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

REPLY BRIEF OF APPELLANT

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

CERTIFICATE OF INTERESTED PERSONS

Pursuant to this Court's Rule 26.1-1, the undersigned counsel certifies that to the best of counsel's knowledge, the certificate of interested persons contained in the Brief of Appellant is complete.

Dated: July 17, 2014

Respectfully submitted,

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INTRODUCTION

This appeal presents two complex questions involving the Employee Retirement and Income Security Act of 1974 ("ERISA"). *First*: did the district court correctly hold that the National Elevator Industry Health Benefit Plan Summary Plan Description is, under ERISA, both a "summary plan description" and part of the Plan's "written instrument." And *second*: did the district court correctly hold that an equitable lien by agreement, under ERISA, may be placed on the general assets of a plan participant or beneficiary if the specific property on which the lien would have attached has been dissipated prior to litigation or judgment.

In their opposition brief, the Trustees fall short of defending either of the district court's holdings. The Trustees' erroneous reading of Supreme Court precedent and inability to refute the factual arguments in Mr. Montanile's opening brief established that reversal is warranted on issue one. *See infra* pp. 1–16 (Argument Section I). And the Trustees' complete failure to address the well reasoned position of the United States Department of Labor coupled with the district court's confessed existence of a genuine fact dispute regarding the dissipation of Mr. Montanile's settlement funds establish that reversal is warranted on issue two. *See infra* pp. 16–25 (Argument Section II).

ARGUMENT

I. Because the Reimbursement Provision that the Trustees Seek to Enforce Is Not a "Term[] of the Plan," Mr. Montanile Was Entitled to Summary Judgment on the 29 U.S.C. § 1132(a)(3) Claim.

This case involves a single-count complaint filed by the Trustees pursuant to 29 U.S.C. § 1132(a)(3). Vol. 1, Dkt. No 1. That statute permits a fiduciary to seek "appropriate equitable relief" to redress violations or enforce provisions of "this subchapter [of ERISA] or the terms of the plan . . . ." 29 U.S.C. § 1132(a)(3)(B). The Trustees maintain that they are entitled to equitable relief because Mr. Montanile has breached the Reimbursement Provision found in a document self-entitled the National Elevator Industry Health Benefit Plan *Summary Plan Description* ("NEI Plan SPD"). *See* Opening Brief at 6; Vol. 1, Dkt. 36, 5.

In the district court, Mr. Montanile filed a motion for summary judgment arguing that the Trustees' 29 U.S.C. § 1132(a)(3) claim failed as a matter of law. Vol. 1, Dkt. No. 35. His position was (and is) straightforward: the Reimbursement Provision contained in the NEI Plan SPD is not a "term[] of the plan." As such, it cannot be enforced pursuant to 29 U.S.C. § 1132(a)(3). The Reimbursement Provision is not a term of the Plan because it is found *only* in the NEI Plan SPD. It was never included in any document that constitutes part of the "written instrument" through which the National Elevator Industry Health Benefit Plan

("Plan") was "established or maintained." *See* Opening Brief at 15–28 (explaining the "written instrument" requirement of 29 U.S.C. § 1102(a)(1)).

In their brief, the Trustees concede that the Reimbursement Provision was never included in any document other than the NEI Plan SPD. *See infra* pp. 3–6 (Section I.A.). According to the Trustees, however, the district court correctly determined that this document qualified under ERISA as *both* the summary plan description (as required by 29 U.S.C. § 1022) *and* part of the "written instrument" (as required by 29 U.S.C. § 1102). *See* Trustees Brief at 10–24. For the reasons set forth by Mr. Montanile in his opening brief, the district court was wrong. *See* Opening Brief at 15–28. And, as explained in detail below, nothing in the Trustees' brief can explain away that error. *See infra* pp. 6–16 (Section I.B.).

A. The Trustees Concede that the Reimbursement Provision Is Found *Only* in the National Elevator Industry Health Benefit Plan *Summary Plan Description.*

The Plan was unquestionably established by a trust instrument dated May 19, 1952. Opening Brief at 8. Additional terms of the Plan were established by a collective bargaining agreement ("CBA"). *Id.* at 9 n.4. The trust instrument was amended and restated several times, culminating in a current plan document (the "Trust"). *Id.* at 8. The Trust contemplates the adoption of another written instrument that would provide detailed information about the specific welfare benefits available to each participant in the Plan. *Id.* at 8–9. But as explained by

Mr. Montanile in his opening brief, "the Trustees decided to organize the provision of benefits around various contracts entered into between the Plan and third-party service providers" "[r]ather than prepare the formal 'Plan of Welfare Benefits' envisioned by the Trust . . . ." *Id*. at 9–10 (discussing the Plan's Form 5500, which is filed annually by the Trustees with the United States Department of Labor).

