from the plan." 29 U.S.C. § 1102.

It is unsurprising that Congress imposed substantial obligations on plan sponsors with respect to the drafting of plan documents because ERISA plans hold tremendous amounts of money. *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., FINANCIAL ACCOUNTS OF THE UNITED STATES: FLOW OF FUNDS, BALANCE SHEETS, AND INTEGRATED MACROECONOMIC ACCOUNTS, FORTH QUARTER 2013, at 82 (2013), *available at* http://www.federalreserve.gov/releases/z1/current/z1.pdf (ERISA plans hold $7.9 trillion in private pension funds).

Because of the complexity and detail inherent in ERISA plans, Congress recognized that shorter, simpler summaries would be necessary to meaningfully communicate plans' material terms to participants and beneficiaries. Accordingly,

Congress imposed upon plan sponsors the duty to prepare and furnish a "summary plan description of any employee benefit plan … to participants and beneficiaries …." 29 U.S.C. § 1022(a). In accordance with ERISA, each "summary plan description shall include [twelve statutorily enumerated categories of information relevant to participants and beneficiaries], shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a).

There are numerous indications in ERISA's plain text that Congress consciously decided to create a multi-document system involving a written plan document and a summary description of that document. For example:

- In the statutory section entitled "Establishment of Plan," ERISA specifically enumerates the "[r]equisite features of [a] plan." 29 U.S.C. § 1102. In a separate statutory section entitled "Summary Plan Description," ERISA specifically enumerates different requirements of "a summary plan description." 29 U.S.C. § 1022.

- The statute refers to "a summary plan description of any employee benefit plan." 29 U.S.C. § 1022. Merriam-Webster defines "of" as "belonging to, relating to, or connected with (… something)." Logically, a thing cannot belong to, relate to, or connect with itself.

- The statute specifically describes the summary plan description as a "summary." Merriam-Webster defines "summary" as "using few words to give the most important information about something." Applying such a definition, the Fifth Circuit has held that "[b]y definition, a summary description of the [ERISA plan] does not reproduce each and every term, word for word, of the [ERISA plan]." *Hansen v. Cont'l Ins. Co.*, 940 F.2d 971, 981 (5th Cir. 1997), *abrogated on other grounds by CIGNA Corp. v. Amara*, 131 S. Ct. at 1877–78 ("*Hansen*").

The Supreme Court in *Amara* recognized as much when it rejected the argument that "the terms of the summaries are terms of the plan." 131 S.Ct. at 1877. The Court found statutory support to reject that argument and also identified the tension between drafting plan documents and "the basic summary plan description objective: clear, simple communication." *Id.* As the Supreme Court observed: "To make the language of a plan summary legally binding could well lead plan administrators to sacrifice simplicity and comprehensibility in order to describe plan terms in the language of lawyers." *Id.* at 1877–78. To be sure: the competing congressional objectives of (1) requiring sponsors to create a comprehensive legally binding written instrument and (2) requiring the material terms of a plan to be disclosed to its participants in a clear and simple manner would be frustrated by attempts (like the one in this case) to rely on one-size-fits-all documents.

Put simply, the Trustees have impermissibly "collaps[ed] two distinct documents into one." *Hansen*, 940 F.2d at 981. Because ERISA does not allow a summary plan description to serve as the "written instrument," or any part thereof, the magistrate judge erred in holding to the contrary. Accordingly, the Court should reverse the order and judgment of the magistrate judge, and enter judgment for Mr. Montanile.[7]

B. In Any Event, the National Elevator Summary Plan Description Is Not a Plan Document.

Even if ERISA did theoretically allow a single document to serve as both a "written instrument" (or part thereof) under section 1102(a) and summary plan description under section 1022(a), the reimbursement provision on which the Trustees rely would still be unenforceable because the *particular* summary plan description in this case—the National Elevator Summary Plan Description—was never intended to be (and is not) part of the "written instrument."

