No. 19-1144

IN THE

Supreme Court of the United States

MICHAEL MCCARRON,

Petitioner,

v.

DECARLO & SHANLEY, P.C.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Cited Authorities

STATUTES

STATEMENT OF THE CASE

The Southwest Regional Council of Carpenters ("SWRCC") is a labor union organized with the United Brotherhood of Carpenters and Joiners of America ("UBC"). The Southwest Training Fund ("SWTF") is a multi-employer benefit plan that provides an apprenticeship program for union carpenters. Petitioner Michael McCarron ("Petitioner" or "McCarron") served as the Executive Secretary-Treasurer of SWRCC from August 1999 to August 2013. McCarron was the SWRCC's chief executive officer and responsible for its day to day business. McCarron's brother, Douglas McCarron ("Douglas") was and still is the general president of the UBC as well as a Trustee of the SWTF; Chairman of the Southwest Carpenters Trust Funds, and a political rival of Petitioner.

In April of 2014, SWRCC filed an action in the US District Court, Central District of California against McCarron alleging violation of the Labor Management Reporting and Disclosure Act ("LMRDA") (29 U.S.C. § 501 (a)), claiming that SWRCC was injured by McCarron's reimbursement of overcharged lease payments between SWRCC and SWTF. Of particular note is that the lawsuit was filed on behalf of SWRCC by Respondent law firm DeCarlo & Shanley ("D&S"), the very law firm that instructed McCarron to refund the overcharged lease payments in the first instance. That is, D&S filed a lawsuit on behalf of SWRCC against McCarron for following D&S' own instructions.

McCarron also counterclaimed against SWRCC, D&S, and other parties not relevant to this petition.

McCarron's claims against D&S were for indemnity and contribution, as well as state law claims for negligence, breach of fiduciary duty, breach of contract, fraud and conspiracy. McCarron was ultimately vindicated by judgment on all claims brought by SWRCC against him.

On November 19, 2018, the District Court heard and granted D&S' motion to dismiss (Fed. R. Civ. P. § 12(b)(6)), which was the last remaining matter in the action. Final Judgment was rendered on January 4, 2019. Thereafter, McCarron filed an appeal to the Ninth Circuit which ultimately affirmed the District Court's dismissal of his claims and McCarron's petition for rehearing was similarly denied. On March 16, 2020, McCarron timely filed a Petition for Writ of Certiorari. On May 18, 2020, Respondent D&S filed its opposition to Petitioner's petition. Petitioner now submits this reply brief.

RESPONSE TO RESPONDENT'S OPPOSITION AND REASONS FOR GRANTING THE PETITION

1. Factual Disputes Raised by Respondent are Immaterial Because the Matter was Decided by a Motion to Dismiss

Respondent alleges factual differences form a basis for denial of Petitioner's petition as its first argument in its opposition to Petitioner's petition. However, the procedural posture of this action involved a motion to dismiss (Fed. R. Civ. P. 12(b)(6)). Disputed factual issues are immaterial at the motion to dismiss stage of the litigation because the motion is based solely upon the facts plead in the complaint.

To overcome a motion to dismiss a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." (*Bell Atl. Corp. v. Twombly* 550 U.S. 544, 570 (2007)) ("*Bell*"). "Facial plausibility" is demonstrated when a plaintiff has plead facts that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." (*Ashcroft v. Iqbal* 556 U.S. 662, 678 (2009) ("*Ashcroft*"). For purposes of a motion to dismiss, courts must accept all well-plead factual allegations as true (*Ashcroft* 556 U.S. at 678). Furthermore, courts are only permitted to consider the complaint, materials incorporated into the complaint by reference, and matters properly subject to judicial notice (*Metzler Inv. GMBH v. Corinthian Colleges, Inc.* 540 F.3d 1049, 1061 (9th Cir. 2008)). While assuming the well-plead factual allegations are true, the court is required to "determine whether they plausibly give rise to an entitlement to relief." (*Ashcroft* 556 U.S. at 679).

Here, the primary basis of the District Court and Ninth Circuit's basis for dismissal of (or affirmance of the dismissal of) Petitioner's entire complaint was ERISA preemption, a pure question of law. The only relevant question is whether the District Court and Ninth Circuit were correct in their determinations that ERISA preempted all of McCarron's state common law claims. Factual questions, disputes and issues are reserved for later stages in the action. This notwithstanding, it must be remembered that McCarron fully prevailed in the action SWRCC filed against him and that the Department of Labor fully vindicated McCarron's actions which actually saved the SWRCC significant penalties and fees.

Therefore, Respondent's first argument relating to contested factual issues in McCarron's case are without merit regarding whether or not this Court should grant Petitioner's Petition for Writ of Certiorari—disputed issues of fact are immaterial with regard to a motion to dismiss under Fed. R. Civ. P. 12(b)(6).

