No. _____

In the
Supreme Court of the United States

ROBERT HOCH,
Petitioner,
v.

MBI ENERGY SERVICES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an ERISA Plan Administrator may enforce reimbursement provisions against an ERISA beneficiary that are contained only in a Summary Plan Description and where no ERISA Plan document containing the reimbursement provisions exists, in contravention of this Court's holding in *Cigna Corp. v. Amara*, 563 U.S. 421 (2011), that enforceable terms within ERISA must be contained in the Plan document and cannot be contained only in a Summary Plan Description.

PARTIES TO THE CASE

Robert Hoch, Petitioner, was the Defendant-Appellant below. MBI Energy Services, Inc., Respondent, was the Plaintiff-Appellee below.

STATEMENT OF RELATED PROCEEDINGS

- MBI Energy Services, Inc. v. Robert Hoch, et. al., No. 18-1539 (8th Cir.) (opinion issued and judgment entered July 3, 2019; mandate issued July 24, 2019).
- MBI Energy Services, Inc. v. Robert Hoch, et. al., No. 16-cv-329-DLH-CSM (D. N. Dakota) (memorandum of decision issued Feb. 28, 2018; judgment entered Feb. 28, 2018).

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

Robert Hoch respectfully petitions this court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The decision by the District Court for the District of North Dakota is annexed to the appendix at Pet. App. 13 - 24. The decision by the United States Court of Appeals for the Eighth Circuit is annexed to the appendix at Pet. App. 1 - 10.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eighth Circuit issued its opinion and judgment on July 3, 2019. Pet. App. 11. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3):

> (a) **Persons empowered to bring a civil action** A civil action may be brought—
>
> > (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

CONCISE STATEMENT OF THE CASE

Robert Hoch ("Hoch") was a member and beneficiary of a self-funded employee benefit plan ("the Plan") sponsored and administered by MBI Energy Services, Inc. ("MBI"). Pet. App. at 2. The Plan provided Hoch $68,210.38 in medical benefits after he was injured in an accident. *Id*. Hoch reached a settlement with the tortfeasor responsible for his injury and received a settlement from the tortfeasor's insurer. *Id*.

MBI demanded that Hoch reimburse MBI for the benefits it paid to Hoch and based its repayment demand on subrogation terms that were contained only in a Summary Plan Description. No MBI Energy ERISA Plan document existed to contain reimbursement requirements.

Hoch disputed MBI's entitlement to reimbursement. MBI filed suit against Hoch in the United States District Court for the District of North Dakota, seeking to enforce the terms of the Summary Plan Description against Hoch pursuant to 29 U.S.C. § 1132(a)(3). *Id*.

The District Court had jurisdiction pursuant to 29 U.S.C. § 1132(e)(1), conferring on district courts of the United States exclusive jurisdiction of civil actions brought pursuant to 29 U.S.C. § 1132(a)(3). The Court of Appeals for the Eighth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

A. Introduction

This Court should grant Hoch's Petition for Writ of Certiorari because the United States Court of Appeals for the Eighth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court.

Specifically, the United States Court of Appeals for the 8th Circuit held that even though the reimbursement terms were contained only in a Summary Plan Description and not in an ERISA Plan, the repayment terms were legally operative because no ERISA Plan document existed.

This Court has decided that a health-plan administrator may enforce a reimbursement provision *of a Plan document* by filing suit under § 1132(a)(3) of ERISA. *See Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006).

This Court next decided that Summary Plan Descriptions, "important as they are, provide communication with beneficiaries about the plan, but that their statements do not themselves constitute the terms of the plan." *Cigna Corp. v. Amara*, 563 U.S. 421, 438 (2011).

However, this Court has not decided the significant and recurring issue of whether a plan administrator may enforce a reimbursement provision *of a Summary Plan Description* in a § 1132(a)(3) action when no

separate plan document exists.[1] This question is an important issue affecting millions of ERISA plan beneficiaries and is ripe for this Court's review. This case is an appropriate vehicle for deciding this question.

The Eighth Circuit Court of Appeals was not faithful to and evaded this Court's ruling in *Cigna Corp. v. Amara*. The Eighth Circuit's decision that the terms of a Summary Plan Description may be enforced as if terms of a plan because the employer did not have an ERISA Plan document in violation of ERISA undermines and conflicts with this Court's holding and reasoning in *Cigna Corp. v. Amara*, 563 U.S. 421 (2011).