[7] Regardless of whether the National Elevator Summary Plan Description is characterized as a plan document or a summary plan description (but not both), the result would be the same in this case. If the document is a summary plan description, then the Trustees cannot rely on 29 U.S.C. § 1132(a)(3) to enforce the Reimbursement Provision because section 1132(a)(3) only authorizes "appropriate equitable relief to [*inter alia*] enforce … *the terms of the [ERISA] plan*" (emphasis added). *See also McCutchen*, 133 S. Ct. at 1541. Similarly, if the document is a plan document, then the Trustees cannot rely on 29 U.S.C. § 1132(a)(3) to enforce terms that are adverse to Mr. Montanile because the terms were not disclosed in a summary plan description. *See Amara*, 131 S. Ct. 1866.

This case involves a billion dollar multiemployer plan to which over 500 employers contribute. National Elevator Plan Form 5500 at *48–50. As required by ERISA, the Trustees used a formal written instrument to codify the plan's terms—a trust entitled the Restated Agreement and Declaration of Trust: National Elevator Industry Welfare Plan ("Trust"). Vol. 1, Dkt. No. 36-2, 2. As the Trust explains, the Trustees and the Union "establish[ed] The National Elevator Industry Welfare Plan … by an Agreement and Declaration of Trust dated May 19, 1952." Vol. 1, Dkt. No. 36-2, 2.

The National Elevator Plan contains the plan features required under 29 U.S.C. § 1102. Article II "provide[s] a procedure for establishing and carrying out a funding policy." Vol. 1, Dkt. No. 36-2, 7–9. Articles III, IV, and V "describe the plan's procedures for the allocation of responsibilities for its operation and administration." Vol. 1, Dkt. No. 36-2, 9–30. Article XI "provide[s] a procedure for amending the plan, and for identifying the persons who have authority to amend the plan." Vol. 1, Dkt. No. 36-2, 40–42. And Articles VI and VII "specify the basis on which payments are made to and from the plan." Vol. 1, Dkt. No. 36-2, 30–37.

To be sure: Article VII of the Plan contemplates the formal adoption of a written "Plan of Welfare Benefits" that will specify the "detailed basis on which payment of benefits is to be made pursuant to [the Trust]." Vol. 1, Dkt. No. 36-2, 34. Rather than creating their own Plan of Welfare Benefits, however, the Trustees

opted to enter into various contracts with third parties to provide coverage "for hospitalization, major medical, surgical, dental, medical prescription, mental health, alcoholism and substance abuse, vision and hearing benefits to eligible participants and their dependents, and weekly income, accidental death and dismemberment and life benefits to eligible participants." National Elevator Plan Form 5500 at *151.

Specifically, the trustees entered into three categories of third-party service agreements: (1) an arrangement with MetLife, Inc. to provide life and accidental death and dismemberment insurance; (2) an arrangement with "Blue Cross Blue Shield of Illinois … to provide a network of physicians and hospitals," and other health-related administrative services; and (3) arrangements with various administrative services only providers for the provision of all other benefits offered by the plan. *Id.*

The Trustees could have taken the contracts on which these arrangements are based and incorporated their terms into one formal plan document called a Plan of Welfare Benefits, as permitted by Article VII of the Plan. In such a document, they could have also specified additional terms that would be binding on participants and beneficiaries, including a reimbursement provision like the one in this case. Alternatively, the Trustees could have amended the Trust to include a reimbursement provision like the one in this case. They did just that when other

important terms not contained in the official documents were added to the National Elevator Plan. Vol. 1, Dkt. No. 36-2, 53 (adding liquidated damages clause), 68 (vesting the Trustees with discretionary authority). Instead, however, the Trustees chose to rely on their contracts with third-party service providers to establish the terms of the Plan. Mr. Montanile does not contest the wisdom or legality of this practice.

In this litigation, however, the Trustees are not attempting to enforce the terms of the National Elevator Plan, the terms of the relevant Blue Cross Blue Shield agreement(s) pursuant to which Mr. Montanile's medical services were provided, or the terms of the other third-party contracts between the Plan and its service providers, which might collectively be viewed as the Plan of Welfare Benefits. That is so presumably because none of these documents contains the Reimbursement Provision on which the Trustees' claim is based.

