No. _____

In The
Supreme Court of the United States

FIRST AGENCY, INC. AND GUARANTEE TRUST LIFE INSURANCE COMPANY,

Petitioners,

v.

DAKOTAS AND WESTERN MINNESOTA ELECTRICAL INDUSTRY HEALTH & WELFARE FUND, BY RANDY STAINBROOK AND EDWARD CHRISTIAN, IN THEIR REPRESENTATIVE CAPACITY AS TRUSTEES, AND EACH OF THEIR SUCCESSORS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

JONATHAN B. FRANK
Of Counsel
MADDIN HAUSER ROTH & HELLER, P.C.
28400 Northwestern Hwy., 2nd Floor
Southfield, MI 48034
(248) 354-4030
JFrank@maddinhauser.com
Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. In this insurance coverage dispute, did the Eighth Circuit mistakenly apply this Court's clear direction for interpreting Section 502(a)(3) of ERISA, and specifically this Court's recent decision in *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*, 577 U.S. ___ (2016), when it held that Plaintiff's standard request for declaratory relief sought "equitable relief" under Section 502(a)(3)?

2. Did the Eighth Circuit err when it affirmed the lower court's interpretation of the two insuring documents based on outdated ERISA cases involving "federal common law"?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Only the parties named in the caption are parties to the proceeding. Pursuant to this Court's Rule 29.6, undersigned counsel states that First Agency, Inc. and Guarantee Trust Life Insurance Company have no parent corporation and no publicly held company owns 10% or more of their stock.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioners First Agency, Inc. and Guarantee Trust Life Insurance Company (referred to herein collectively as "GTL") respectfully submit this petition for a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeals.

OPINIONS BELOW

The unreported decision from the United States District Court for the District of North Dakota can be found at 2016 WL 1736619 (D.N.D. Mar. 11, 2016). App. 17–27. The Eighth Circuit Court of Appeals decision is reported at *Dakotas and Western Minnesota Electrical Industry Health & Welfare Fund v. First Agency, Inc. and Guaranty Trust Life Insurance Company*, 865 F.3d 1098 (8th Cir. 2017). App. 1–16.

JURISDICTION

On September 14, 2017, the Eighth Circuit Court of Appeals denied GTL's Petition for Rehearing. The jurisdiction of this Court is invoked under 29 U.S.C. §1254(1).

STATUTE INVOLVED

29 U.S.C. §1132(a)(3) ("Section 502(a)(3)"): 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.

STATEMENT

Plaintiff Dakotas and Western Minnesota Electrical Industry Health & Welfare Fund ("Dakotas") is an ERISA plan (the "Plan"). 29 U.S.C. §1002(2). Defendant Guarantee Trust Life Insurance Company is a non-ERISA private insurance company. Defendant First Agency, Inc. is its agent and administrator.

Dakotas' Complaint was filed July 13, 2015 in the United States District Court for the District of North Dakota. Dakotas sued GTL for declaratory relief, purportedly under Section 502(a)(3) of ERISA. 29 U.S.C. §1132(a)(3). Specifically, Dakotas sought a determination of which entity, Dakotas or GTL, would pay for medical bills resulting from an injury sustained by Jacob Plassmeyer ("Plassmeyer"), a student-athlete at Westminster College in Missouri. Dakotas relied on 28 U.S.C. §1331 and 29 U.S.C. §1132(a)(3) as the basis for jurisdiction. Dakotas opted not to include Plassmeyer in the case.

Plassmeyer was arguably entitled to coverage from Dakotas because his father was a member of the union covered by the Plan; he was also arguably

entitled to coverage from GTL because GTL provided coverage to Westminster College's student-athletes. When the case was filed, neither Dakotas nor GTL had paid Plassmeyer's medical bills. The Plan and GTL's policy have inconsistent provisions regarding which entity would be primarily liable for coverage.

Details about Plassmeyer's injuries may be found in paragraphs 29–30 of the Complaint. Medical bills for Plassmeyer's care were submitted to Dakotas, which denied payment. Complaint at ¶¶ 10–11, 14, 33, 37. Dakotas denied payment of these bills on the basis that it believed GTL was primarily responsible for coverage. Complaint at ¶ 36. Dakotas commenced the underlying lawsuit as necessary to determine who will pay those bills. Complaint at ¶ 41.

GTL filed a Motion to Dismiss on August 20, 2015. Dakotas filed its Motion for Summary Judgment on September 3, 2015. The District Court for the District of North Dakota issued its ruling dispensing with both motions on March 11, 2016, denying GTL's motion and granting Dakotas' motion. App. 17–27. The District Court entered judgment in favor of Dakotas, which included the assessment of attorney fees under 29 U.S.C. §1132(g)(1). App. 28–29.