The Eighth Circuit itself recognized that this Court's holding in *Amara* undermined the Eighth Circuit's own prior holding and reasoning in its case of *Admin. Comm. of Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Gamboa*, 479 F.3d 538 (8th Cir. 2007), that the Summary Plan Description contained the enforceable terms of the plan, *see* Pet. App. at 7 (App. Ct. Op. at *6), and that "conflating a plan and a summary plan description risks undermining ERISA's

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[1] In *U.S. Airways, Inc. v. McCutchen*, 569 U.S. 88 (2013), this Court treated the language of a Summary Plan Description as the terms of the plan. However, this Court expressly noted that "We have made clear that the statements in a summary plan description "communicat[e] with beneficiaries about the plan, but . . . do not themselves constitute the terms of the plan." *McCutchen*, 569 U.S. at 91 n.1. (citing *CIGNA Corp. v. Amara*, 563 U.S. 421, 438 (2011)." The only reason this Court treated the terms of the Summary Plan Description as the terms of the plan was because "the parties litigated this case, and both lower courts decided it, based solely on the language [of the SPD]." *Id*.

goal that the summary plan description embody 'clear, simple communication[.]'" Id. at 9 (App. Ct. Op. at *7).

The argument set forth in this petition explains that the Eighth Circuit's holding that a Summary Plan Description can be both a Summary Plan Description and also the ERISA Plan itself undermines and conflicts with this Court's holding and reasoning in *Amara*. *Amara*'s directive that Summary Plan Descriptions "provide communication with beneficiaries about the plan" and "do not themselves constitute the terms of the plan" is equally applicable to a situation where a plan administrator seeks to enforce a reimbursement provision that is contained only in a Summary Plan Description and there is no ERISA Plan containing an employer's right to reimbursement.

Critically, pursuant to this Court's decision in *Amara*, the contents of a Summary Plan Description document that is required to provide "clear, simple communication" to plan beneficiaries regarding plan terms cannot, at the same time, set forth the detailed and specific legally binding contractual terms the employer seeks to enforce against the ERISA plan beneficiary. Those terms must come from the plan document itself as required by ERISA.

B. Background

One of the primary functions of ERISA is to ensure the integrity of written benefit plans. *Dugan v. Hobbs*, 99 F.3d 307, 309-10 (9th Cir. 1996); *Van Orman v. American Ins. Co.*, 680 F.2d 301, 302 (3d Cir. 1982). To effectuate that goal, ERISA requires a Plan Sponsor to establish a written "Plan Document," as defined by 29

U.S.C. §1102, and a Plan Administrator to establish a separate, written "Summary Plan Description," as required by 29 U.S.C. §1022.

The Plan document and the Summary Plan Description each have their own statutory purpose. The plan document is a written instrument created by the Plan sponsor, contains the detailed and specific enforceable contractual terms of the Plan, and is the written instrument by which the plan administrator must operate the plan. 29 U.S.C. § 1002(1); 29 U.S.C. § 1102. Conversely, the Summary Plan Description summarizes the relevant portions of the plan document, *Schwartz v. Prudential Ins. Co. of Am.*, 450 F.3d 697, 700 (7th Cir. 2006) and provides "clear, simple communication" to plan beneficiaries regarding plan terms. *See Cigna Corp. v. Amara*, 563 U.S. 421, 437 (2011).

The differentiation between a Summary Plan Description and a plan document setting forth the terms of the plan was laid bare by this Court in *Cigna Corp. v. Amara*, 563 U.S. 421 (2011). In *Amara*, this Court rejected that the "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." *Id.* at 436. This Court's reasoning was three-fold.

First, this Court found that the text of the statute itself demonstrated that the information contained within a Summary Plan Description was not itself part of the plan:

> "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."

Id.

Second, this Court explained that the division of authority between the Plan sponsor and the Plan administrator supported its view that the terms of the Summary Plan Description were not the terms of the Plan:

> "Nor do we find it easy to square the Solicitor General's reading with the statute's division of authority between a plan's sponsor and the plan's administrator. The plan's sponsor (e.g., the employer), like a trust's settlor, creates the basic terms and conditions of the plan, executes a written instrument containing those terms and conditions, and provides in that instrument "a procedure" for making amendments. § 402, 29 U.S.C. § 1102. The plan's administrator, a trustee-like fiduciary, manages the plan, follows its terms in doing so, and provides participants with the summary documents that describe the plan (and modifications) in readily

> understandable form. §§ 3(21)(A), 101(a), 102, 104, 29 U.S.C. §§ 1002(21)(A), 1021(a), 1022, 1024 (2006 ed. and Supp. III). Here, the District Court found that the same entity, CIGNA, filled both roles. See 534 F. Supp. 2d, at 331. But that is not always the case. Regardless, we have found that ERISA carefully distinguishes these roles. See, e.g., Varity Corp., 516 U.S., at 498, 116 S. Ct. 1065, 134 L. Ed. 2d 130. And we have no reason to believe that the statute intends to mix the responsibilities by giving the administrator the power to set plan terms indirectly by including them in the summary plan descriptions. See Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 81-85, 115 S. Ct. 1223, 131 L. Ed. 2d 94 (1995)."