The Trustees acknowledge that the Trust (and the CBA) are "written plan documents" which govern the Plan. *See, e.g.*, Trustees' Brief at 13. *See also* Vol. 1, Dkt. No. 36, 2 (acknowledging that the plan "was established and is maintained in accordance with its Restated Agreement and Declaration of Trust . . . ."). And the Trustees concede that there is no Reimbursement Provision in either the Trust or the CBA.

The Trustees make little mention, however, of the contracts entered into between the Plan and third-party service providers that are disclosed in the Plan's annual filings with the Department of Labor. *See* Opening Brief at 9–11, 22–24 (discussing these contracts); Trustees' Brief at 23–24 (containing the Trustees' only discussion of these contracts). That is telling because, as explained by Mr. Montanile in his opening brief, it seems that these contracts set forth the very benefit terms that are *summarized* by the NEI Plan SPD.[1]

[1] Indeed, in some cases it is *self-evident* that these documents are in fact being summarized by the NEI Plan SPD. *See* Opening Brief at 26–27 (providing

To be clear: the Trustees never actually deny that these contracts were summarized by the document entitled the NEI Plan SPD.[2] Nor do the Trustees ever suggest that there is a Reimbursement Provision in these contracts. Instead, they accuse Mr. Montanile of engaging in "unfounded conjecture" and fault him for "offer[ing] no evidence [about the contents] of these documents." Trustees' Brief at 23. These statements are shameless. As the Trustees correctly observe: "not one of these contracts or agreements is in the record." *Id.* But these document are in the custody and control *of the Trustees*. They should have been disclosed pursuant to Federal Rule of Civil Procedure 26.[3] And if Mr. Montanile's understanding (based on publicly available documents filed by the Trustees with the Department of Labor) is incorrect, it would be easy for the Trustees to dispute it. *See, e.g.*,

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examples of text in the NEI Plan SPD that can only be explained if an unidentified extrinsic document exists).

[2] Indeed, they carefully tiptoe around this issue with statements such as: "The NEI Plan is governed by *several* 'written plan documents' *including* the collective bargaining agreement between signatory employers and the union, the Trust Agreement and the Summary Plan Description." Trustees' Brief at 13 (emphasis added). There would be no need for the Trustees to use ambiguous phrasing if the three documents mentioned were in fact the *only* documents that comprise the plan.

[3] And this is not an isolated oversight. For example, only in connection with the reply to their Motion for Summary Judgment did the Trustees produce the document (minutes from a meeting of the Trustees) that they now rely on exclusively to "prove" their intent to adopt the NEI Plan SPD as a formal plan document. *See* Trustees' Brief at 22.

Trustees' Brief at 11 n.1 (referring to correspondence with the Department of Labor that is not in the record).

The following is beyond dispute: the 29 U.S.C. § 1132(a)(3) claim asserted by the Trustees is predicated entirely on Mr. Montanile's failure to comply with the Reimbursement Provision found in the NEI Plan SPD. There are *at least* two documents *besides* the NEI Plan SPD that comprise the "written instrument" pursuant to which the Plan was "maintained and established." *See, e.g.*, Opening Brief at 7–11 (discussing the Plan's form 5500 filings), 26–27 (interpreting the plain text of the NEI Plan SPD). And neither the Reimbursement Provision (nor any similar provision) appears in *any document* other than the NEI Plan SPD. Consequently, the Trustees can only pursue relief under 29 U.S.C. § 1132(a)(3) – to redress a violation of the "terms of the plan" – if the NEI Plan SPD *also* constitutes part of the "written instrument." As explained next, it does not.

B. Provisions Found *only* in the National Elevator Industry Health Benefit Plan Summary Plan Description Are Not "Terms of the Plan" for Purposes of 29 U.S.C. § 1132.

In their brief, the Trustees continue to defend the core position they advanced in the district court. *See* Trustees' Brief at 10–24 (arguing that "THE DISTRICT COURT CORRECTLY DETERMINED THAT THE DOCUMENT TITLED 'NATIONAL ELEVATOR INDUSTRY HEALTH BENEFIT PLAN

SUMMARY PLAN DESCRIPTION' IS AN ENFORCEABLE PLAN DOCUMENT"). The Trustees are wrong.

