No. 18-

IN THE

Supreme Court of the United States

JEFFREY A. ROBERTSON,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1974, Congress enacted the Employee Retirement Income Security Act (ERISA or Act), 29 U.S.C. §1001 *et seq.* Its purpose was "to protect . . . the interests of participants in employee benefit plans and their beneficiaries . . ." ERISA, §2(b), 29 U.S.C. §1001(b). One way Congress chose to accomplish that result was "by providing" those individuals with "ready access to the Federal courts" to enforce their rights. *Id.* It did so by including a special venue provision in the Act, §502(e)(2), 29 U.S.C. §1132(e)(2), under which participants and their beneficiaries could file suit against employee benefit plans in any one of three venues -- where the plan is administered, where the breach occurred or where the defendant plan resides or may be found.

Despite the choices made by Congress, in this case the Pfizer Retirement Committee adopted its own "special" forum selection clause making the United States District Court for the Southern District of New York as the sole venue for all actions brought against it by its plan participants and their beneficiaries. As applied here to the breach of fiduciary duty action brought against it by Jeffrey Robertson, that venue displaced *all* three of the venues that Congress granted him under Section 502(e)(2) of the Act. Not only that. The Committee's choice of venue was adopted without Mr. Robertson's knowledge, involvement or consent.

The question presented is:

Whether a private employee benefit plan's unilateral adoption of a forum selection clause that circumvents the venue choices that Congress granted plan participants and their beneficiaries under ERISA is a violation of public policy.

PARTIES TO THE PROCEEDING

Jeffrey A. Robertson, the petitioner here, was the plaintiff in the District Court and the mandamus petitioner in the Third Circuit. The Pfizer Retirement Committee and Fidelity Executive Services d/b/a Fidelity Employer Services Company, LLC are the real parties in interest in this litigation. In the District Court, they were the named defendants; in the Third Circuit, they were the respondents to Mr. Robertson's mandamus petition. Respondent, the United States District Court for the Eastern District of Pennsylvania, was the named mandamus respondent in the Court of Appeals.

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The District Court's Memorandum Opinion and Order transferring the case from the Eastern District of Pennsylvania to the Southern District of New York are not reported. Pet. App. 5a-31a. Its Memorandum Opinion is available at 2018 WL 3618248 (E.D.Pa. July 27, 2018). The Third Circuit's Order denying mandamus is also unreported, Pet. App. 3a, as is its subsequent Order denying Mr. Robertson's petition for rehearing. Pet. App. 1a.

JURISDICTION

The Third Circuit denied Mr. Robertson's mandamus petition on August 16, 2018. On February 1, 2019 the Third Circuit denied his petition for rehearing. This Court's jurisdiction thus rests on 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 502(e)(2) of ERISA grants plan participants the right to bring suit in any of three federal district courts. It provides:

> Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

29 U.S.C. §1132(e)(2).

Section 404(a)(1)(D) of ERISA prohibits ERISA fiduciaries from enforcing any plan provision that is inconsistent with the Act's terms. In relevant part, it provides:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title [*i.e.*, title I, of which §502(e)(2) is a part] and title IV.

29 U.S.C. §1104(a)(1)(D).

STATEMENT OF THE CASE

1. When Congress enacted ERISA in 1974, it did not default to the general venue statute, 28 U.S.C. §1391. Instead, having found that "jurisdictional and procedural obstacles" had "hampered effective enforcement of [the] fiduciary responsibilities" that employee benefit plans owed their employees, H.R. Rep. No. 93-533, at 17 (1973), and that those plans "are affected with a national public interest," ERISA, §2(a), 29 U.S.C. §1001(a), Congress declared it was necessary "to protect . . . the interests of participants in employee benefit plans . . . by providing [them with] appropriate remedies, sanctions, *and ready access to the Federal courts*." ERISA, §2(b), 29 U.S.C. §1001(b) (emphasis added).

2. Congress accomplished that goal in Subchapter 1 of ERISA titled "Protection of Employee Benefit Rights."

There, in §502(e)(2), 29 U.S.C. §1132(e)(2), it set out three broad venue options for plan participants and their beneficiaries:

> Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found.