Id. at 437.

Third, this Court reasoned that the statute's objective – to provide clear, simple communication to plan beneficiaries – would be defeated if the Summary Plan Description was part of the plan:

> "Finally, we find it difficult to reconcile the Solicitor General's interpretation with the basic summary plan description objective: clear, simple communication. See §§ 2(a), 102(a), 29 U.S.C. § 1001(a), 1022(a) (2006 ed.). 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. Consider the difference between a will and the summary of a will or between a property deed

> and its summary. Consider, too, the length of Part I of this opinion, and then consider how much longer Part I would have to be if we had to include all the qualifications and nuances that a plan drafter might have found important and feared to omit lest they lose all legal significance. The District Court's opinions take up 109 pages of the Federal Supplement. None of this is to say that plan administrators can avoid providing complete and accurate summaries of plan terms in the manner required by ERISA and its implementing regulations. But we fear that the Solicitor General's rule might bring about complexity that would defeat the fundamental purpose of the summaries."

Id. at 437-8.

Accordingly, this Court concluded that Summary Plan Descriptions, "important as they are, provide communication with beneficiaries about the plan, but that their statements do not themselves constitute the terms of the plan for purposes of § 502(a)(1)(B)." *Id*. at 438.

In a concurring opinion, Justice Scalia further solidified that a Summary Plan Description could not set forth the terms of the Plan:

> "ERISA defines the word "plan" as "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both," 29 U.S.C. § 1002(3), and it requires that a "plan" "be established and maintained pursuant to a written instrument," § 1102(a)(1). An SPD, in

> contrast, is a disclosure meant "to reasonably apprise [plan] participants and beneficiaries of their rights and obligations under the plan." § 1022(a). *It would be peculiar for a document meant to "apprise" participants of their rights "under the plan " to be itself part of the "plan." Any doubt that it is not is eliminated by ERISA's repeated differentiation of SPDs from the "written instruments" that constitute a plan*, see, e.g., §§ 1029(c), 1024(b)(2), and ERISA's assignment to different entities of responsibility for drafting and amending SPDs on the one hand and plans on the other, see §§ 1002(1), (2)(A) ; 1021(a) (2006 ed. and Supp. III), 1024(b)(1); Beck v. PACE Int'l Union, 551 U.S. 96, 101, 127 S.Ct. 2310, 168 L.Ed.2d 1 (2007). An SPD, moreover, would not fulfill its purpose of providing an easily accessible summary of the plan if it were an authoritative part of the plan itself; the minor omissions appropriate for a summary would risk revising the plan."

Id. at 446 (emphasis added).

Thus, according to Justice Scalia, ERISA repeatedly differentiated Summary Plan Descriptions from the "'written instruments' that constitute the 'plan.'" *Id*. While Justice Scalia's opinion is not binding precedent, it accurately restated what the *Amara* majority had held in Part II(A): that the Summary Plan Description was separate and distinct from the plan documents that constitute the plan and set forth the plan terms. The Court's analysis thus led to the decision that in order for terms to be enforceable, they must be in a

separate written Plan document, created by the Plan sponsor, and not in a Summary Plan Description.

Amara involved a situation where the employer had properly created two separate documents: a Plan document under 29 U.S.C. §1102, containing the contractual terms of the plan and a separate Summary Plan Description summarizing those terms pursuant to 29 U.S.C. §1022.

Instantly, however, MBI did not comply with ERISA requirements and had only one document, the Summary Plan Description. Nonetheless, MBI enforced the terms of the Summary Plan Description in its 502(a)(3) action on the basis that the terms of the Summary Plan Description were the terms of the plan. Pet. App. at 25-33. The District Court agreed and granted summary judgment in MBI's favor. *Id*. at 23.

The Eighth Circuit affirmed the District Court's granting of summary judgment. In doing so, the Court relied on *Admin. Comm. of Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Gamboa*, 479 F.3d 538, 542 (8th Cir. 2007), an Eighth Circuit case that predated *Amara* which enforced the reimbursement terms of a Summary Plan Description against a plan beneficiary:

> "We previously addressed this question in *Gamboa*, which rejected the argument that a summary plan description cannot serve as a plan. In that case, as in this one, a beneficiary received benefits under an ERISA plan and also recovered a settlement with a third party. Gamboa, 479 F.3d at 540. The plan sought

> reimbursement, but the district court found that the reimbursement provision was not an enforceable part of the plan because it was contained only in a summary plan description that was not identified as a formal plan document. Id. at 540-41, 543. We reversed the district court's judgment because the summary plan description was the only document providing an identifiable source of plan benefits. Id. at 544."