GTL filed a timely appeal to the Eighth Circuit Court of Appeals on April 6, 2016. On August 3, 2017, the Eighth Circuit Court of Appeals affirmed the District Court's opinion as to ERISA jurisdiction under Section 502(a)(3) but reversed the District Court's opinion granting attorney fees to Dakotas. *Dakotas*

and Western Minnesota Electrical Industry Health & Welfare Fund v. First Agency, Inc. and Guaranty Trust Life Insurance Company, 865 F.3d 1098 (8th Cir. 2017). App. 1–16. On August 17, 2017, GTL filed a Petition for Rehearing, which was denied on September 14, 2017. App. 30–31.

REASONS FOR GRANTING THE PETITION

This petition presents a purely legal question: is Dakotas' claim one for "equitable relief" under Section 502(a)(3)? To answer that question under *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*, 577 U.S. ___ (2016), and its predecessors, this Court must necessarily review the history of "equitable relief" and determine if there is historical support for the claim. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) and *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006).

There is no such support. Dakotas' claim for declaratory relief is legal, not equitable, albeit cleverly labeled in an attempt to avoid ERISA's bar against such claims. In short, this is a garden-variety contract dispute between two insurance providers, one of which happens to be an ERISA plan. That fact alone does not trigger jurisdiction under Section 502(a)(3).

The Eighth Circuit misapplied the rule of *Montanile* when it analogized Dakotas' case to a trustee's equitable petition for a bill for instructions, an argument

never advanced by Dakotas. The Eighth Circuit's opinion appeared motivated by the Eighth Circuit's policy considerations rather than by fidelity to ERISA's language.

Finally, the Eighth Circuit erred by holding that GTL is responsible for Plassmeyer's bills as a matter of contract interpretation. The plain language of the relevant policies supports the opposite conclusion, but the Eighth Circuit, following inapplicable and outdated ERISA law, gave primacy to the coordination of benefits language in Dakotas' Plan.

I. DAKOTAS DID NOT SEEK "EQUITABLE RELIEF" UNDER SECTION 502(a)(3).

This Court should appreciate the historical context of Dakotas' claim against GTL. In the past several years, ERISA plans (such as Dakotas) have filed actions against private insurers (such as GTL), most in the specific context of student-athlete injury coverage. Typically, there are conflicting coordination of benefits provisions and a resultant dispute regarding which plan or insurer must provide primary coverage. One ERISA plan, the Central States Southeast and Southwest Areas Welfare Fund, has been particularly prolific, filing a series of claims against other non-ERISA insurers, including GTL.

The sequence of events underlying those cases is critical. In each case, Central States ***paid*** the insured's claim and then sought ***repayment*** from the non-ERISA private insurer, claiming the insurer actually

had the primary obligation to pay. Each case presented a question of basic contract interpretation.

Central States was unsuccessful invoking Section 502(a)(3). Because Central States had already paid the claim, it was not seeking "equitable relief" under ERISA. *See Cent. States, Se. & Sw. Areas Health & Welfare Fund v. Student Assurance Servs.*, 797 F.3d 512 (8th Cir. 2015); *Cent. States, Se. & Sw. Areas Health & Welfare Fund v. Health Special Risk, Inc.*, 756 F.3d 356 (5th Cir. 2014); *Cent. States, Se. & Sw. Areas Health & Welfare Fund v. First Agency, Inc.*, 756 F.3d 954 (6th Cir. 2014); *Cent. States, Se. & Sw. Areas Health & Welfare Fund v. Bollinger*, 573 Fed. App'x 197 (3d Cir. 2014); *Cent. States, Se. & Sw. Areas Health & Welfare Fund v. Gerber Life Ins. Co.*, 771 F.3d 150 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 1847 (2015) (collectively, the "Central States Cases").

The Central States Cases built on the foundation laid by this Court in *Great-West* and *Sereboff*, which confirmed that Congress expressly intended that Section 502(a)(3) only permit claims for "equitable relief." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) and *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006). This Court's mandate was unequivocal. "ERISA'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." *Great-West*, 534 U.S. at 209. As the Central States Cases recognized, once Central States paid the claims, its effort to seek repayment from a third party was a

legal claim, not a claim for "equitable relief." Although Central States tried to characterize its claims as "restitution," "equitable lien," or "constructive trust" cases, the Courts of Appeals analyzed the substance, not the caption, of the claims.

The rationale of the Central States Cases preceded, but was essentially confirmed by, this Court's holding in *Montanile*: "[u]nder this Court's precedents, whether the remedy a plaintiff seeks 'is legal or equitable depends on [(1)] the basis for [the plaintiff's] claim and [(2)] the nature of the underlying remedies sought.' *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356, 363 (2006) (internal quotation marks omitted)." In *Montanile*, the Court held that a plan fiduciary's "subrogation" claim against a plan participant to recover covered medical expenses was not necessarily a claim for "equitable relief." The key factual issue was whether the plan participant still retained any funds received from third parties. If not, the plan fiduciary's claim would be against the plan participant's "general assets" and thus outside the scope of ERISA.