3. In this case, petitioner Jeffrey Robertson, a former executive employee of Pfizer, Inc., filed an ERISA breach of fiduciary duty suit against the Pfizer Retirement Committee (the Committee) and its contracted agent, Fidelity Executive Services d/b/a Fidelity Employer Services Company, LLC (Fidelity). The core allegations of his Complaint centered on the defendants' failure to provide him with the material information he needed in order to make an informed decision about his retirement options. Cmplt., ¶¶3-6, 28-50. Specifically, he alleged that the Committee and Fidelity failed to inform him that hundreds of thousands of dollars due him under the Pfizer Pension Plan ($715,507 to be precise) could not be rolled over to another qualified plan and, thus, were subject to immediate federal and state taxation. *Id.* at ¶¶3-5, 42-44.

4. Mr. Robertson filed his lawsuit in the United States District Court for the Eastern District of Pennsylvania (No.: 2:18-cv-00246). It was there where both defendants resided and there where the claimed ERISA breach occurred. (The Pfizer Pension Plan was administered in New Jersey, notwithstanding the Committee's misleading contention that it was administered in New York, *see infra* at 17-18.)

Rather than answer his Complaint, the defendants moved the District Court to dismiss, or, alternatively, transfer it to the District Court for the Southern District of New York. They did so based on a forum selection clause the Committee added to the Pfizer Pension Plan on January 1, 2016 -- but which it did not notify plan participants about until March 1, 2017.

5. Mr. Robertson opposed the motion on a number of grounds. First, he pointed out that dismissal was not the proper means to seek enforcement of a forum selection clause, citing the on-point decision of this Court in *Atlantic Marine Const. Co. v. U.S. Dist. Court for the W.D. of Texas*, 571 U.S. 49, 52 and 55-59 (2013). Second, he opposed the defendants' transfer motion because the Committee's forum selection clause was invalid and unenforceable as a matter of public policy and because it was unilaterally imposed on him without his knowledge, involvement or consent.

6. In a Memorandum Opinion and Order, the District Court denied the defendants' motion to dismiss but granted their motion to transfer the case to the Southern District of New York. Pet. App. 5a-31a.[1]

7. Following circuit precedent, Mr. Robertson then filed a petition for writ of mandamus in the Third Circuit seeking review of the District Court's transfer order. *Accord Sunbelt Corp. v. Noble, Denton & Associates,*

1. In subsequent orders, the District Court stayed transfer of the case, including its most recent order, dated February 11, 2019, which keeps the stay in place pending disposition by the Court of Mr. Robertson's petition for certiorari.

Inc., 5 F.3d 28, 30 (3d Cir. 1993) ("[m]andamus is . . . the appropriate mechanism for reviewing an allegedly improper transfer order").

8. Without opinion, by order dated August 16, 2018, the Third Circuit denied issuance of the writ. Pet. App. 3a-4a. A subsequent-filed petition for rehearing was denied by the Circuit on February 1, 2019. Pet. App. 1a-2a.

REASONS FOR GRANTING THE PETITION

The Court Should Grant Review To Decide Whether Private Employee Benefit Plans Can Unilaterally Override The Statutory Venue Choices That Congress Made Available To Plan Participants And Their Beneficiaries Under ERISA.

A. The Rulings Below Cannot Be Reconciled With This Court's Precedents.

Seventy years ago, in *Boyd v. Grand Trunk Western Railroad Co.*, 338 U.S. 263 (1949), the Court held that a privately-imposed forum selection clause that circumvented the venue choices made by Congress in the Federal Employers' Liability Act was "void." *Id.* at 265. "The right to select the forum granted in §6 [of FELA] is a substantial right. It would thwart the express purpose of [FELA] to sanction defeat of that right by the device at bar." *Id.* at 266.

Boyd has been called "obscure" and "a bit of a relic" by the Seventh Circuit. *Mathias v. U.S. Dist. Court for the Central Dist. of Illinois*, 867 F.3d 727, 733 (7th Cir. 2017), *cert. denied*, 138 S.Ct. 756 (2018). In this case,

the Committee and Fidelity went so far as to say of it: "the Supreme Court in *Atlantic Marine* has implicitly overruled *Boyd* . . ." (3d Circuit Brief for Respondent, at 21).