Instead, the Trustees seek to enforce a Reimbursement Provision that is found in the National Elevator Summary Plan Description—a document which summarizes those various third-party contracts and occasionally includes additional terms. It is clear that the National Elevator Summary Plan Description was never intended by the Trustees to constitute a formal plan document. Indeed, the National Elevator Summary Plan Description cannot be reasonably construed

to be anything other than a (poorly drafted) summary plan description.[8] Numerous features of the National Elevator Summary Plan Description confirm this reality:

- The National Elevator Summary Plan Description consistently describes itself as a "summary plan description" but never describes itself as the Plan, a plan document, or any constituent part thereof. For example, the introductory letter to the National Elevator Summary Plan Description informs the reader that "[t]he Board of Trustees of the National Elevator Industry Health Benefit Plan is pleased to issue this revised *Summary Plan*

[8] It is worth noting that the National Elevator Summary Plan Description does not comply with the comprehensibility requirement of ERISA or the applicable regulations promulgated by the United States Department of Labor. The cumbersome 95-page document fails to meet the statutory requirement of including information "in a manner calculated to be understood by the average plan participant." 29 U.S.C. § 1022. For example: the Reimbursement Provision is buried on page 71. The section in which the provision is found is innocuously entitled "Coordination of Benefits." The section begins by stating two "Fast Facts," which according to the National Elevator Summary Plan Description "appear at the beginning of each section to give [the participant] a quick overview of what is contained within that section." The two Fast Facts for this section inform the participant (1) that "You must report any duplicate group health coverage for yourself and/or your dependents on any claim you submit to the Benefits Office" and (2) that "benefits under this Plan are coordinated with HMO, PPO, Medicare or other group health care coverage." It is hard to overstate the irrelevance of these topics when compared to the extremely harsh Reimbursement Provision contained in this section. A practice such as this, which minimizes the importance of the Reimbursement Provision, is prohibited both by ERISA and applicable Department of Labor regulations. *See* 29 U.S.C. § 1022; 29 C.F.R. § 2520.102-2 ("Any description of exception, limitations, reductions, and other restrictions of plan benefits shall not be minimized, rendered obscure or otherwise made to appear unimportant."). As a result, the Reimbursement Provision may not be enforced. *Amara*, 131 S. Ct. 1866.

Description." Vol. 2, Dkt. No. 36-3, 2 (emphasis added). It proceeds to state that "We encourage you and your family to read this Summary Plan Description carefully to make the best use of the benefits the National Elevator Industry Health Benefit Plan offers." Vol. 2, Dkt. No. 36-3, 2. Similarly, the full title of the National Elevator Summary Plan Description is the National Elevator Industry Health Benefit Plan *Summary Plan Description*, not the National Elevator Health Benefit Plan *and* Summary Plan Description. Vol. 2, Dkt. No. 36-3, 1.

- The National Elevator Summary Plan Description consistently cross-references an extrinsic Plan. For example, the introductory letter explains that "[t]his handbook has been written to reflect the changes in the Health Benefit Plan since the last version was printed." Vol. 2, Dkt. No. 36-3, 2. Another disclosure explains that "[s]eparate eligibility rules apply to the owners participant in the Plan" and tells such participants to "[c]ontact the Benefits Office for more information." Vol. 2, Dkt. No. 36-3, 13. Another disclosure explains that coverage may end on "the day your employment with an employer in a category of work covered by the Plan terminates." Vol. 2, Dkt. No. 36-3, 15. (Covered categories of work are not subsequently identified in the document.) Yet another disclosure informs participants of

their right to "request a copy of Plan documents" and to "examine … all documents governing the Plan." Vol. 2, Dkt. No. 36-4, 40.

- In the Glossary of Terms, the Plan is not defined as The National Elevator Industry Health Benefit Plan Summary Plan Description. Nor is the Plan defined as the "Plan of Welfare Benefits" contemplated by the Trust. Instead, the Plan is defined as "the National Elevator Industry Health Benefit Plan"—the exact Plan that was expressly created *by the Trust*. Vol. 2, Dkt. No. 36-4, 41.