1. As explained in Mr. Montanile's opening brief, "ERISA's text simply cannot be read to allow one document to serve as both the 'written instrument' and the 'summary plan description.'" Opening Brief at 17; *see id.* at 17–21 (explaining, in particular, the textual support for this argument). Conspicuously absent from the Trustees' brief is *any mention of* – let alone response to – the textual arguments advanced by Mr. Montanile. Instead, the Trustees counter with three red herrings:

First, the Trustees attempt to avoid the plain meaning of ERISA by incorrectly arguing that this argument was waived. *See* Trustees' Brief at 10–12. In support of this purported "waiver," the Trustees assert that "[t]he Appellant argues for the first time on appeal that a summary plan description cannot be a governing plan document." *Id*. at 10. The Trustees' assertion, however, is demonstrably false. *See, e.g.*, Vol. 1, Dkt. No. 35, 5 (arguing that "*by definition*, the SPD is a summary of other governing plan documents.") (emphasis added); Vol. 1, Dkt. No. 35, 7 ("Amara makes clear that the SPD is *an entirely separate document* from the agreement between the parties that constitutes 'the plan.'") (emphasis added).[4]

[4] In arguing that Mr. Montanile is now taking "the exact opposite position," the Trustees quote entirely out of context a phrase from one section of his opposition to the Trustees' motion for summary judgment which he began *by expressly incorporating his own summary judgment motion.* Vol. 1, Dkt. No. 39, 4.

The Trustees state that "[h]ad the Appellant not waived this issue below, [they] would have vigorously challenged the argument's legal underpinnings as both an evidentiary matter and as a matter of law." Trustees' Brief at 11. But the issue which the Trustees mistakenly assert was "waived" is a pure question of law (i.e., whether, under ERISA, one document can ever serve as both the "written instrument" and the "summary plan description"). As such, there was nothing for the Trustees to challenge as "an evidentiary matter." And even if the issue had not been raised in the district court, it would be in the sound discretion of this Court to address it now. *See, e.g.*, *Wright v. Hanna Steel Corp.*, 270 F.3d 1336, 1342 (11th Cir. 2001) (choosing to address an ERISA question that, unlike here, was

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As noted above, Mr. Montanile argued in his summary judgment motion that "*by definition*, the SPD is a summary of other governing plan documents" and that "Amara makes clear that the SPD is *an entirely separate document* from the agreement between the parties that constitutes 'the plan.'" Vol. 1, Dkt. No. 35, 5, 7 (emphasis added). That is *precisely* the same argument advanced in his opening brief with this Court.

The phrase quoted by the Trustees immediately followed. In the process of arguing that the NEI Plan SPD in this case was obviously *not intended* to also serve as part of the written instrument, Mr. Montanile "acknowledge[d] that ERISA plan fiduciaries may draft a document that operates both as the governing plan document and the SPD mandated by ERISA . . . ." Vol. 1, Dkt. No. 39, 4. Mr. Montanile was not suggesting, however, that such a document would *comply with ERISA*. That legal position would directly contradict both the letter and clear spirit of his own summary judgment motion. He was referring to *the existence of* the common pre-*Amara* practice which unfortunately – as evidenced by this case – has not been discontinued by some fiduciaries.

admittedly not raised in the district court because "[t]he construction and application of the statutes in this case involve pure questions of law . . . .").

Second, the Trustees attempt to avoid the plain meaning of ERISA by incorrectly arguing that this Court is bound by prior Eleventh Circuit decisions. *See* Trustees' Brief at 12–21. To be clear: the Trustees cite only one relevant decision: *Alday v. Container Corp. of America*, 906 F.2d 660, 666 (11th Cir. 1990) (holding that "there was an SPD that clearly functioned as the plan document required by ERISA.") And the holding of that decision was abrogated by the United States Supreme Court in *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011) ("Amara") (rejecting the position advanced by the Solicitor General and expressly holding that "statements [in a ERISA summary plan description] do not themselves constitute the *terms* of the plan . . . .") (emphasis in original).[5]

[5] The Trustees also cite an Eighth Circuit case which reached the same conclusion. *See* Trustees' Brief at 14 (citing *Ross v. Rail Car Am. Group Disability Income Plan*, 285 F.3d 735, 738–39 (8th Cir. 2002)). As with *Alday*, the core holding of the Eighth Circuit in *Ross* was abrogated by *Amara*. To be sure: the Trustees cite several other cases. But none has any relevance here. For example, the Trustees cite three district court cases for the proposition that "more than one document collectively can comprise the ERISA § 402 written instrument . . . ." Trustees' Brief at 13–14. But, as recognized by Mr. Montanile in his opening brief, that proposition is obvious. *See, e.g.*, Opening Brief at 3 (describing the "written instrument" as "a document (*or collective group of documents*) that is (or are) the physical embodiment of the employee benefit plan") (emphasis added). The issue in this case is not whether multiple documents can comprise the "written instrument" but rather whether a *summary plan description* can serve as one of those documents.