2. Lower Courts Need Precedent as They Continue to Struggle With the Scope and Breadth of ERISA Preemption and This Case is the Ideal Companion Case for the *Rutledge v. Pharmaceutical Care Management Association* Case Presently Pending Before This Court

In passing ERISA, Congress was certain to note, (29 U.S.C. §1144(a)):

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

When a state law directly conflicts with ERISA it is preempted (*Boggs v. Boggs* 520 U.S. 833 (1997)). In *New York State Conference of Blue Cross v. Travelers Ins. Co.* 514 U.S. 645, 654 (1995) this Court noted the "And yet, despite the variety of these opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant

state law." Despite this pronouncement, lower courts have continued to struggle to determine the scope and breadth of ERISA preemption. For example, in *Dishman v. UNM Life Insurance Co. of America* 269 F.3d 974 (2001 9th Cir.), the Ninth Circuit noted:

> It is with great trepidation that we tread into the field of ERISA preemption. . . .
>
> The problem is this: 29 U.S.C. § 1144(a) states that ERISA "shall supersede any and all state laws insofar as they . . . relate to any employee benefit plan." . . . . "to determine whether a state law has the forbidden connection [to an ERISA plan], we look to 'the objectives of the ERISA statute as a guide to the scope of the state law that Congress would survive,' as well as to the nature of the effect of the state law on ERISA plans." (*Id.* at 980-81).

By way of further example, in his original petition, McCarron cited *Rudel v. Hawaii Management Alliance Association* (9th Cir. 2019) 2019 U.S. App, LEXIS 27371 and *Dialysis Newco, Inc. v. Cmty. Health Sys. Grp. Health Plan* (5th Cir. September 11, 2019) 2019 U.S. App. LEXIS 27418, as examples of two recent cases which have reached very different decisions on ERISA preemption. In *Stoker v. Hartford Life and Accident Insurance Company* 355 F. Supp.3d 893 (2019 D. Arizona), the Arizona district court held that an intentional infliction of emotional distress claim against an insurer was not preempted by ERISA. Conversely, *Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson* 201 F.3d 1212 (9th Cir. 2000) (a case partly abrogated by this Court on other grounds), found ERISA

preemption for a state law claim against a law firm which allegedly overcharged a plan for legal services. However, other Ninth Circuit cases such as *Depot, Inc. v. Caring for Montanans, Inc.* 915 F.3d 643 (9th Cir. 2019) have called the logic in *Rutledge* into question.

These cases are but a small example of the lower courts' struggle determining the scope of ERISA preemption. It is without question that this struggle has lead both to inconsistent decisions as well as the improper dismissal of countless meritorious claims due to mistaken misapplications of ERISA preemption principles.

The result in McCarron's case provides yet another example of the fact that lower courts continue to use ERISA preemption as a basis to dismiss meritorious cases. McCarron's case deals primarily with the LMRDA, not ERISA. The basis of SWRCC's original action against McCarron was an alleged violation of LMRDA, not ERISA. McCarron's lawsuit should not have been dismissed on the basis of ERISA preemption.

Additionally, this Court is presently set to hear *Rutledge v. Pharmaceutical Care Management Association* (Supreme Court Case Number 18-540) later this term. The *Rutledge* case is also an ERISA preemption case, dealing primarily with Arkansas' statute regulating pharmacy benefit managers' drug-reimbursement rates; a statutory based ERISA preemption matter. Petitioner's petition presents the other side of the coin, common law and other individual-focused claims as they relate to ERISA preemption. Therefore, Petitioner's matter represents the ideal companion case for this Court to provide significant clarification on the issue of ERISA

preemption and how lower courts should examine which state common law claims are, and which are not preempted by ERISA.

Despite Respondent's contentions, it is beyond dispute that the issue of ERISA preemption has continued to vex lower courts, attorneys and litigants alike. District and Circuit Courts have freely admitted to the difficulties of determining when ERISA does, and when it does not preempt various claims. All too often, meritorious claims, like those plead by Appellant have been dismissed based upon mistaken findings of ERISA preemption, generally in early pleading stages, before the merits of the case have been examined.

McCarron's state common law claims against a law firm that represented a labor union in no way frustrates Congress's intent to establish the exclusive regulation of employee welfare benefit plans. Unless a state law, especially a common law claim, truly vitiates the intent of Congress, lower courts should not stretch logic to find preemption, resulting in the dismissal of viable claims, especially when doing so in would no way frustrate Congressional intent. Therefore, Petitioner's petition represents an ideal situation for this Court to determine the scope and breadth of ERISA preemption as it relates to state common law claims.

CONCLUSION

For the above and foregoing reasons, Petitioner respectfully requests the issuance of a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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