Those are odd ways to discredit a unanimous decision of this Court. Nothing in the intervening seventy years suggests *Boyd* has lost any of its vitality or precedential value. In fact, rather than lying in repose, *Boyd*'s core holding -- rendering "void" any private contract that acts to "thwart" or defeat" a special venue statute enacted for the public's protection, 338 U.S. at 266 -- has both antecedent and subsequent support. For example, in *U.S. v. National City Lines, Inc.*, 334 U.S. 573 (1948), the Court held that the special venue provision of the Clayton Act, 15 U.S.C. §22, could not be overridden by application of the doctrine of *forum non conveniens*. Congress, said the Court, left no " . . . room for judicial discretion to apply the doctrine to deprive an anti-trust plaintiff of the venue choices conferred by the statute." *Id.* at 588. *See also Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704 (1945), a non-venue case, in which the Court stated: "It has been held in this and other courts that a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such a waiver or release contravenes the statutory policy."

Four years after *Boyd* was decided, the Court cited it in *South Buffalo Ry. Co. v. Ahern*, 344 U.S. 367 (1953), another FELA case, and referred to it in these words: "mindful of the benevolent aims of the Act, we have jealously scrutinized private arrangements for the bartering away of federal rights." *Id.* at 372-73. Nineteen years later, in *M/S Bremen v. Zapata Off-Shore Co.*,

407 U.S. 1 (1972), the Court upheld a forum selection clause between two sophisticated private parties in a non-statutory contract dispute case. But, citing *Boyd*, it was quick to point out: "[a] contractual choice of forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or judicial decision." *Id.* at 15.

On that basis, numerous lower federal courts have cited *Boyd* with approval and have held private forum selection clauses to be invalid and unenforceable because they conflicted with the public policies enunciated in other federally-enacted statutes. *See*, e.g., *Volkswagen Interamericana, S.A. v. Rohlsen*, 360 F.2d 437, 439 (1st Cir.) (contractual forum selection clause held unenforceable because it conflicted with the statutory venue provisions of the Automobile Dealers' Day in Court Act), *cert. denied*, 385 U.S. 919 (1966); *Smallwood v. Allied Lines, Inc.*, 660 F.3d 1115, 1121-22 and n.7 (9th Cir. 2011) (same result as to the special venue provision in the Carmack Amendment to the Interstate Commerce Act); *U.S. ex rel. VT. Marble Co. v. Roscoe-Ajax Const. Co.*, 246 F.Supp. 439, 442-43 (N.D. Cal. 1965) (same result as to the special venue provision of the Miller Act); *Smith v. Kyphone, Inc.*, 578 F.Supp.2d 954, 960-61 (M.D.Tenn. 2008) (same result as to Title VII's special venue provision); and *Serpico v. Laborer's Int'l. Union of North America*, 1995 WL 479569, at *1 (N.D.Ill. Aug. 4, 1994) (same result as to the special venue provision of the Labor Management Reporting and Disclosure Act).[2]

2. This is not to suggest that all federal special venue statutes automatically invalidate a non-conforming private forum selection clause. *Accord Cortez Byrd Chips, Inc. v. Bill Harbert*

No less convincing is the respondents' contention that the Court *sub silentio* overruled *Boyd* in *Atl. Marine Const. Co., Inc. v. U.S. Dist. Court for the W. Dist. of Texas*, 571 U.S. 49 (2013). There are two reasons for that conclusion: First, *Atlantic Marine* does not even reference *Boyd*, much less hint at its demise. That is because *Atlantic Marine* has no bearing on the question presented here. Quite the contrary. It involved the validity of a forum selection clause between two private parties. No special venue statute was at issue there and thus the Court had no occasion to resolve, much less consider, the entirely separate question present here, *viz*, whether a privately-imposed forum selection clause can circumvent the venue choices made by Congress in enacting ERISA. *Boyd*, its forebears and progeny, are the precedents from which to consider that issue. For respondents to suggest that *Boyd* somehow has lost its precedential effect is not just misguided, it ignores the material similarity between