The Trustees spend much of their brief unsuccessfully trying to explain away *Amara*. *See* Trustees' Brief at 14–21. Their core argument turns on the Court's use of a single word. According to the Trustees, "Justice Breyer's use of the word 'necessarily' presumes that there may be times when the summary plan description either constitutes, or is part of, the written plan." Trustees' Brief at 16. The Trustees' reading of *Amara*, however, quotes only part of the relevant passage which reads as follows:

> [W]e cannot agree that the terms of statutorily required plan summaries (or summaries of plan modifications) necessarily may be enforced (under §502(a)(1)(B)) as the terms of the plan itself. For one thing, it is difficult to square the Solicitor General's reading of the statute with ERISA §102(a), the provision that obliges plan administrators to furnish summary plan descriptions. *The syntax of that provision, requiring that participants and beneficiaries be advised of their rights and obligations "under the plan," suggests that the information about the plan provided by those disclosures is not itself part of the plan.* See 29 U. S. C. §1022(a). *Nothing in §502(a)(1)(B) (or, as far as we can tell, anywhere else) suggests the contrary.*

Amara, 131 S. Ct. at 1877 (emphasis added).

As the emphasized language makes clear, the *Amara* Court expressly adopted the reading of ERISA advanced by Mr. Montanile – a textual position that the Trustees fail to address *at all* in their brief. Put simply, the Court categorically recognized that language in a summary plan description is *not* part of the plan. Indeed, as the *Amara* Court ultimately concluded: "summary documents, important

as they are, provide communication with beneficiaries *about* the plan . . . their statements do not themselves constitute the *terms* of the plan . . . .” *Id.* at 1878 (emphasis in original).[6]

Third, the Trustees advance a series of misguided policy arguments which they believe render significant certain alleged factual differences between this case and *Amara*. For example, the Trustees argue that this case is more like two pre-*Amara*, out-of-circuit cases than *Amara* because “[h]ere, there is only one document that describes the nature and extent of plan benefits.” Trustees’ Brief at 17–18 (citing and quoting *Administrative Committee of the Wal-Mart Stores, Inc. Associates’ Health and Welfare Plan v. Gamboa*, 479 F.3d 538 (8th Cir. 2007) (“*Gamboa*”); *Feifer v. Prudential Insurance Co. of America*, 306 F.3d 1202 (2d Cir. 2002) (“*Feifer*”)). Cases such as these have no relevance in the post-*Amara* world. To be sure: the *Gamboa* and *Feifer* courts were concerned about the effect of holding that the SPD could not be enforced, as this would leave the plans in those cases without enforceable terms. *See* Trustees’ Brief at 17–18 (discussing these cases). That animating concern no longer exists, however, because the

[6] As any dictionary makes clear, the word “necessarily” has two different meanings. For example, Merriam-Webster defines “necessarily” as *either* “of necessity / unavoidably” *or* “as a logical result or consequence.” It is clear from context that Justice Breyer intended the word necessarily to mean “as a logical result” (i.e., just because ERISA requires a summary plan description does not *as a logical result* mean that the terms in summary plan description may be enforced as the terms of the plan itself).

remedies of reformation and surcharge would be available to participants and beneficiaries in such a circumstance. *Amara*, 131 S. Ct. 1866.[7]

The Trustees also suggest that *Amara* only applies in cases where the sponsor and administrator are different based on the policy notion that administrators, when creating an SPD, should not be permitted to change the terms of the plan because that function is exclusive to the sponsor. *See* Trustees' Brief at 18–19. That cannot possibly be the case because, just as here, in *Amara* "the District Court found that the same entity . . . filled both roles [of sponsor and administrator]." *Cigna v. Amara*, 131 S. Ct. at 1877.

The Trustees' final argument is that *Amara* only applies in cases where the plan's fiduciaries have acted in a misleading manner. Trustees' Brief at 20–21. But that is precisely what Mr. Montanile has concisely maintained is the case here. To

[7] The Trustees' policy argument that participants and beneficiaries of the Plan will be harmed if the NEI Plan SPD is unenforceable is hard to take seriously. *See* Trustees' Brief at 21–22 (arguing that Mr. Montanile's interpretation of *Amara* will harm all other participants and beneficiaries of the Plan). Even before *Amara*, the failure by a fiduciary to create a valid written instrument (which occurred here unless the third party contracts are part of the written instrument) was well recognized as a violation of ERISA which entitled plan participants and beneficiaries to relief. *See, e.g.*, *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982). After *Amara*, the form of such relief in cases such as this is quite clear. Any terms contained in the SPD that are favorable to participants and beneficiaries will be enforceable pursuant to a reformed plan. *Amara*, 131 S. Ct. at 1877. And to the extent the Trustees' conduct constitutes a breach of fiduciary duty, the Trustees may be made liable directly under the remedy of surcharge. *Id.* It is well established that a violation of ERISA such as this cannot possibly operate to the detriment of participants and beneficiaries.