Although *Montanile* had not yet been decided, Dakotas was well aware of the Central States Cases. Therefore, Dakotas opted to file the present action ***before*** it paid Plassmeyer's bills, labeling it a claim for declaratory relief. Indeed, in the proceedings below, Dakotas admitted that, had it ***already paid*** Plassmeyer's medical bills, and merely sought to use ERISA as a tool to recover from GTL, its claims would be barred: "The Dakotas Fund is in agreement with

Defendants that the federal courts apparently have foreclosed an ERISA plan's right to recover reimbursement from a third-party insurer. . . ." Dakotas therefore styled its primary prayer for relief as seeking a "declar[ation] as between the Dakotas Health Fund and the Defendants, that the Defendants had, and continue to have, primary responsibility for paying the covered medical expenses on behalf of the Student relating to accidental injuries he sustained during a college-sponsored athletic practice, and to pay his future covered medical expenses. . . ."

By switching the sequence of events from "pay first, sue later" to "sue first, pay later," Dakotas tried to invoke ERISA jurisdiction by asserting that the ultimate coverage decision was not a legal claim but an equitable one. Yet the ultimate coverage decision remains the same: does Dakotas' Plan or GTL's policy provide primary benefits? The method for resolving this dispute also remains the same: comparing the coordination of benefits language in Dakotas' Plan with that found in GTL's policy.

Seen in this light, GTL suggests that it should be clear that, in the context of *Great-West*, *Sereboff*, and *Montanile*, there is really no difference between the Central States Cases and this one. Timing of payment aside, Dakotas sought a declaration of legal rights against a party with whom Dakotas has no relationship whatsoever – GTL, a private insurer – regarding who must pay Plassmeyer's medical bills. The District Court, following Dakotas' lead, ruled that "primary responsibility for payment of medical expenses in this

case falls on the defendants." App. 27. But the District Court did not provide any reasoning to support its conclusion that "The plan does not seek to recover any payments, past or future. Rather, the plan seeks a declaration on the extent of its liability. The requested relief is limited to equitable relief under the statute." App. 21.

The Eighth Circuit did not adopt any of Dakotas' arguments. Dakotas argued that the label "declaratory relief" ought to be sufficient. But in fact, this label does not by itself determine the remedy. An action for declaratory relief is not *per se* a request for equitable relief. *See Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 284 (1988) ("Actions for declaratory judgments are neither legal nor equitable, and courts have therefore had to look to the kind of action that would have been brought had Congress not provided the declaratory judgment remedy."); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) (holding that an action for declaratory relief was legal, not equitable, and therefore subject to trial by jury); Bray, The System of Equitable Remedies, 63 *UCLA Law Review* 530, 542 (2016) ("the declaratory judgment, though not easy to classify, should typically be seen as a non-equitable remedy."), 561 ("the declaratory judgment lacks the distinctive characteristics of the equitable remedies."); Dobbs, *Law of Remedies* (2nd ed.) §12.8(7), at 243–244 ("The declaratory judgment suit is not grounded in 'equitable' jurisdiction, so a jury trial is appropriate if factual issues are raised.").

The remedy Dakotas sought is ***not*** within the category of relief "typically available in equity" during the days of the divided bench. Those remedies included restitution, reformation, rescission, injunctions, equitable liens and the like, where a court sitting in equity would seek to correct an inequitable situation between two parties by granting an equitable order.[1] To the contrary, Dakotas sought a typical legal remedy made available through the advent of declaratory relief: construction of two competing insurance contracts as between two parties with no relationship with each other. *See* 16 *Couch on Insurance* §232:47 (Lee R. Russ & Thomas F. Segalla, eds., 3d ed., Thomson/West 2005) ("[A declaratory judgment's] purpose is to afford a final disposition of the controversy before trial by the determination of the ***legal*** rights and obligations of the parties . . . [i]n essence, where language in the insurance contract is thought to need clarification in order to determine the ***legal*** positions of the parties, declaratory action is appropriate.") (emphasis added); Dobbs, *Law*

---

[1] *See* Bray, *supra*, at 541 ("The equitable remedies still used regularly in the United States are the injunction, specific performance, reformation, quiet title, and a cluster of restitutionary remedies: accounting for profits, constructive trust, equitable lien, subrogation, and equitable rescission."). ERISA cases often involve restitution and equitable liens. This Court has noted that "one feature of equitable restitution was that it sought to impose a constructive trust or equitable lien on 'particular funds or property in the defendant's possession.' " *Sereboff*, 547 U.S. at 362 (*quoting Great-West*, 534 U.S. at 213). It has further stated that "for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Great-West*, 534 U.S. at 215.

of Remedies (2nd ed.) §1.1, at 9 ("When the insurer insists that it does not cover the claim and the others insist that it does, declaratory judgment is a good resolution."). It is well-settled that an action to interpret or construe an insurance contract is an action at law, not an equitable action. Indeed, in the Eighth Circuit a party to such an action would be entitled to demand a jury. *Johnson v. Fidelity & Casualty Co. of N.Y.*, 238 F.2d 322, 324–25 (8th Cir. 1956) (insurer entitled to jury trial in declaratory judgment action to determine coverage under insurance policy).[2]