Pet. App. at 5-6 (App. Ct. Op. at *4-5).

Hoch argued that the Eighth Circuit Court's holding in *Gamboa* was superceded by this Court's *Amara* opinion. *Id*. at 6 (App. Ct. Op. at *5). The Eighth Circuit recognized that *Amara*:

> "undermines parts of *Gamboa*'s reasoning, *see, e.g.*, 479 F.3d at 544 ("[W]e have held that the terms of a summary plan description prevail even if they conflict with the provisions of a formal plan . . . .")[.]"

Id. at 7 (App. Ct. Op. at *6).

Further, the Court recognized:

> To be sure, conflating a plan and a summary plan description risks undermining ERISA's goal that the summary plan description embody "clear, simple communication," *Amara*, 563 U.S. at 437, and we do not address whether this SPD meets all the requirements of § 1022."

Id. at 9 (App. Ct. Op. at *7).

However, the Eight Circuit Court refused to find that *Amara* overruled its prior holding in *Gamboa* that the Summary Plan Description sets forth the enforceable terms of the plan because *Amara* "[did] not address the question we decided in *Gamboa*: whether, in the absence of any other plan document providing benefits, the summary plan description could constitute the plan." *Id*. at 7 (App. Ct. Op. at *6). Ultimately, the Eighth Circuit determined that the Summary Plan Description was the Plan document and that "the equities in this case buttress our conclusion that the reimbursement provision is enforceable." *Id*. at 9 (App. Ct. Op. at *7).

In sum, the Eighth Circuit evaded the reasoning and holding of the *Amara* Court in order to enforce the terms of the Summary Plan Description. But the Court's distinction - that this case is different because there is only a Summary Plan Description, and not a separate written plan document - enforces an anomaly that should never legally exist. ERISA requires both a written Plan document *and* a separate Summary Plan Description. ERISA does not conflate the two documents and does not authorize a Plan to choose to have only one or the other.

C. Argument

For the following reasons, this Court's holding in *Amara* is as equally applicable to situations where there exists only a Summary Plan Description.

First, the text of ERISA demonstrates that ERISA affirmatively requires a written Plan document and a separate Summary Plan Description.

Second, the division of authority between the Plan Sponsor and Plan Administrator demonstrates that ERISA affirmatively requires a written Plan document and a separate Summary Plan Description and that the terms of the Summary Plan Description are not enforceable as the terms of the Plan.

Third, this Court's concern that Plan administrators would sacrifice "simplicity and comprehensibility in order to describe Plan terms in the language of lawyers" in order to make the Plan summary legally enforceable is not assuaged where, as here, a single document acts as both the Plan document and the Summary Plan Description. In fact, this Court's aforementioned concern is directly implicated by the practice of issuing a single document that acts as both the written Plan document and the Summary Plan Description.

Fourth, *Amara* does not limit its holding to instances where a Summary Plan Description conflicts with an ERISA Plan document. Rather, *Amara* actually holds that for terms to be effective, those terms must be contained in the Plan Document and terms contained only in an SPD are insufficient.

Fifth, granting the petition and reversing the Eighth Circuit would not put Plan benefits provided solely under the terms of a Summary Plan Description in danger.

1. The syntax of ERISA § 102(a), 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, even where no other Plan document exists.

This Court's holding in *Amara* cannot be so narrowly constrained to apply only to situations where there is both a Summary Plan Description and a separate additional Plan document. Such a constraint would seem to implicitly authorize that ERISA permits some other arrangement in which a single document would serve as both the governing Plan document and also s the Summary Plan Description despite ERISA's requirement for both separate and distinct documents. However, as explained below, ERISA does not contemplate or authorize having the written Plan instrument establishing the Plan also simultaneously being the Summary Plan Description.

Initially, the Plan document and the Summary Plan Description each have their own statutory purpose. The Plan document is a written instrument created by the Plan sponsor, contains the detailed and specific enforceable contractual terms of the Plan, and is the written instrument by which the Plan Administrator must operate the plan. 29 U.S.C. § 1002(1); 29 U.S.C. § 1102.

ERISA requires that the written instrument establishing the Plan include, at minimum:

> (1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,
>
> (2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105(c)(1) of this title),
>
> (3) provide a procedure for amending such 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(b).