be clear: the Trustees in this case are attempting to enforce a document that is self-described as a *summary plan description* as if it were a *formal written instrument*. It would have been easy to explain to participants and beneficiaries that the NEI Plan SPD was intended by the Trustees to function as the "Plan of Welfare Benefits" contemplated by the Trust if that was truly the case. Similarly, it would have been easy to amend the Trust to identify the NEI Plan SPD as a binding instrument under the Plan. The Trust was amended on 16 other occasions to address less important matters. *See* Vol. 2, Dkt No. 36-2, 47–95. But the Trustees chose to do none of these things. This case is a perfect example of why the *Amara* Court believed it was important to maintain a clear distinction between any summary plan description and the written instrument that it summarizes.

2. Even if this Court concludes that ERISA permits one document to serve as both the written instrument and the summary plan description, the district court erred in this case when it determined that there was no genuine issue of material fact as to whether the NEI Plan SPD was intended to serve both such functions. As the plain text of the NEI Plan SPD, the overall structure Plan, and the internal records of the Trustees all show, the NEI Plan SPD was intended to be exactly what it is self-described as: a summary plan description.

In his opening brief, Mr. Montanile explained at length how the record evidence and filings of the Trustees with the Department of Labor clearly establish

the existence of a genuine dispute over the intent behind the NEI Plan SPD. *See* Opening Brief at 21–28. In their opposition brief, the Trustees' do not directly respond to directly to the substance of any of Mr. Montanile's contentions. *See* Trustees' Brief at 22–24. Instead, they advance three incorrect procedural arguments. *See id.*

First, the Trustees argue that in the court below Mr. Montanile did not offer counterevidence to refute or otherwise challenge the affidavit of John McGowan, a representative of the National Elevator Plan who averred that the NEI Plan SPD was formally approved to operate as part of the Plan's written instrument. Trustees' Brief at 22. That suggestion is plainly false. Indeed, the Trustees' position is contradicted by the very portions of Mr. Montanile's brief that they quote. As they concede, Mr. Montanile argued that "that the affidavit testimony was not supported by 'minutes, notes or other documents' demonstrating that the document had been formally approved by the Trustees." Trustees' Brief at 22.[8] It is obvious that Mr.

[8] To be sure: the Trustees "presented an additional affidavit with the minutes of the meeting" in the district court. Trustees' Brief at 22. But they did so only in connection with their *reply*, leaving Mr. Montanile with no opportunity to address this "evidence" in the ordinary course of briefing the cross-motions for summary judgment. More importantly, the Trustees concede that this document is the only documentary evidence that the NEI Plan SPD was intended to operate as the formal plan document. *See* Trustees' Brief at 22 (stating that they produced "the minutes of the meeting where the Trustees approved the [NEI Plan SPD]."). This document, without question, does not even begin to suggest that the NEI Plan SPD was formally adopted as the Plan of Welfare Benefit contemplated by the Trust. To the contrary, the Trustees' explicitly noted in these minutes that they merely

Montanile was taking the position that a bald assertion of a biased Trustee representative – without supporting documentary proof which a multi-billion dollar plan would certainly have – should not be treated as credible.

Second, the Trustees argue that any finding of the district court may not be disturbed on appeal unless "this Court determines it is clearly erroneous." Trustees' Brief at 22–23 (citing *General Trading v. Yale Material Handling Corp.*, 119 F.3d 1485, 1495 (11th Cir. 1997)). That is not, and never has been, the standard of review that applies to a district court's order granting summary judgment.

> On appeal, parties seeking affirmance of summary judgment bear the *exacting burden* of demonstrating that no genuine dispute exists as to any material fact in the case. In assessing whether the movants have met this burden, we review the evidence and all factual inferences arising from the evidence *in the light most favorable to the non-moving party*.

Useden v. Acker, 947 F.2d 1563, 1572 (11th Cir. 1991) (citations omitted) (emphasis added). The Trustees' position cannot withstand such scrutiny.

Third, the Trustees attempt to sweep away Mr. Montanile's entire discussion of the Plan's agreements with third-party service providers for various reasons that all relate to Mr. Montanile's failure to have had knowledge of and put such documents into the record. What the Trustees do not mention is that the relevant

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"[r]eview[ed] and approv[ed an] *updated Summary Plan Description*." Vol. 2, Dkt. No. 41-2, 5 (emphasis added).

agreements (which must exist because they are mentioned by the Trustees' filings with the Department of Labor) are entirely in *their control*.