Even the Trustees internal records confirm that the National Elevator Summary Plan Description was not intended to be a "written instrument." In opposing summary judgment, the Trustees asked the court to take them at their word that they had formally "adopted the current National Elevator Industry Health Benefit Plan Summary Plan Description as the Plan of Welfare Benefits governing the operation of the National Elevator Industry Welfare Plan at their regular meeting on September 8–9, 2004." Vol. 1, Dkt. No. 36-1, 2. But when, in connection with their cross-motion reply, the Trustees produced the minutes of the meeting at which the National Elevator Summary Plan Description was purportedly adopted, their records told a different story. Vol. 1, Dkt. No. 36-1, 2. Rather than confirming the formal adoption of the National Elevator Summary Plan Description as the "Plan of Welfare Benefits," the minutes specifically contradicted the Trustees' averment,

revealing that the Trustees had really only "[r]eview[ed] and approv[ed an] updated Summary Plan Description." Vol. 2, Dkt. No. 41-2, 5.[9]

II. The District Court Erred in Holding That the Trustees Could Impose an Equitable Lien on the General Assets of Mr. Montanile.

In this case, Plaintiff sought $121,044.02 from Mr. Montanile as reimbursement for medical benefits paid by the National Elevator Plan to Mr. Montanile's healthcare providers. Vol. 1, Dkt. No. 1, 4. The Trustees filed a one-count complaint seeking to attach Mr. Montanile's settlement fund under 29 U.S.C. § 1132(a)(3). Vol. 1, Dkt. No. 1, 4. As explained below, those funds were honestly dissipated prior to the filing of the complaint. As such, the Trustees have no remedy under 29 U.S.C. § 1132(a)(3), which—as the Supreme Court has repeatedly held—does not permit compensatory damages for breach of contract. The district court's contrary holding is reversible error.

A. The Trustees' Complaint Sought an Equitable Lien by Agreement on the Settlement Funds received by Mr. Montanile.

29 U.S.C. § 1132(a)(3) authorizes a fiduciary of an ERISA plan to bring a civil action against a participant or beneficiary "to obtain other appropriate

[9] The magistrate judge erroneously relied on the Trustees' misrepresentation in holding that the National Elevator SPD was a governing plan document. Vol. 2, Dkt. No. 45, 7 ("Undisputed affidavit testimony supports the conclusion that the Summary Plan Description is a governing plan document."). Because the meeting minutes were produced only after Mr. Montanile's own reply brief was filed, Mr. Montanile had no opportunity to respond to this "undisputed" fact.

equitable relief" to, *inter alia*, "enforce … the terms of the [ERISA] plan." The phrase "appropriate equitable relief" has been interpreted narrowly by the Supreme Court to refer to only "those categories of relief that were *typically* available in equity." *Mertens v. Hewitt Associates*, 508 U.S. 248, 256 (1993) ("*Mertens*").

As the Supreme Court explained in *Sereboff*, 547 U.S. 356, the equitable relief available under 29 U.S.C. § 1132(a)(3) includes an "equitable lien by agreement" on "'particular funds or property in the defendant's possession.'" *Id.* at 362 (quoting *Mertens*, 534 U.S. at 213). Accordingly, as fiduciaries for the National Elevator Plan, the Trustees sought to impose an equitable lien by agreement on Mr. Montanile's *settlement funds* relying on the Reimbursement Provision. [10]

B. By the Time the Complaint Was Filed, However, the Settlement Funds Had Been Honestly Dissipated by Mr. Montanile.

When the Trustees contacted Mr. Montanile to ask him to repay the approximately $120,000 advanced by the plan to cover his medical bills, only $108,000 remained of the original settlement funds. Mr. Montanile retained Brian S. King to represent him in connection with the Trustee's claim for reimbursement. Vol. 2, Dkt. No. 39-3, 5-6. For eight months, Mr. Montanile patiently waited while

[10] As discussed above, see *supra* pp. 15–28, Mr. Montanile also appeals the district court's holding that the Reimbursement Provision is enforceable. For the sake of this argument, Mr. Montanile assumes the validity of that provision.