Dakotas also relied on *Winstead v. J.C. Penney Co., Inc.*, 933 F.2d 576 (7th Cir. 1991). But *Winstead* is old, bad law, effectively overruled by the three more recent decisions from this Court on the fundamental point of whether a plaintiff in an ERISA case must be seeking a remedy typically available in equity. *Winstead* also involved two ERISA plans, unlike here. Finally, Dakotas cannot be said to be "enforcing" the terms of its Plan as required by Section 502(a)(3). *See Gulf Life Ins. Co. v. Arnold*, 809 F.2d 1520 (11th Cir. 1987) (plan's action to interpret plan is not an equitable action or an action to enforce the plan).[3]

Bypassing Dakotas' arguments, the Eighth Circuit instead developed a new theory: that Dakotas'

---

[2] For a more recent discussion outside the Eighth Circuit of the right to a jury trial in a declaratory action, *see Marseilles Hydro Power, L.L.C. v. Marseilles Land and Water Co.*, 299 F.3d 643, 648–49 (7th Cir. 2002).

[3] The Eighth Circuit also erred by *citing Winstead* in its footnote 2. App. 4, n. 2.

case was analogous to a trustee's equitable petition for a "bill for instructions." *Dakotas*, 865 F.3d at 1103–04. Significantly, however, the Dakotas trustees did not request "instructions" from the District Court as to their duties or conduct before denying Plassmeyer's claim.

Given this Court's clear instructions about performing an accurate historical analysis, GTL disagrees with the Eighth Circuit's conclusion. Before explaining why, GTL would like the Court to understand that GTL agrees with:

- The Eighth Circuit's analysis of recent ERISA case law;
- The need to review historical evidence concerning the scope of "equitable relief";
- The principle that an action for declaratory relief is not necessarily equitable;
- The Eighth Circuit's rejection of Dakotas' position that an action for declaratory relief regarding future conduct, alone, is sufficient to invoke ERISA jurisdiction; and
- The general principle that a trustee's "bill for instructions" seeks an equitable remedy.

GTL disagrees with the final step of the Eighth Circuit's analysis, however: that Dakotas' complaint for declaratory relief has a historical analogue in a trustee's equitable "bill for instructions." Notably, this step was not proposed by Dakotas, and therefore was

not briefed. Nor was it the subject of the oral argument. It is also inconsistent with the analysis of previous ERISA cases. *See NewPage Wisconsin System Inc. v. United Steel, Paper & Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union, AFL-CIO/CLC*, 651 F.3d 775, 777 (7th Cir. 2011) (where ERISA plan fiduciary sought declaration that changes to the language of its plan were proper, the court noted that the complaint "neither requests equitable relief nor asks the court for help in enforcing the Plan"). GTL is therefore hopeful that, upon more thorough consideration, the Court will reverse the Eighth Circuit's decision and hold instead that Dakotas was not seeking "equitable relief" under ERISA.

Here is why GTL disagrees with the Eighth Circuit's analysis: the "bill for instructions" that a trustee might file is to obtain a preemptive ruling of the trustee's rights ***vis-à-vis the beneficiaries of the trust or other trustees concerning the res of the trust***. In such a case, the trustee, possibly unsure of the proper course of action and not wanting to violate a fiduciary duty, might seek judicial guidance. Such guidance then offers the fiduciary protection against adverse actions ***by the beneficiaries of the trust or other trustees***. *See, e.g., Asche v. Asche*, 210 A.2d 306 (Del. 1965) (trustee of a will seeking declaration of rights against beneficiary); *Takabuki v. Ching*, 695 P.2d 319 (Haw. 1985) (trustees of a charitable trust); *Bishop v. Pittman*, 33 Haw. 647 (1935) (trustee of a

will).[4] After confirming the historical right to seek instructions, the *Takabuki* Court quoted 4 Scott, *The Law of Trusts*, § 394 (3d ed. 1967) (footnotes omitted) for the following principles:

> The trustees of a charitable trust, like the trustees of a private trust, can maintain a suit for instructions. The trustees are entitled to instructions as to the proper construction of the trust instrument, as to the validity of the trust, and as to the extent of their powers and duties. The purpose of the giving of instructions by the court is to enable the trustees properly to discharge their duties under the trust and to protect them in the discharge of these duties.

The Yale Law Journal note cited by the Eighth Circuit also supports this conclusion, offering the following example: "the very instrument under which an executor or a trustee is appointed frequently may be unclear or ambiguous in its terms, requiring authoritative construction." *Executors' and Trustees' Bills For Instructions*, 44 Yale L.J. 1433 (1935). The note then confirms the following restriction on the scope of a bill for instructions: "some sort of conduct related to the administration of the trust must be involved; *instructions as to matters outside the instrument* or arising after termination of the trust *will be refused*." *Id.* at 1438–39 (emphasis added).

---

[4] Hawaii has a long history of reported decisions analyzing a trustee's "bill for instructions."