Conversely, the Summary Plan Description summarizes the relevant portions of the Plan document, *Schwartz v. Prudential Ins. Co. of Am.*, 450 F.3d 697,700 (7th Cir. 2006) and provides "clear, simple communication" to plan beneficiaries regarding Plan terms. *See Cigna Corp. v. Amara*, 563 U.S. 421, 437 (2011). The summary is to include "important Plan provisions, names and addresses of persons responsible for Plan investment or management, a description of benefits, the circumstances that may result in disqualification or ineligibility and the procedures to be followed in presenting claims for benefits under the plan." *See* H.R. Rep. No. 93-1280, p.258 (1974); *see also* 29 U.S.C. § 1022(b).

Further, Congress directed that the Plan Administrator "shall make copies of the latest updated summary plan description *and* [...] the bargaining agreement, trust agreement, contract, or other instruments under which the plan was established or is operated available for examination by any plan participant or beneficiary[.]" 29 U.S.C. § 1024(b)(2) (emphasis added).

The Plan Administrator is also directed to provide "a copy of the latest updated summary plan description *and* the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated." 29 U.S.C. § 1024(b)(4) (emphasis added). The use of the conjunctive "and" in subsections (b)(2) and (b)(4) suggests that Congress intended that the Summary Plan Description and the written Plan document were to be two separate and distinct documents.

As this Court has repeatedly observed, ERISA is a "'comprehensive and reticulated statute,' the product of a decade of congressional study of the Nation's private employee benefit system." *Mertens v. Hewitt Assocs*, 508 U.S. 248, 251 (1993) (citing *Nachman Corp. v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361 (1980)). Because of this, this Court has strictly adhered to the text of ERISA in deciding ERISA cases. For example, in *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), this Court refused to "infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did not intend to authorize other remedies that it simply forgot

to incorporate expressly.'" *Mertens*, 508 U.S. at 254 (citing *Russell*, 473 U.S., at 146-147).

Here, Congress' requirement that a Plan have both a written Plan document under section 1102 *and* a separate Summary Plan Description under section 1022 evidences its intent that a written Plan document and the Summary Plan Description are not one in the same.

The *Amara* Court affirmed Congress' intent when it held that the requirement 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." *Amara*, 563 U.S. at 436. As Justice Scalia aptly stated, it would be "peculiar for a document meant to 'apprise' participants of their rights 'under the plan' to be itself part of the 'plan.' Any doubt that it is not is eliminated by ERISA's repeated differentiation of SPDs from the 'written instruments' that constitute a plan[.]" *Id*. at 446.

The Eighth Circuit's holding below that the Summary Plan Description can serve as the written Plan document when there is no separate Plan document glosses over "ERISA's repeated differentiation of SPDs from the 'written instruments' that constitute a plan," *Id.*, and instead enforces precisely the view that the *Amara* Court rejected; that is, that the terms of the Plan summaries may be enforced as terms of the Plan itself. Enforcing the terms of a Summary Plan Description in a section 502(a)(3) action, even though this Court held that the terms of a Summary Plan Description are not

enforceable, based solely on the distinction that the Summary Plan Description can serve as the written Plan document where there is no Plan document completely ignores ERISA's dual requirement of a Plan document *and* a separate Summary Plan Description and excuses MBI's failure to adhere to this statutory scheme.

Moreover, such a distinction renders either section 1102 or section 1022 mere surplusage of the other. MBI's argument and the Eighth Circuit's finding that the Summary Plan Description is also the Plan document because the Summary Plan Description, as drafted here, meets the four requirements of 1102(b) ignores that Congress deliberately crafted ERISA to require both a written plan document *and* a separate Summary Plan Description that is "sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations" under the Plan document. The contents of the Summary Plan Description will contain the same information as the Plan document itself, the only difference being that the Summary Plan Description is written so that the average plan member can understand it.

If Congress had intended for a Summary Plan Description to be an enforceable Plan document, it could have easily done so when it enacted ERISA. But because ERISA is a "'comprehensive and reticulated statute,'" and "the product of a decade of congressional study of the Nation's private employee benefit system," *Mertens*, *supra*, Congress could not have intended either section to be mere surplusage of the other.

2. The division of authority between a Plan's sponsor and the Plan's administrator demonstrates that the terms of the Summary Plan Description are not enforceable as the Plan terms, even where no other Plan document exists.

Congress' intent that a Plan have both a written Plan document under section 1102 *and* a separate Summary Plan Description is further demonstrated by ERISA's careful delineation of the roles of the Plan Sponsor, responsible for the establishment of the written Plan document, and the Plan Administrator, responsible for creating and distributing the Summary Plan Description.