Mr. King attempted to negotiate a settlement whereby Mr. Montanile would pay a reasonable portion of the remaining settlement funds to the Trustees. Vol. 2, Dkt. No. 45, 13. During this time, the funds remained in the possession and control his attorneys. Vol. 1, Dkt. No. 35-2, 2. After it became clear that a settlement could not be reached, Mr. Montanile had his attorney, Mr. King, ask the Trustees to file a lawsuit so that he present to the court his arguments as to why he was not obligated to reimburse the plan. Vol. 2, Dkt. No. 39-3, 2. Mr. King informed the Trustees' lawyers that unless they filed a lawsuit within 14 days of his request, he would disburse the remaining settlement funds to Mr. Montanile. Vol. 1, Dkt. No. 35-2, 2.

The Trustees could have filed a lawsuit, sought a preliminary injunction, or taken other steps to protect their rights. Instead, they did not even respond to Mr. King's letter. Vol. 1, Dkt. No. 35-2, 2. After a month had passed, Mr. King's office disbursed the remaining funds to Mr. Montanile. Vol. 1, Dkt. No. 35-2, 2. Thereafter, the Trustees slept on their rights, waiting six months to file a mere five page form complaint. Vol. 1, Dkt. No. 35-2, 2. During that time, a substantial portion of the fund was spent by Mr. Montanile caring for himself and his 12 year old daughter, and paying Mr. King for his legal services performed in connection with the dispute. Vol. 1, Dkt. No. 35-2, 2; Vol. 2, Dkt. No. 39-3, 2.

When the Trustees moved for summary judgment in the litigation, Mr. Montanile argued that the equitable lien by agreement sought by the Trustees was

unavailable because the settlement funds that they sought to attach had been dissipated. Vol. 2, Dkt. No. 39, 8–9. The magistrate judge correctly recognized that the Supreme Court did not confront the dissipation issue in *Sereboff*. Vol. 2, Dkt. No. 45, 18. The magistrate judge also correctly recognized that the "Eleventh Circuit has … not had occasion to address this issue of dissipation." Vol. 2, Dkt. No. 45, 18. But, as explained below, the magistrate judge erred when it rejected Mr. Montanile's argument.

C. The District Court Permitted the Trustees to Assert an Equitable Lien by Agreement on the General Assets of Mr. Montanile.

As the Eighth and Ninth Circuits have recognized, and as the United States Department of Labor recently explained, seeking to impose personal liability on a defendant rather than a particular fund that exists at the time of filing constitutes suit for legal (not equitable) relief, and is not authorized under 29 U.S.C. § 1132(a)(3). *See Bilyeu v. Morgan Stanley Long Term Disability Plan*, 683 F.3d 1083 (2012); *Treasurer, Trustees of Drury Industries, Inc. Health Care Plan & Trust v. Goding*, 692 F.3d 888 (8th Cir. 2012); Brief for the United States as Amicus Curiae at 11, *Thurber v. Aetna Life Ins. Co.*, No. 13-130 (May 2014) ("DOL Amicus in *Thurber*").[11]

[11] *But see Cusson v. Liberty Life Assurance Co.*, 592 F.3d 215, 231 (1st Cir. 2010); *Thurber v. Aetna Life Ins. Co.*, 712 F.3d 654, 657 (2d Cir. 2013); *Funk v. CIGNA Grp. Ins.*, 648 F.3d 182, 194 (3d Cir. 2011); *Longaberger Co. v. Kolt*, 586

The Supreme Court has twice considered the availability of "appropriate equitable relief" in cases where a fiduciary has sought reimbursement of plan benefits from a participant. In *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 210 (2002) ("*Great-West*"), a fiduciary sought reimbursement pursuant to an ERISA plan against a participant who settled with her third party tortfeasor. 534 U.S. at 207. Under the state court's order, the proceeds of the participant's settlement had been deposited directly into a special needs trust, which was not made a party to the litigation. *Id.* at 208.