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Const. Co., 529 U.S. 193, 204 (2000) ("analysis of special venue provisions must be specific to the statute"). But it is to suggest that *Boyd* is still good law; and as applied to a historic law such as ERISA, whose declared national public purpose was designed "to protect . . . the interests of participants in employee benefit plans . . . by establishing standards of conduct . . . for fiduciaries of employee benefit plans, and by providing for . . . *ready access to the Federal courts*, 29 U.S.C. §1001(b) (emphasis added), *Boyd* and its progeny provide strong support for the conclusion that private forum selection clauses that clash with ERISA's special venue provision are invalid and unenforceable. *Cf. Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89, 98 (2010) (referring to the Carmack Amendment to the Interstate Commerce Act, the Court stated: "if [Carmack's] terms apply to the bill of lading here, the cargo owners would have a substantial argument that the Tokyo forum selection clause in the bills of lading is preempted by Carmack's venue provisions").

the FELA special venue provision at issue in *Boyd* and ERISA's special venue provision at issue here. *Cf.* Section 6 of FELA with Section 502(l)(2) of ERISA.

Second, it would be unusual for the Court to overrule one of its own precedents without even mentioning it. Doing so would be particularly concerning because "overruling a precedent of this Court is a matter of no small import," *Payne v. Tennessee*, 501 U.S. 808, 842 (1999) (Souter, J. and Kennedy, J., concurring), something that is rarely if ever done by silent implication. *Shalala v. Illinois Council on Long Term Care, Inc.*, 592 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*").

B. The Rulings Below Are Inconsistent With The Statutory Context, History And Purpose Underlying Congress' Enactment Of ERISA's Special Venue Provision.

What was Congress' intent in enacting ERISA's special venue provision? And why did it provide participants and beneficiaries with three broad federal court venues in which to sue employee benefit plans? In answering those questions, "we must (as usual) interpret the relevant words not in a vacuum, but with reference to the statutory context, structure, history, and purpose." *Ambramski v. U.S.*, 573 U.S. 169, 179 (2014) (internal citation and quotation omitted); *New Prime Inc. v. Oliviera*, 586 U.S. ___, ___ (2019) (slip op. at 6) ("words generally should be interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute") (internal citations and quotation marks omitted).

With these canons of statutory construction as benchmarks, the answers that emerge leave no doubt that in passing ERISA in 1974, and including within it a special venue provision, Congress never intended to allow a private employee benefit plan to self-select its own preferred forum and circumvent the broad federal court venues Congress itself chose for the protection of plan participants and their beneficiaries.

1. As the Nation's first private employee benefits law, ERISA was not passed overnight. It took Congress "almost a decade of studying the Nation's private pension plans" before it was enacted. *Nachman Corp. v. Pension Ben. Guaranty Corp.*, 446 U.S. 359, 362 (1980). As described in its "findings and declaration of policy," Congress enacted ERISA for the protection of "employees and their beneficiaries." Section 2(a), 29 U.S.C. §1001(a). It did so because . . .

> the continued well-being and security of millions of employees and their dependents are directly affected by these [employee benefit] plans; *that they are affected with a national public interest*; . . . [*and*] that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries . . . that . . . safeguards be provided with respect to the establishment, operation and administration of such plans.

Id. (emphasis added).

2. Among its findings, Congress pointed to an array of "jurisdictional and procedural obstacles which in the

past appear to have hampered effective enforcement of fiduciary responsibilities under state law . . . .” H.R. Rep. No. 93-533, at 17 (1973); *accord* S. Rep. No. 93-127, at 35 (1973). Through ERISA, Congress was determined to eliminate those “obstacles,” and it did so “by providing for appropriate remedies, sanctions, and *ready access to the Federal courts*.” ERISA, §2(b), 29 U.S.C. §1001(b) (emphasis added).