II. At a Minimum, the Trustees Were Not Entitled to Summary Judgment on Their 29 U.S.C. § 1132(a)(3) Claim Because Mr. Montanile's Dissipation of the Settlement Funds Is a Genuine Issue of Material Fact.

29 U.S.C. § 1132(a)(3) does not permit a fiduciary to impose an equitable lien on settlement funds that have been dissipated prior to the commencement of litigation.[9] Opening Brief at 31–36. This reading of 29 U.S.C. § 1132(a)(3) has been expressly endorsed by the United States Department of Labor. *See generally* Opening Brief at 31–36 (discussing, at length, the *amicus* brief filed by the United States Solicitor General and Department of Labor in *Thurber v. Aetna Life Ins. Co.*, No. 13-130 (May 2014) ("DOL Amicus in *Thurber*")). In their brief, the Trustees acknowledge that the Department of Labor is "the agency charged with enforcing and regulating ERISA . . . ." Trustees' Brief at 11 n.1. Amazingly, however, the Trustees fail to mention – let alone refute – the thorough reasoning set forth by the Department of Labor). *See* Trustees' Brief at 24–33 (failing to mention or respond to the position articulated by the Department of Labor).

[9] Though Mr. Montanile will presume for the purpose of argument that the *filing* of a lawsuit is the action that renders the equitable lien by agreement enforceable, he would not be surprised if the Court held that an equitable lien by agreement is only enforceable to the extent that funds exist *at the time of judgment* in a case such as this where the fiduciary, in uncustomary fashion, has failed to demand that disputed funds be deposited into a court registry.

As explained below in Section II.A, see *infra* pp. 20–25, the position articulated by the Department of Labor (and adopted by the Eighth and Ninth Circuits) is a correct reading of 29 U.S.C. § 1132(a)(3) as interpreted by the United States Supreme Court. The contrary position articulated by the district court (and adopted by the First, Second, Third, Sixth, and Seventh Circuits) is simply wrong. *Id.* It rests on a fundamental misinterpretation of controlling Supreme Court precedent. *Id.*

As explained below in Section II.B, see *infra* pp. 26–28 the Trustees' assertion that Mr. Montanile's opening brief and the record are "replete with inconsistences" regarding the facts of the dissipation of the settlement funds is completely without merit. Trustees' Brief at 26 n.7.

A. For the Reasons Articulated by the United States Department of Labor, 29 U.S.C. § 1132(a)(3) Does Not Authorize the Imposition of an Equitable Lien on Funds that Have Been Dissipated.

The district court erred in holding that Mr. Montanile's dissipation of the settlement funds was immaterial to the Trustees' claim under 29 U.S.C. § 1132(a)(3). While an equitable lien by agreement does not require the Trustees to trace the settlement funds back to their own possession, the Trustees *are* required to prove that the settlement funds – or property that is traceable to those specific

funds – are currently in *Mr. Montanile's* possession.[10] To hold otherwise – as the district court did – permits the Trustees to enforce their equitable lien against Mr. Montanile's general assets. That is a quintessentially *legal* remedy. And the United States Supreme Court has made clear that 29 U.S.C. § 1132(a)(3) only allows a litigant to seek those remedies that were "typically available in equity." *Mertens v. Hewitt Associates*, 508 U.S. 248, 256 (1993).

To be sure: five courts of appeal have concluded that an equitable lien can be enforced even when the specific fund to which the lien attaches has been dissipated. But those decisions misapprehend the historical requirements of an equitable lien by assignment. And, as the Department of Labor has explained, those decisions are based on a fundamental misreading of *Sereboff v. Mid Atlantic Medical Services*, 547 U.S. 356 (2006). *See* DOL Amicus in Thurber at 11, No. 13-130. In assessing the correct meaning of *Sereboff* – and the historical requirements of an equitable lien by agreement – Mr. Montanile respectfully suggests that the carefully reasoned analysis of the Department of Labor deserves considerable attention, as does the extensive opinion of the Ninth Circuit in *Bilyeu v. Morgan Stanley Long Term Disability Plan*, 683 F.3d 1083 (9th Cir. 2012) ("*Bilyeu*").

[10] This would also include any specific funds in the possession of Mr. Montanile's "heirs, administrators, executors, voluntary assignees, and purchasers or encumbrancers with notice." 4 Spencer W. Symons, Pomeroy's Equity Jurisprudence § 1235 at 696 (5th ed. 1941) ("*Pomeroy*").