The *Amara* Court recognized the division of authority between the Plan Sponsor and Plan Administrator:

> "Nor do we find it easy to square the Solicitor General's reading with the statute's division of authority between a Plan's sponsor and the Plan's administrator. The Plan's sponsor (e.g., the employer), like a trust's settlor, creates the basic terms and conditions of the Plan, executes a written instrument containing those terms and conditions, and provides in that instrument "a procedure" for making amendments. The Plan's administrator, a trustee-like fiduciary, manages the Plan, follows its terms in doing so, and provides participants with the summary

> documents that describe the Plan (and modifications) in readily understandable form."

Amara, 563 U.S. at 437 (citations omitted).

Where the same entity serves as both the Plan Sponsor and Plan Administrator, the distinction is no less important. As the *Amara* Court explained:

> "Here, the District Court found that the same entity, CIGNA, filled both roles. But that is not always the case. Regardless, we have found that ERISA carefully distinguishes these roles. And we have no reason to believe that the statute intends to mix the responsibilities by giving the administrator the power to set Plan terms indirectly by including them in the Summary Plan Descriptions."

Id. (citations omitted).

Indeed, the distinction between the roles is critical. The Plan Administrator cannot set Plan terms by furnishing a Summary Plan Description that it contends constitutes the binding terms of the Plan. On this point, the Eighth Circuit stated:

> "We emphasized that "ERISA requires every Plan to provide a procedure governing amendment of the Plan." Id. at 485 (citing 29 U.S.C. § 1102(b)(3)). We indicated a purported grant of discretion appearing only in the SPD could not be viewed as a procedurally proper amendment of the policy:

> To hold that the Summary Plan Description nonetheless granted the administrator discretion in this case would be to endorse the practice of issuing ERISA policies that are silent on key provisions and later issuing Summary Plan Descriptions filling the gaps with terms favoring the employer.... [T]here would ... be little need to follow formal amendment procedures if key terms could be changed by a summary plan description."

Ringwald v. Prudential Ins. Co. of America, 609 F.3d 946, 949 (8th Cir. 2010).

As indicated by the Eighth Circuit, a number of other courts have come to the same conclusion. *See Schwartz v. Prudential Ins. Co. of America*, 450 F.3d 697, 700 (7th Cir. 2006) (""The situation is otherwise ... when the SPD, as here, says the administrator has rights, which the plan itself does not confer.... [T]he SPD [must] be an accurate summary [of the plan], not an unnegotiated enlargement of the administrator's authority."); *Shaw v. Conn. Gen. Life Ins. Co.*, 353 F.3d 1276, 1283-83 (11th Cir. 2003); *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1161-62 (9th Cir. 2001)).

Here, a Plan document establishing MBI's reimbursement rights does not even exist. The only source of MBI's purported right to reimbursement is found in the Summary Plan Description, which MBI prepared in its role as Plan Administrator. The Eighth Circuit's holding below that the Summary Plan Description can serve as the written Plan document where there is no separate, written Plan document

essentially blurs the distinction between the role of the Plan Sponsor and the Plan Administrator. The result is an impermissible and unnegotiated enlargement of the rights of the Plan Administrator at the expense of Plan participants.

This is not an exercise in elevating form over substance. Allowing the Plan Administrator to set the terms of the Plan by permitting the Summary Plan Description to also serve as the written Plan document governing the Plan significantly affects the rights of the Plan's beneficiaries. For example, the reimbursement provision in MBI's Summary Plan Description purportedly obviates the Made Whole doctrine. *See* Pet. App. at 47 ("This right of reimbursement shall apply to any such recovery to the extent of any benefits paid under this Benefit Plan even if the Member has not received full compensation for the injury or condition."). MBI's inclusion of the provision obviating the Made Whole doctrine in the reimbursement provision of the Summary Plan Description negates whatever equitable defense a member may have to MBI's reimbursement claim. *See U.S. Airways, Inc. v. McCutchen*, 569 U.S. 88, 106 (2013). Thus, MBI, acting solely in its role as the Plan Administrator, not only enlarges its own rights, but contracts the rights of the Plan's beneficiaries. This is not the arrangement that ERISA intended.

3. Congress' objective of achieving clear, simple communication is contravened if the Summary Plan Description is made legally enforceable, even where no other Plan document exists.

As this Court has repeatedly stated, "[o]ne of ERISA's central goals is to enable Plan beneficiaries to learn their rights and obligations at any time." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83-84 (1995). This goal is effectuated "through a comprehensive set of "reporting and disclosure" requirements[.]" *Id.* (citing 29 U.S.C. §§ 1021-1031).