Historically, the "essentials for the maintenance of a bill of instructions have been said to be the possession of a fiduciary fund concerning which there is a present duty in reference to the disposition of the principal or income, that there are conflicting claims asserted by those interested in the trust res, and that there is no other remedy open to the trustee if he is to be protected in the performance of his duties and not compelled to proceed at his own risk." *Wellesley Coll. v. Attorney Gen.*, 313 Mass. 722, 729 (1943) (citations omitted). "A trustee, however, is not entitled to instructions concerning all matters connected with the administration of his trust, and the remedy is subject to fairly well established limitations." *Wellesley*, 313 Mass. at 729.

The *Wellesley* case showcases a strained misuse of a petition requesting a bill for instructions, and the Supreme Judicial Court of Massachusetts' rejection of that attempt. In *Wellesley*, Wellesley College filed a petition in equity seeking instructions as to whether the college was subject to a statute imposing a tax on meals "amounting to $1 or more that are 'furnished at any restaurant, eating house, hotel, drug store, club, resort or other place at which meals or food are regularly served to the public.'" *Wellesley*, 313 Mass. at 723. Wellesley College contended that it was "seeking instructions as to its duties under the trust created by its charter, which was a written instrument." *Wellesley*, 313 Mass. at 726. The respondents in *Wellesley* were the Attorney General and state's tax commissioner, the latter of which filed a demurrer. *Id.*

As an initial matter, the Court recognized that "trustees of a trust may bring a petition for instructions and secure the opinion of the court upon the validity of the trust, a construction of the instrument creating the trust, and their duties and powers in carrying out the provisions of the trust." *Wellesley*, 313 Mass. at 728–29. However, the Court sustained the commissioner's demurrer because Wellesley College "merely [sought] to settle a controversy between the petitioner and the commissioner." *Id.* at 729. The Court specifically held that a bill for instructions was inappropriate because the tax commissioner "made no claim under any trust," did not allege wrongful administration "of the trust property," and asserted "no claim in the trust property." *Id*.

In rejecting Wellesley College's misuse of the bill for instructions, the *Wellesley* Court cited *Treadwell v. Salisbury Mfg. Co.*, 73 Mass. 393 (1856), observing that *Treadwell* barred Wellesley College's request for a bill for instructions. In *Treadwell*, the Court held that a bill for instructions was inappropriate for reasons similar to those found in *Wellesley*: (1) the adverse parties were "neither the owners nor claimants of any property in the hands of the complainants" seeking the bill for instructions. *Treadwell*, 73 Mass. at 400; (2) those who actually had an interest in the "trust estate . . . [were] not even made parties to the bill." *Id.*; and (3) "there are no adverse claimants of the trust estate or its income." *Id.*

Like Wellesley College and the *Treadwell* plaintiffs, the Eighth Circuit misapplied the concept of a bill

for instructions. Dakotas is not in a fiduciary relationship with GTL and the trustees were not seeking guidance regarding the performance of their fiduciary duties. GTL did not make any claim to Dakotas' trust or to Dakotas' trust property.

Further, it was plain in *Wellesley* that Wellesley College had already determined, in its opinion, that it was not subject to the meal tax and was pursuing a judicial declaration vis-à-vis third parties under the pretext of requesting "instructions" from the court. Likewise here, Dakotas had conclusively determined for all internal purposes that Dakotas was not primarily obligated to pay Plassmeyer's medical expenses based on Dakotas' interpretation of its ERISA plan. A bill for instructions is inappropriate where the trustee requesting the instructions lacks "real and serious doubts as to his duty." *Hill v. Moors*, 224 Mass. 163, 165 (1916) (declaring that "the court is without jurisdiction to entertain such a petition"). Dakotas' request for declaratory judgment did not seek guidance but rather affirmation and validation of Dakotas' determination of its obligations. *Id.* ("The plaintiffs do not seek the instructions of this court as to their duties in the administration of the trust, but allege in substance that they have fully performed their obligations thereunder and ask that the action taken by them be ratified and confirmed.").

A review of other decisions addressing bills for instructions confirms that the Eighth Circuit inaccurately characterized Dakotas' declaratory judgment action as seeking "equitable relief"; these decisions

uniformly involve trustees seeking guidance regarding trust beneficiaries' entitlement to a trust res or the rights of parties with conflicting claims to the trust res:

- *Walker v. O'Brien*, 115 F.2d 956 (9th Cir. 1940), involved a bill for instructions filed by trustees by which "the trustees sought a judicial determination of the rights of" two alleged beneficiaries of a trust deed.
- *McDonald v. Fulton Tr. Co. of New York*, 107 F.2d 237 (D.C. Cir. 1939), involved a bill for instructions filed by trustees to determine a beneficiary's rights under a trust created by will. The trust's beneficiaries were receiving $14,000 per year from the trust, but claimed they were entitled to the entirety of the trust's proceeds based on the will's language. The District Court ruled that the beneficiaries were not entitled to the entirety of the trust's proceeds. On appeal, the Court of Appeals for the District of Columbia affirmed.
- *U.S. Fid. & Guar. Co. v. Henry Waterhouse Tr. Co.*, 11 F.2d 497 (9th Cir. 1926), involved a bill for instructions filed by a trust company's receiver to authorize the receiver to pay off claims against the trust company using the trust company's assets. Over $200,000 in competing claims had been filed against the trust company, and the insolvent trust company did not have enough funds to pay them all; the receiver sought direction on

which of the competing claims to the trust res were preferred in order to determine which parties would receive payment.