In their opposition brief, the Trustees make too much of the distinction between "an equitable lien sought as a matter of restitution" and "an equitable lien by agreement." Trustees' Brief at 28–29 (quoting *Sereboff*, 547 U.S. at 364–365 (internal quotation marks omitted)). The *Sereboff* Court expressly held that an equitable lien by agreement requires the Trustees to "specifically identif[y] a particular fund, distinct from [Mr. Montanile's] general assets," and to "specifically identif[y] . . . a particular share of that fund to which [the Trustees are] entitled." *Sereboff*, 547 U.S. at 364.

To be sure: it is *not* necessary for that particular fund to be traced back to the Trustees. *Sereboff*, 547 U.S. at 364–365. But it *is* necessary for the Trustees to demonstrate that the particular fund is within Mr. Montanile's possession. *Sereboff*, 547 U.S. at 364 (explaining that plan fiduciary could "'follow' a portion of the [settlement] recovery 'into the Sereboffs' hands' 'as soon as the settlement fund was identified,' and impose on that portion a constructive trust or equitable lien" (internal brackets omitted)). As the logic of *Sereboff* dictates, and as the Department of Labor, Ninth Circuit, and Eighth Circuit have explicitly recognized, "where . . . 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,'" and "such a recovery would be legal, not equitable, and thus unavailable under ERISA Section 502(a)(3)." *Bilyeu*, 683 F.3d at 1094; *Treasurer, Trustees of Drury*

Industries, Inc. Health Care Plan & Trust v. Goding, 692 F.3d 888, 897 (8th Cir. 2012); DOL Amicus in *Thurber* at 11.[11]

The Court in *Sereboff* did not dispense with the requirement that an equitable lien – by agreement or otherwise – can only be enforced against a specifically identifiable fund within the possession of the defendant. Nor could the Court have done so because of the very nature of an equitable lien by agreement:

> The doctrine may be stated in its general form, that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is *enforceable against the property* . . . .

4 Pomeroy § 1235 at 696 (emphasis added). The significance of the lien's enforceability against specifically identifiable property, rather than defendant's general assets, cannot be overstated:

> The remedies of equity are, as a class, specific. . . . [T]hese remedies are, as a general rule, directed against some specific thing; they give or enforce a right to or over some particular thing – a tract of land, personal property, or a fund – rather than a right to recover a sum of money generally out of the defendant's assets.

[11] The Trustees assert that the Eighth Circuit has not held that an equitable lien by agreement cannot be enforced against a defendant's general assets. The Trustees are wrong. *See Goding*, 692 F.3d at 897 (specifically holding that a plaintiff's equitable lien by agreement claim could not be maintained where the defendant was no longer in the possession of settlement funds because any judgment would result in legal, not equitable, relief).

4 Pomeroy § 1234 at 694; *see also id.* at 695 ("The doctrine of 'equitable liens' supplies this necessary element; and it was introduced for the sole purpose of furnishing a ground for the specific remedies which equity confers, operating upon particular identified property, instead of the general pecuniary recoveries granted by courts of law."); *cf.* 4 Pomeroy § 1280 at 806-807 ("The sure criterion is whether the order or direction to the drawee, if assented to by him, would create an absolute personal indebtedness payable by him at all events, or whether it creates an obligation only to make payment out of the particular designated fund.").

The Trustees are mistaken that the possession requirement applies only to equitable liens sought as a matter of restitution. The Dobbs treatise, which the Trustees themselves invoke, identifies an equitable lien as first and foremost a *lien*, which "is a charge against *property* that makes *the property* stand as security for a debt owed." 1 Dobbs Law of Remedies § 4.3(3) at 600 (2d. ed. 1993). The treatise next appears to address equitable liens by agreement, but it does not purport to discuss the requirements that attach to such equitable liens.[12] It certainly does not exhaustively categorize every difference between the two types of equitable liens. Instead, the treatise focuses on equitable liens imposed as a matter *of restitution*.

[12] Indeed, the treatise does not even use the term equitable lien by agreement, and thus it is not a particularly useful resource to understand whether the equitable lien by agreement shares any requirements with the restitutionary equitable lien.

See id. at 601 (discussing "equitable liens imposed . . . to prevent unjust enrichment"). The Trustees misapprehend the significance of that discussion. The treatise nowhere indicates that an equitable lien by agreement can be enforced against the defendant's general assets.