Thus, ERISA requires that a Summary Plan Description 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." See 29 U.S.C. § 1022(a). The clear purpose is to "create an objective standard, a type of plain-language requirement in contrast to the often overly technical lawyerese that tends to be employed in the underlying plan documents themselves." *Diaz v. United Agr. Emp. Welf. Benefit Plan*, 50 F.3d 1478, 1485 (9th Cir. 1995).

This mandate "stems from the reality that the average person cannot reasonably be expected to assimilate all information contained in a voluminous health insurance plan. In requiring a compendium of the actual plan's benefits, terms and conditions, Congress intended to apprise plan participants, in laymen's terms, of their rights under the plan." *Daniel*

v. Master Health Plan, Inc., 864 F. Supp. 1399, 1407 (S.D. Ga. 1994).

The Eighth Circuit's holding below that the Summary Plan Description can serve as the written Plan document when there is no separate, written Plan document directly implicates this Court's concern that Plan Administrators would sacrifice "simplicity and comprehensibility in order to describe Plan terms in the language of lawyers" in order to make the Plan summary legally enforceable.

In the courts below, MBI argued that the contents of the Summary Plan Description should be enforced as a Plan document because the Summary Plan Description meets the criteria for a Plan document:

> "As noted above, an ERISA plan document must set forth the method of funding, allocate responsibility for administration and operation of the Plan, provide a procedure to amend the plan, and specify how benefits are paid from the plan. The SPD should be enforced because it is indisputably a written document and clearly meets all of these criteria."

Pet. App. at 54.

MBI further opined that the Summary Plan Description provided *exhaustive details* regarding the terms of the plan:

> "[T]he SPD provides *exhaustive details* about the benefits and obligations of Plan participants including information about deductibles, coinsurance, out-of-pocket maximums, waiting

> periods, in-network versus out-of-network providers, accessing the Blue Card Network, services that are covered by the Plan, services that are excluded by the Plan, how benefits are coordinated with other plans, the claims and appeal process, and also provides the Plan's right of reimbursement and subrogation."

Pet. App. at 55 (emphasis added).

This is precisely the sort of practice that Congress sought to avoid when enacting ERISA's administration and disclosure requirements. The Eighth Circuit's holding only reinforces the practice of issuing a single document that acts as both the written Plan document and the Summary Plan Description.

ERISA's goal of achieving clear, simple communication through a Summary Plan Description is completely undermined by the practice of drafting the Summary Plan Description with "exhaustive detail," and in the language of lawyers in order to "include all the qualifications and nuances that a plan drafter might have found important and feared to omit lest they lose all legal significance." *Amara*, 563 U.S. at 437-8. Even the Eighth Circuit recognized that *Amara* "undermines parts of *Gamboa*'s reasoning, *see, e.g.*, 479 F.3d at 544 ("[W]e have held that the terms of a summary plan description prevail even if they conflict with the provisions of a formal plan . . . .")[.]" *Id*. at 7 (App. Ct. Op. at *6). The Court further recognized that "conflating a plan and a summary plan description risks undermining ERISA's goal that the summary plan description embody 'clear, simple communication[.]'" *Id*. at 9 (App. Ct. Op. at *7).

The requirement that a Summary Plan Description be "written in a manner calculated to be understood by the average plan participant" is rendered utterly meaningless by the practice of writing the "summaries" in exhaustive detail and in the language of lawyers with the intent of enforcing the terms of the "summaries" against the plan beneficiary in an ERISA action.

4. *Amara* does not limit its holding to instances where a Summary Plan Description conflicts with an ERISA Plan document.

Fourth, *Amara* does not limit its holding to instances where a Summary Plan Description conflicts with a separate, written Plan document. Rather, *Amara* actually holds that for terms to be effective, those terms must be contained in the Plan Document and terms contained only in a Summary Plan Description are insufficient.

In fact, an anomalous result would follow if the holding of *Amara* was limited to plans that had both a plan document and a Summary Plan Description. While the *Amara* Court's decision sprang from the fact that the ERISA plan at issue had both a plan document and a Summary Plan Description, the holding and reasoning of *Amara* does not logically end there.

ERISA requires both a plan document and a Summary Plan Description. It does not permit any other arrangement. The distinction that the Eighth Circuit drew - that this case is different and mandates a different result because there is only a Summary

Plan Description, and not a separate written plan document - enforces an anomaly that should never legally exist.

If a Plan complies with ERISA and the Plan sponsor establishes a Plan by creating a written plan document and the Plan Administrator creates a Summary Plan Description summarizing that plan document, the written plan document prevails over the Plan Administrator's Summary Plan Description in the event of a conflict.