3. “Ready access” did not mean just “access” to the federal courts. To read those two words parsimoniously would render the adjective “ready” as no more than a meaningless modifier, a construction contrary to congressional intent. “We will not read the statute to render the modifier superfluous.” *Mertens v. Hewitt Associates*, 508 U.S. 248, 258 (1993). Rather, “ready access,” as used by Congress in its declaration of policy, was intended “in the sense of being ‘immediately available or at hand: that can be had or used at once.’ ” *Dumont v. Pepsico, Inc.*, 192 F. Supp. 3d 209, 220 (D.Me. 2016) (*citing Webster’s Third New International Dictionary*, 1890 (2002)).

4. Nor was ERISA’s special venue provision intended as a statutory grant of authority for benefit plans or fiduciaries. *Gulf Life Ins. Co. v. Arnold*, 809 F.2d 1520 (11th Cir. 1987). To the contrary, Section 502(e)(2) notably appears in Subchapter I of ERISA -- which is titled “Protection of Employee Benefit Rights.” By its terms, that Section of the Act was never intended to be a tool to be used by employee benefit plans to override the rights of plan participants and their beneficiaries. To accept a contrary view would mean that “the sword that Congress intended participants/beneficiaries to wield in asserting

their rights could instead be turned against those whom it was designed to aid." *Gulf Life*, 809 F.2d at 1525.

5. In Section 502(e)(2) of ERISA, Congress chose to provide plan participants and beneficiaries with special venue choices as part of a "carefully crafted and detailed enforcement scheme." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002). It also made sure that employee benefit plans, while free to devise plan documents of their own choosing, could not do so to disrupt or defeat the rights it conferred on employees under the Act. Thus, in Section 404(a)(1)(D), Congress stated that plan fiduciaries were required to follow plan documents *only* "insofar as such documents and instruments are consistent with the provisions of [title I] and title IV [of ERISA]." 29 U.S.C. §1104(a)(1)(D). For that reason, a plan is not free to "displace" a specific provision in ERISA "simply by inserting a contrary term in plan documents." *Unum Life Ins. Co. of America v. Ward*, 526 U.S. 358, 376 (1999).

6. ERISA's history also provides a rich source of evidence that Congress never intended (nor had reason to envision) that a private employee benefit plan could defeat the venue choices it made available to plan participants and their beneficiaries. A law review article to be published next month provides context for that conclusion. *See* Christine P. Bartholomew, James A. Wooten, *The Venue Shuffle: Forum Selection Clauses and ERISA*, 66 UCLA L. Rev. ____ (forthcoming May 2019) (hereinafter "Manuscript at ____"), online at https://www.uclalawreview.org/the-venue-shuffle-forum-selection-clauses-erisa/ (as last visited on April 23, 2019).

In their article, the authors trace in detail the historical setting in which ERISA emerged, including a full account of the bills, reports and statements of the key actors who played a role in its passage. As relevant here, they describe the many obstacles, both substantive and procedural, that threatened the rights of plan participants. Manuscript at 21-24. These included "complex issues of jurisdiction, service and venue." *Id.* at 23. That is why Congress chose to provide plan participants and their beneficiaries not with just "access" to the federal courts, but rather, "ready access" to them. *Id.* at 22.

The venue provision that emerged from Congress' consideration, Section 502(e)(2) of ERISA, was thus no last minute afterthought. "[T]he legislative history of pension reform confirms that the drafters meant for employees to have venue options that would facilitate enforcement of their benefit rights." Manuscript at 31.

The origins of that legislative history can be traced back to February 1967 when the Johnson administration first presented a pension reform bill to Congress that included a broadly-worded venue provision. *Id.* Three years later, in March 1970, the precise language that was to become Section 502(e)(2) of ERISA was introduced by Senator Jacob Javits on behalf of the Nixon administration. *Id.* at 31-32.[3] His bill, S. 3589, then reappeared in other bills sponsored by Senator Harrison Williams, the Chair of the Senate Labor Committee, and by Congressman

3. In support of his bill, Senator Javits observed: "service of process, venue, and jurisdictional requirements compound even further the difficulty facing individual employees who might want to institute suit to protect their rights under present law." Manuscript at 32.