- *Eaton v. Boston Safe Deposit & Tr. Co.*, 240 U.S. 427 (1916), involved a bill for instructions brought by a trust company "to ascertain whether a trust's beneficiary's bankruptcy trustee was entitled to the trust funds instead of the beneficiary." *Eaton*, 240 U.S. at 427–28. The trust's language purported to make the trust's income "free from interference or control of [beneficiary's] creditors." *Id.* at 428. The bankruptcy trustee sought to avoid the effect of this language so that the trust's income passed to the bankruptcy estate rather than remaining with the beneficiary.

- *Hammond v. Whittredge*, 204 U.S. 538 (1907), involved a bill for instructions filed by the trustee of a trust under a will. The trust directed the payment of money to certain beneficiaries. One of the beneficiaries filed for bankruptcy and failed to disclose his interest in the trust. Nonetheless, the beneficiary assigned all of his interests to certain assignees as part of the bankruptcy. After the bankruptcy, a lender of the beneficiary sought to redirect payment of the beneficiary's trust interest to pay a number of loans made by lender to beneficiary. Thus, there were competing claims to the beneficiary's trust interest: one by the assignees of the

beneficiary's bankruptcy estate and one by the beneficiary's lender. The trust's trustee filed the bill for instructions to determine who was entitled to receive the trust money.

- *Leland v. Hayden*, 102 Mass. 542 (1869), also involved a bill for instructions filed by the trustees of a testamentary trust. The trust directed the trustees to pay "income" of the trust to the testator's survivors. The testator's survivor (his daughter) demanded that the trustees pay her certain stock dividends and transfer to her certain shares because they represented "income" of the trust to which she was entitled by the terms of the trust. The trustees were uncertain whether the beneficiary daughter was right, and filed the bill for instructions "for the direction" of the court to determine whether the trustees should transfer shares to her.

Each of the above cases involves either a trust beneficiary seeking access or rights in a trust's res – *Fulton*, *Hayden*, *Walker*, *Leland* – or involves competing claims to a trust's res – *Whittredge*, *Eaton*, *Henry Waterhouse*. Conversely, *Wellesley* and *Treadwell* did not involve either of those two factual situations; the courts in both cases accordingly found a bill for instructions inappropriate.

With this background, the Eighth Circuit's overly-broad reading of ERISA is captured in the following language from the Opinion:

> Dakotas' trustees seek a judicial ruling on an uncertain question critical to proper performance of their fiduciary duties in administering plan assets and paying beneficiary claims – a ruling traditionally available in courts of equity by a bill for instructions. Replacing that proceeding with a declaratory judgment action after the merger of law and equity hardly alters its essentially equitable nature.

Dakotas, 865 F.3d at 1103.

But, unlike the cases described above that successfully obtained a "bill for instructions," the Dakotas trustees are not seeking to clarify their legal standing vis-à-vis the beneficiaries; indeed, the trustees ***have already decided*** how to act vis-à-vis the plan participants – the trustees are refusing to pay a bill until they sort out the coordination of benefits language with an outside party, GTL. They apparently made that decision based on the recent history of ERISA cases instructing them that, if they paid the bill first, they would undoubtedly lose their rights to sue under ERISA.

If, on the other hand, the trustees had sought to clarify their rights ***against Plassmeyer*** through a preemptive declaratory action under ERISA (*i.e.*, "before you sue us, we are asking a court to decide that our Plan does not cover you"), the Eighth Circuit's decision might be on more solid footing; such a case is simply the inverse of Plassmeyer's affirmative ERISA case (*i.e.*, "you did not pay my claim so now I am suing you"). In such a situation – wherein a beneficiary of the

trust is claiming rights to the trust res – the "bill for instructions" very well might constitute a historical analogue for the trustees' decision to avoid Plassmeyer's claim for breach of fiduciary duty by clarifying that duty before acting.

The more apt historical analogue for this case is to a standard contract dispute between insurance carriers. As noted in *Wellesley*, Dakotas "merely [sought] to settle a controversy between" GTL and Dakotas regarding who was the primary insurer for Plassmeyer. *Wellesley*, 313 Mass. at 729. The fact that Dakotas happens to be an ERISA plan does not mean that ERISA should govern this insurer vs. insurer fight. To make this clear, the Court need only consider a situation where the first insurer (here Dakotas) is not an ERISA plan, but perhaps another insurance carrier providing a policy that might cover a student-athlete. Yes, the internal structure and decision-making process of that insurer might differ from that of the fiduciary relationship between the Dakotas' trustees and the plan participants. But that structure and process is irrelevant once the battle is joined between the two insurance carriers. At that point, the "declaratory relief" case is about interpretation of competing contracts, not fiduciary duties under ERISA. The remedy sought is a basic ***legal remedy: what do the conflicting contracts mean when read together***?