The Court held that the fiduciary had no recourse against the participant personally. *Id.* at 210. Looking to equitable principles existing at the time of the divided bench, the Court explained that "a plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Id.* at 213 (citations omitted). But where the plaintiff does not seek to enforce a constructive trust or an equitable lien, and instead, seeks to impose merely personal liability on the participant for a contractual obligation to pay money, the plaintiff seeks legal

---

F.3d 459, 466–467 (6th Cir. 2009); *Gutta v. Standard Select Trust Ins. Plans*, 530 F.3d 614, 621 (7th Cir. 2008).

relief not available under section 1132(a)(3). *Id.* at 210. *See also Amara*, 131 S. Ct. at 1878–1879 (discussing holding in *Great-West*).

Unlike *Great-West*, the plaintiff in *Sereboff* sought reimbursement from beneficiaries who had direct control over settlement proceeds at the time the plaintiff filed suit. 547 U.S. at 359. As a result, the Court concluded that the "impediment to characterizing the relief in [*Great-West*] as equitable [was] not present [because the plaintiff] sought its recovery through a constructive trust or equitable lien on a specifically identified fund, not from the [beneficiaries'] assets generally, as would be the case with a contract action at law." *Id.* at 362–63. *See also McCutchen*, 133 S. Ct. at 1544–1545 (following *Sereboff*).

Because the "particular fund" in *Sereboff* existed and was in the beneficiaries possession and control at the time the plaintiff's action was filed, the question presented here was not directly implicated. As the Department of Labor has explained, however, the

> logic of *Sereboff* nonetheless suggests an answer to the question in this case because where, as here, the "particular fund" identified by the Plan has been dissipated, the Plan's only choice is to seek recovery from the participant's "assets generally." *Sereboff* establishes that such a recovery would be legal, not equitable, and thus unavailable under [section 1132(a)(3)].

DOL Amicus in *Thurber* at 11, No. 13-130.

That conclusion comports with the very equitable principles that the Supreme Court has held *must* undergird claims for appropriate equitable relief.[12] At equity, an "equitable lien [could] be established and enforced only if there [was] some property which [was] subject to the lien." Restatement of Restitution and Unjust Enrichment § 161, cmt. e (1936) ("Restatement"). Indeed, "[i]t is the very essence of [an equitable lien] that while the lien continues the possession of the thing remains with the debtor …." 4 Spencer W. Symons, *Pomeroy's Equity Jurisprudence* § 1233, at 692 (5th ed. 1941). Thus, where "the property subject to the equitable lien can no longer be traced, the equitable lien cannot be enforced." Restatement § 161, cmt. e.

The magistrate judge ran afoul of these equitable principles when he "conclude[d] that any dissipation of the settlement funds by Defendant is immaterial" to the Trustees' enforcement of an equitable lien by agreement. Vol. 2, Dkt. No. 45, 14 n.2. Indeed, the opinion in *Great-West* rejects precisely such a conclusion, explaining that "where 'the property [sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor,' and the plaintiff 'cannot enforce a constructive trust of or an equitable lien upon other property of the [defendant].'"

[12] For a complete discussion of the relevant equitable principles implicated by this issue, see DOL Amicus in *Thurber* at 11–14, No. 13-130.

534 U.S. at 213–214 (quoting Restatement § 215, cmt. a, at 867) (brackets in original). Nothing in *Sereboff* overrules (explicitly or implicitly) that core teaching of *Great-West*.

The magistrate judge, however, mistakenly read *Sereboff* as embracing the notion that an equitable lien may be enforced without identifying a fund still in the defendant's possession. Vol. 2, Dkt. No. 45, 16. But as the government has explained, when the Supreme Court observed in *Sereboff* that the plan's "inability to satisfy the 'strict tracing rules' for 'equitable restitution' is of no consequence" it was "aimed solely at rejecting the argument that the funds sought by the plan in that case had to be traceable back *to the plan itself*." DOL Amicus in *Thurber* at 14, No. 13-130 (citing *Sereboff*, 547 U.S. at 364; *Bilyeu*, 683 F.3d at 1092).