John Dent who led the pension reform effort in the House Labor Committee. *Id*. at 32-33. It was in that context, and with the stated intent of eliminating the "jurisdictional and procedural obstacles" that previously had hampered the enforcement of plan participants' rights, that Section 502(e)(2)'s broad venue provision became law. *Id*. at 32-34.

To those who today would argue (as the respondents here have done) that Congress did not foreclose employee benefit plans from adopting forum selection clauses at odds with the ones set out in Section 502(e)(2), the authors point out that at the time of ERISA's passage in 1974 those clauses were not in use nor in the minds of the key actors. *Id*. at 34: "Forum selection clauses were not on the radar of drafters or pension benefit experts." Rather, based on the Court's opinion in *Boyd* and the opinions of lower federal courts that faithfully applied *Boyd*, *id*. at 35-37, "the controlling presumption was such clauses would not be enforced . . . ." *Id*. at 34; *see also id*. at 42 ("During the drafting of ERISA, the actions of professionals in the field and ERISA drafters also show a shared presumption that forum selection clauses were unenforceable.")[4]

4. As further evidence that ERISA's drafters never considered nor foresaw that privately-imposed forum selection clauses would displace the venue choices set out in Section 502(e)(2), the authors point to the 1971 version of the Restatement (Second) of Conflict of Law which stated: "effect must be denied a choice of forum provision in situations where the provision is invalidated by statute." Manuscript at 38 and n.204.

C. Review Should Be Granted Because The Question Presented Is One Of National Importance That Has Been Percolating Long Enough In The Lower Federal Courts

This is the fourth time the Court has been asked to review the question presented here. On each of the prior occasions, the courts of appeals have upheld forum selection clauses that undercut the ERISA venues chosen by Congress. The first time, in 2016, the Sixth Circuit was divided 2-1 on the issue. *Smith v. Aegon Companies Pension Plan*, 769 F.3d 922 (6th Cir. 2014). In that case, the Solicitor General argued that private forum selection clauses were invalid under ERISA, but asked the Court to deny review to allow the issue to percolate in the lower federal courts. *See* 2015 WL 7625682, at *8-15 (Brief of the United States as *Amicus Curiae*, Nov. 25, 2015). The Court then denied review. 136 S. Ct. 791 (2016).

The next Term, the Court was again asked to resolve the question in a case arising out of the Eighth Circuit, but there too review was denied. *Clause v. U.S. Dist. Court for the Eastern District of Missouri*, No. 16-2607 (8th Cir. Sept. 27, 2016), *cert. denied*, 137 S. Ct. 825 (2017). And finally, last Term, in another split 2-1 decision from the Seventh Circuit, *Mathias v. U.S. Dist. Court for the Central District of Illinois*, *supra*, a case in which the Secretary of Labor argued that private forum selection clauses were invalid under ERISA, 2016 WL 7212256, at *4-15 (Brief of the Secretary as *Amicus Curiae*, Dec. 8, 2016), the Court again denied review. 138 S. Ct. 756 (2018).

Enough time has now passed to have allowed the issue to fully percolate in the lower federal courts. On

one side of the ledger, a majority of courts has sided with employee benefit plans and upheld forum selection clauses that circumvented the venue choices made in ERISA by Congress. Those courts typically reached their results based on one or more of the following arguments urged on them by plan defendants: this Court's decision in *Boyd* is limited to FELA; Congress did not *per se* bar private forum selection clauses when it enacted ERISA's special venue provision; much like arbitration agreements, forum selection clauses, once frowned upon, are now favored; and finally, those clauses promote uniformity by allowing a single federal district court to resolve the merits of all ERISA claims brought against the plans. Representative of those decisions are the Sixth and Seventh Circuit majority opinions in *Smith* (769 F.3d at 929-33) and *Mathias* (867 F.3d at 732-34), the District Opinion in this case (Pet. App. 5a-29a) and, among others, the following District Court opinions that substantially rely on the Sixth Circuit's reasoning in *Smith*; *Shah v. Wellmark Blue Cross Blue Shield*, 2017 WL 1186341, at *2 (D.N.J. March 30, 2017) and *Feather v. SSM Health Care*, 216 F.Supp.3d 934, 939-40 (S.D. Ill. 2016).