This case should be treated the same as that case. Dakotas' status as an ERISA plan has no relevant legal significance. On this point, *Sereboff* supports GTL, contrary to the Eighth Circuit's suggestion. *Dakotas*,

865 F.3d at 1102–03. Specifically, *Sereboff* supports the argument that a plan fiduciary, seeking guidance about ***internal*** enforcement of plan terms, properly proceeds under ERISA (*i.e.*, the hypothetical case by Dakotas against Plassmeyer). But *Sereboff* does not suggest that a plan fiduciary, already having decided how to interpret the plan vis-à-vis the participants, is in any way "enforcing" that plan when it seeks contractual interpretation (*i.e.*, a declaration of ***legal*** rights) vis-à-vis an external party.

Because this case presents "instructions as to matters outside the instrument," and involves a dispute with a third party and not a beneficiary or co-trustee, there is no analogy to a "bill for instructions." The Eighth Circuit therefore erred by expanding the scope of ERISA beyond the clear teaching of *Great-West*, *Sereboff*, and *Montanile*.

The Eighth Circuit's analysis is also impossible to reconcile with the Central States Cases. In those cases, the courts held that Central States was not seeking equitable relief when it sought a declaration of disputed legal rights regarding insurance coverage. The timing of payment to the insured should not change this analysis. Indeed, a comparison of the actual remedies makes this obvious: in the Central States Cases, Central States wanted a declaration that its coverage was secondary, and that as result the defendant insurance company should write a check to Central States to reimburse Central States for paying the bill, while in the present case, Dakotas wants the same declaration that its coverage is secondary, with the only difference

being that the defendant insurance company would write a check not to Dakotas, but to a non-party. That minor temporal difference and change in the identity of the payee does not change the nature of the remedy itself, which is declaration of legal rights.

The Eighth Circuit also erred by drawing a comparison with "coercive remedies." Those equitable remedies are available to parties in existing relationships, where some activity by one actor needs to be controlled and modified because of its impact on the other actor. *See* Borchard, *Declaratory Action The Next Step Beyond Equity*, 13 Univ. of Chicago Law Review 145, 158 (1946) ("Equity looks to a certain type of coercive relief not grantable in law courts."); Dobbs, *Law of Remedies* (2nd ed.) §1.1, at 6–7 ("Coercive remedies are typified by the injunction. The injunction is a personal command to the defendant to act or to avoid acting in a certain way."), §2.1(2). A distinguishing characteristic of coercive remedies is the availability of contempt for non-compliance. Dobbs, *Law of Remedies* (2nd ed.) §2.1(1), at 56.[5]

Here, on the other hand, there is no relationship between the parties and no basis for an injunction or

---

[5] The Eighth Circuit's analysis of *Garrison v. Memphis Ins. Co.*, 60 U.S. 312 (1856), was also incomplete. The Eighth Circuit suggested that this case demonstrates that "[f]ederal courts sitting in equity had considered declaratory actions to determine the liability of parties under insurance contracts." App. 9. But that case did not involve an insurer vs. insurer dispute about coverage, but rather an insurer's claim for post-adjustment reimbursement. This Court's rationale has no bearing on the present case.

contempt; because Plassmeyer is not a party, it was inaccurate for the Eighth Circuit to suggest that the declaratory relief Dakotas sought "operates coercively to enjoin FA from denying primary coverage." App. 10. There is no harm being caused to Dakotas as a result of wrongful activity by GTL; the harm, if any, is suffered by Plassmeyer, whom Dakotas did not join as a party to the case and who would be free to prosecute his own case against Dakotas.[6]

The Eighth Circuit also misquoted the seminal *Law of Remedies* treatise. According to the Eighth Circuit: "Many claims in equity . . . had as their major purpose a declaration of rights, so that the plaintiff might proceed with an intelligent understanding of what he could and could not legally do. 1 D. Dobbs, Law of Remedies § 2.1(2), pp. 61 (2d ed. 1993)." App. 10, n. 6.

But the treatise's language (italicized below) is more precise and not at all helpful to the Eighth

---

[6] Dakotas' multi-pronged prayer for relief creatively but unsuccessfully attempted to create a relationship where none exists. In addition to the core request for a declaration of contractual rights in prayer (a), Dakotas requested in (b) that the District Court "Enter an order of equitable relief to enjoin Defendants from denying primary coverage and to enforce the terms of the Dakotas Health Plan pursuant to its COB provisions," and in (c) that the District Court "Retain jurisdiction to enforce the declaratory judgment and other equitable remedies sought herein by the Dakotas Health Fund, for such period of time as is required, until Defendants pay the Student's covered medical expenses relating to accidental injuries he sustained during a college-sponsored athletic practice." But without Plassmeyer as a party, these prayers for relief were beyond the ability of the District Court to provide and it therefore did not do so.

Circuit's conclusion: "Many claims in equity *for rescission of a transaction or cancellation of an instrument, claims for reformation, and interpleader*, had as their major purpose a declaration of rights, so that the plaintiff might proceed with an intelligent understanding of what he could and could not legally do." But this case is not for rescission, reformation or interpleader.