Conversely, if a Plan does not follow ERISA, and the Plan sponsor does not establish a written Plan document as required, the Plan Administrator would have the unconstrained ability to set the terms of the Plan and act as it pleased by simply inserting a term into the Summary Plan Description.

Thus, by not following the requirements of ERISA, a Plan Administrator would have greater rights over a beneficiary than it otherwise would have if the Plan sponsor simply complied with ERISA and created a separate written plan document.

5. Granting the petition would not put Plan benefits provided solely under the terms of a Summary Plan Description in danger.

Initially, MBI should bear the burden of its failure to adhere to ERISA's requirements, not the Plan beneficiaries.

Nevertheless, at both the District Court and the Eighth Circuit, MBI argued that MBI employees will apparently lose all their benefits if the reimbursement

provision of the Summary Plan Description was not enforced as a term of the Plan. MBI's reasoning was that if the reimbursement provision could not be enforced, then neither could the benefits provisions. Pet. App. at 52-53.

While the Eighth Circuit did not directly address this issue, the Court alluded to equitable considerations in enforcing the terms of the Summary Plan Description as the terms of the Plan:

> "Having received medical benefits in accordance with the [summary plan description], we will not permit a participant to deny the corresponding responsibilities and obligations that are clearly imposed on the participant in the same document—what is good for the goose is good for the gander." 479 F.3d at 545. We likewise noted the importance of reimbursement in maintaining the "financial viability" of self-funded plans with limited resources. Id. at 545-46.

Id. at 9 (App. Ct. Op. at *7).

First, the question of whether a Plan beneficiary may enforce the benefits provisions of the Summary Plan Description in an ERISA action is not before this court and is not implicated by the question that Hoch's petition seeks to raise. Hoch's petition only concerns the question of whether a Plan Administrator may enforce the reimbursement term of a Summary Plan Description in an action under section 502(a)(3).

Second, the consequences of MBI's reliance on the terms of a Summary Plan Description in its section

502(a)(3) action should fall squarely on MBI's shoulders. As meticulously explained, ERISA's carefully crafted and detailed scheme requires a benefit Plan to have both a written plan document by which the Plan is governed *and* a separate Summary Plan Description written in a manner that a Plan beneficiary may easily understand. One document - the Plan document - governs the terms of the Plan. The other document - the Summary Plan Description - informs the beneficiary of what those terms are. The former is binding; the latter is not, regardless of whether the former actually exists.

Third, ERISA plan beneficiaries can enforce their rights that are contained in a Summary Plan Description as a matter of fiduciary duty. *Baker v. Pa. Economy League, Inc. Retirement Income Plan*, 811 F. Supp. 2d 1136 (E.D. Pa. 2011); *Koehler v. Aetna Health Inc.*, 683 F.3d 182 (5th Cir. 2012); *Stiso v. Int'l Steel Group*, No. 13-3503 (6th Cir. Mar. 25, 2015).

As aforementioned, the Eighth Circuit's decision to enforce the terms of the Summary Plan Description as the terms of the Plan was not based on the terms of a Plan document, but was based on nothing more than what it viewed as "the equities in this case." Pet. App. at 9 (App. Ct. Op. at *7). But section 502(a)(3) does not authorize enforcement of "the equities." Section 502(a)(3) authorizes only the enforcement of *the plan terms* through "appropriate equitable relief."

This Court clearly held in *Amara* that Summary Plan Descriptions, "important as they are, provide communication with beneficiaries about the plan, but that their statements do not themselves constitute the

terms of the plan." *Amara*, 563 U.S. at 438. Knowing this clear holding, MBI maintained only a Summary Plan Description and did not set forth the terms of the Plan in a separate Plan document. The consequence that MBI must face for its failure to comply with ERISA's legislative scheme is its inability to enforce its purported reimbursement right in a 502(a)(3) action against a Plan beneficiary.

CONCLUSION

In sum, the Eighth Circuit's holding below directly conflicts with this Court's holding in *Amara* that Summary Plan Descriptions, "important as they are, provide communication with beneficiaries about the plan, but that their statements do not themselves constitute the terms of the plan." *Amara*, 563 U.S. at 438.

The distinction that the Summary Plan Description can serve as the written Plan document where no other Plan document exists does not affect this Court's holding the statements in a Summary Plan Description do not themselves constitute the terms of the Plan. Recognizing such a distinction ignores ERISA's dual requirement of a Plan document *and* a separate Summary Plan Description, excuses MBI's failure to adhere to this statutory scheme, and seriously undermines ERISA's goal of achieving clear, simple communication regarding the terms of the Plan.

Respectfully Submitted,

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