Similarly, the Trustees' summary of Dobbs' discussion of the equitable lien by agreement misstates an important principle. The Trustees say that "[i]f a defendant is no longer in possession of the property creating the unjust enrichment (or a fund or asset into which it had been converted), then he is no longer enriched and the restitution claim fails." Trustees' Brief at 30. This is incorrect. A plaintiff's entire claim for restitution (i.e., a plaintiff's substantive unjust enrichment claim) will not fail when a particular fund has been dissipated. To the contrary, the plaintiff can recover a money judgment that can be enforced against the defendant's general assets. What will fail is the plaintiff's eligibility for the *equitable lien remedy*. That failure stems not from the fact that defendant is no longer unjustly enriched; it stems from the fact that a lien attaches to a particular fund. And, in the ERISA context, if the plaintiff is no longer eligible for an equitable lien by agreement and is capable of obtaining only a money judgment against the defendant, the plaintiff cannot prevail under 29 U.S.C. § 1132(a)(3).[13]

[13] In addition to advancing their flawed interpretation of *Sereboff*, the Trustees make several arguments as to why the Court should not hold, as a policy

B. As the District Court Expressly Recognized, there Is a Genuine Factual Dispute in this Case Over the Extent to which Mr. Montanile Honestly Dissipated the Funds on which the Trustees Seek to Impose an Equitable Lien.

In an apparent attempt to disparage Mr. Montanile's factual position – that the settlement funds were dissipated such that the $121,004.02 judgment entered against Mr. Montanile exceeded the amount of remaining settlement funds in his possession at the time this suit was filed – the Trustees accuse Mr. Montanile's opening brief and the record of being "replete with inconsistencies." Trustees' Brief at 26. This suggestion is entirely unfounded.

The opening brief and the record tell a consistent story about the dissipation of the settlement funds. First, the settlement disbursement sheet mentioned by the Trustees – read in conjunction with the affidavits of Mr. Montanile and his attorney in the district court, Brian S. King – establishes that Mr. Montanile received $197,416.35 in total distributions from April 2011 through February 2012 as a result of his settlement. Mr. Montanile has never disputed that fact.

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matter, that dissipation is relevant to the enforceability of an equitable lien by agreement. *See* Trustees' Brief at 32–33. For example, they claim that if dissipation is relevant it will encourage participants to quickly dissipate funds. *Id.* at 32. These policy arguments do not appear to have any basis in reality. But even if they did, that would not authorize the Court to redraft ERISA, which the Supreme Court has time and time again interpreted to exclusively permit equitable, not legal, relief. *See, e.g.*, *Sereboff*, 547 U.S. at 362 (2006).

Second, the declarations of Mr. Montanile and Mr. King show that there was substantial dissipation of the settlement funds prior to the filing of this lawsuit. For example: Mr. Montanile declared that, out of the initial $90,000 he received (as indicated on the settlement disbursement sheet), "most of that amount [had] been spent since the time of the settlement in supporting [himself] and [his] daughter and in maintaining [their] home." Vol. 2, Dkt. No. 39-3, 2. He proceeded in his declaration to explain why: "I am the custodial single parent for my 12-year old daughter. I have been solely responsible for raising and supporting my daughter since she was one year old." Vol. 2, Dkt. No. 39-3, 2. Mr. King's declaration provided an additional reason why significant portions of the settlement funds had been spent: "Montanile has paid me and incurred obligations to pay me on an hourly basis for my legal work in this case." Vol. 1, Dkt. No. 35-2, 2. And to be clear: Mr. Montanile expressly "denie[d] that he is in actual or constructive possession of any but a small portion of the proceeds realized from the settlement of his claims." Vol. 2, Dkt. No. 39-3, 2. In his opening brief, Mr. Montanile contradicted not one of these statements.

This evidence would have been more than sufficient to create a genuine issue of material fact as to whether less than $121,004.02 of the settlement fund

remained in Mr. Montanile's possession at the time this lawsuit was filed.[14] The district court recognized as much. Indeed, the district court felt obligated to specifically mention that the parties had "varying interpretations of this settlement disbursement sheet." Vol. 2, Dkt. No. 45, 14 n.2. Because the district court "ultimately [found] that any dissipation of settlement funds by [Mr. Montanile was] immaterial," however, it expressly declined to consider the underlying factual issue of the extent to which the settlement funds had been dissipated. Vol. 2, Dkt. No. 45, 14 n.2 If the Court holds that the fact of dissipation affects the enforceability of an equitable lien by agreement, then any associated factual issues such as this may be resolved on remand.

[14] Although it may have been better strategy for Mr. Montanile to include a more thorough account of his expenditures, to do so would not be necessary to create a genuine dispute of material fact that would preclude summary judgment.

CONCLUSION

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

Dated: July 17, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,695 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).

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I certify that on July 17, 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 July 17, 2014, a true and correct copy of this brief was served, via UPS Ground, postage prepaid, upon the following individual:

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