In short, the parties to this case just disagree about contract interpretation. Such a disagreement can be resolved in the context of a standard action for declaratory relief which finds a historical analogue in an action ***at law***, not an action for equitable relief.

A final note. In the proceedings below, Dakotas argued that absent an ERISA method of recovery, it (as an ERISA plan) would have no other method of recovery against a non-ERISA plan which disagrees with the ERISA plan's assessment of benefit coordination. Dakotas also argued that the goal of ERISA would be frustrated if the lower court did not issue relief.

This Court rejected such an argument in *Mertens v. Hewitt Associates*, 508 U.S. 248, 251 (1993). In *Mertens*, the ERISA beneficiaries argued that the application of Section 502(a)(3)'s equitable relief requirement would result in ERISA beneficiaries having no remedies in certain circumstances, thereby leaving them exposed to unfair liability. *Id*. The beneficiaries, therefore, urged the Court to "give a strained interpretation to § 502(a)(3) in order to achieve the 'purpose of ERISA to protect plan participants and beneficiaries.'" *Mertens*, 508 U.S. at 261. Rejecting this argument, the

Court held that ERISA is a "comprehensive and reticulated statute" which provides for a "carefully crafted and detailed enforcement scheme." *Id*. at 254. This enforcement scheme provides "strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *Id*. at 254 (emphasis in original).

Similarly, in *Great-West*, the Court rejected the ERISA fiduciary's argument that its inability to pursue a claim under Section 502(a)(3) would deprive it of a remedy to enforce its plan's reimbursement provision. *Great-West*, 534 U.S. at 718. Relying on *Mertens*, the Court found that "[r]especting Congress's choice to limit the relief available under §502(a)(3) to 'equitable relief' requires us to recognize the difference between legal and equitable forms of restitution." *Id*. at 218. The Court concluded that "[w]e will not attempt to adjust the 'carefully crafted and detailed enforcement scheme' embodied in the text that Congress has adopted." *Id*. at 221 (*quoting Mertens*, 508 U.S. at 254).

Most recently, the Court in *Montanile* reiterated its historical confirmation of the sanctity of the language Congress chose when drafting ERISA. Rejecting the Board's argument that allowing an equitable lien against the participant's general assets was consistent with ERISA's general objectives, the Court noted its reliance on "the words of [ERISA's] text regarding the specific issue under consideration." *Montanile*, 136 S. Ct. at 661.

Based on these three cases, the Eighth Circuit should not have relied on the "broad purposes" of ERISA, cited the outdated *Winstead* decision, or quoted ***the dissent*** in *Mertens*. App. 4; 5; 10–11.

II. GTL IS NOT PRIMARILY LIABLE TO COVER PLASSMEYER'S EXPENSES.

Erroneously considering this to be an ERISA case, the Eighth Circuit then also erred by granting Dakotas' Plan primacy in interpreting the coordination of benefits ("COB"), following the outdated, pre-*Great-West/Sereboff/Montanile* Sixth Circuit law enunciated in *Auto Owners Ins. Co. v. Thorn Apple Valley, Inc.*, 31 F.3d 371, 374 (6th Cir. 1994). The Eighth Circuit should not have consulted "federal common law" to give either party's insuring document priority over the other. *Cent. States, Se. & Sw. Areas Health & Welfare Fund v. Gerber Life Ins. Co.*, 771 F.3d 150, 158 (2d Cir. 2014) ("that avenue is now closed.").

The Eighth Circuit cited the Sixth Circuit decision in *Cent. States, Se. & Sw. Areas Health & Welfare Fund v. First Agency, Inc.*, 756 F.3d 954 (6th Cir. 2014), which in turn cited *Auto Owners*. But the Second Circuit case "closing the avenue" followed the Sixth Circuit's decision. In addition, the Sixth Circuit relied on the unique Sixth Circuit preference contained in the 1994 decision in *Auto Owners*, which has not been applied outside of the Sixth Circuit and which pre-dated this Court's cases. Without this erroneous reliance on the outdated *Auto Owners* decision, there is no "tie-breaker" and the insuring documents stand on equal footing.

Analyzing the documents on equal footing, and without granting primacy to the Plan, the Plan and GTL's Policy simply conflict. If so, GTL's Policy would prevail, since the second paragraph of GTL's COB provision places the obligation for coverage on the plan or policy "in effect for the longer period of time at the date of such injury." Dakotas does not dispute that its Plan was in effect before GTL's Policy. The Eighth Circuit did not address this dispositive argument in its Opinion because, believing this to be an ERISA case, it granted the Dakotas Plan primacy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. In the alternative, Petitioner requests summary reversal of the Eighth Circuit decision.

Respectfully submitted,

JONATHAN B. FRANK
Of Counsel
MADDIN HAUSER ROTH & HELLER, P.C.
28400 Northwestern Hwy., 2nd Floor
Southfield, MI 48034
(248) 354-4030
JFrank@maddinhauser.com
Counsel for Petitioners

Dated: December 13, 2017