To be clear: the magistrate judge (and the circuits with which he aligned in the split) conflate the equitable principles relevant to the *creation* of an equitable lien by agreement—which occurs when the particular fund comes into existence—with the equitable principles relevant to the *enforcement* of an equitable lien by agreement—which occurs when official proceedings are initiated. When a plaintiff files a lawsuit seeking to enforce an equitable lien by agreement against a dissipated fund, there is no property against which the lien may be enforced. In such a circumstance, the plaintiff actually seeks to impose personal liability upon the participant or beneficiary. Such relief is legal, not equitable, and may not be

sought under section 1132(a)(3). *Great-West*, 534 U.S. at 210 (2002).[13] Although one might describe such a conclusion as formalistic, as the government has observed, "formalism is inevitable when construing and applying a statutory term, like 'appropriate equitable relief,' 29 U.S.C. § 1132(a)(3), that reflects principles from the time of the 'divided bench … with its technical refinements.' *Mertens*, 508 U.S. at 256–57." DOL Amicus in *Thurber* at 19, No. 13-130. And as the Supreme Court has repeatedly admonished: "The authority of courts to develop a 'federal common law' under ERISA … is not the authority to revise the text of the statute." *Mertens*, 508 U.S. at 259 (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989)).

[13] Such a rule is not a *per se* bar to a fiduciary's ability to obtain reimbursement where the particular fund at issue has been dissipated. There may be instances where equity would have permitted a fiduciary to trace monies that have been extracted from a particular fund, such as in cases involving partial dissipation, wrongful dissipation, or co-mingling of assets. *See* DOL Amicus in *Thurber* at 12, No. 13-130. Such issues are irrelevant to this appeal, however, because the magistrate judge granted summary judgment to the Trustees under the broad assumption that "any dissipation of the settlement funds by [Mr. Montanile] is immaterial." Vol. 2, Dkt. No. 45, 21. As such, factual questions regarding dissipation in this case will be litigated, if necessary, on remand.

CONCLUSION

The order and judgment of the district court should be reversed.

Dated: May 27, 2014

Respectfully submitted,

/s/ Peter K. Stris
Peter K. Stris
Victor O'Connell
Lauren E. Martin
STRIS & MAHER LLP
19210 South Vermont Avenue
Building E
Gardena, CA 90248
(424) 212-7090

Radha A. Pathak
3333 Harbor Blvd.
Costa Mesa, CA 92626
(714) 444-4141, ext. 231

Counsel for Defendant-Appellant

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,010 words, as determined by the word-count function of Microsoft Word for Mac 2011, excluding parts of the brief excepted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P 32(a)(5) and the type style requirements of Fed. R. App. P 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2011 in 14-point Times New Roman font.

Dated: May 27, 2014

/s/ Peter K. Stris

Peter K. Stris
STRIS & MAHER LLP
19210 South Vermont Avenue
Building E
Gardena, CA 90248
(424) 212-7090

Counsel for Defendant-Appellant

CERTIFICATE OF SERVICE

I certify that on May 27, 2014, I filed the foregoing Brief of Appellant by causing a copy to be electronically uploaded to the Court's ECF system and by causing paper copies to be delivered to the Court by UPS Overnight Delivery. I certify that on May 27, 2014, a true and correct copy of this brief was served, via UPS Ground, postage prepaid, upon the following individual:

John David Kolb
Gibson & Sharps, PSC
9420 Bunsen Pkwy, Ste. 250
Louisville, KY 40223

Counsel for Plaintiff-Appellee

Dated: May 27, 2014

/s/ Peter K. Stris
Peter K. Stris
STRIS & MAHER LLP
19210 South Vermont Avenue
Building E
Gardena, CA 90248
(424) 212-7090

Counsel for Defendant-Appellant