On the other side of the ledger are the dissents by Judge Clay in *Smith* (769 F.3d at 934-36) and Judge Ripple in *Mathias* (867 F.3d at 734-37), both of whom concluded that private forum selection clauses are violative of the national public policy underlying Congress' enactment of ERISA's special venue provision. Their views were presaged ten years earlier by the Eleventh Circuit in *Gulf Life* in its decision to reject any effort by employee benefit plans to thwart plan participants' rights to the venues chosen for them by Congress. *See* 809 F.2d at 1525 and n.7. So too, district courts around the country have

reached the same conclusion after analyzing the text, history and legislative purpose of ERISA's special venue provision. *See*, *e.g.*, *Dumont v. Pepsico Inc.*, 203 F.Supp.3d 209, 216-223 (D. Me. 2016) and *Nicolas v. MCI Health and Welfare Plan*, 453 F.Supp.2d 972, 974 (E.D. Tex. 2006); *see also* the pre-*Mathias* district court opinions in *Harris v. BP Corp. North America Inc.*, 2016 WL 8193539, at *3-8 (N.D. Ill. July 8, 2016) and *Coleman v. SuperValu, Inc. Short Team Disability Program*, 920 F.Supp.2d 901, 906-08 (N.D. Ill. 2013).

All the arguments for and against private forum selection clauses have thus been aired and resolved as to their permissibility under ERISA. There is no longer any reason for the Court to await further developments on the issue by the lower federal courts. Moreover, "millions of employees" are covered by employee benefit plans, §1(a) of ERISA, 29 U.S.C. §1001(a), a number that has increased dramatically over the years. All these employees are at risk to being subject to forum selection clauses that override ERISA's special venue provision. Their rights, like Mr. Robertson's, are now ripe for review by the Court.[5]

D. This Is An Ideal Case To Resolve The Question Presented.

To our knowledge, no case but this one has arisen in the context of an employee benefit plan's ouster of not one,

5. According to the United States Department of Labor, 136.2 million people are now covered by private pension plans in this country. *See Dept. of Labor, Private Pension Plan Bulletin Abstract of 2016 Form 5500 Annual Reports*, at 1 (Dec. 2018)

but all three of the venue choices made available to plan participants by Section 502(e)(2) of ERISA. But that is precisely what happened here. Recall that Section 502(e)(2) afforded Mr. Robertson three venue choices: he could file suit where the Pfizer Pension Plan was administered, where the breach occurred or where the defendant(s) reside or can be found. Recall too that no one, least of all the Committee or Fidelity, disputes the fact that Mr. Robertson chose the Eastern District of Pennsylvania where the breach occurred and where they both reside.

But in an effort to mislead the District Court, the Committee and Fidelity contended in their moving papers, Defendants' Mem. of Law in the District Court at 11 and n.6, that the Pfizer Pension Plan was administered in New York City -- thus seemingly making available to Mr. Robertson at least one of the three venues granted him by Section 502(e)(2). In quick order Mr. Robertson exposed that fallacy. He submitted evidence to the District Court that indisputably proved that the Plan was administered in Peapack, New Jersey. It was *there* that he was directed by the Committee's Retirement Director to submit his breach of fiduciary duty claim; it was *there* where he submitted his claim by certified mail; it was *there* where the Summary Plan Description directed plan participants to file their claims and appeals; and it was *there* that Pfizer listed the Committee's address in the annual Form 5500 report that it filed with the United States Department of Labor. *See* the Appendix filed in the Third Circuit, App. at 212-13, 216, 224, 227 and 229.

Nor is that all that makes this case unique. For here there is no evidence that Mr. Robertson ever agreed (or was asked to agree) to the Committee's forum selection

clause. In the District Court, he submitted a Declaration in which he stated that he had no notice that the Committee was considering amending Pfizer's Pension Plan to make the Southern District of New York the venue for any claims he might have against it; no idea why that venue was chosen by the Committee; no opportunity to bargain about its choice; and no opportunity to accept or reject the Committee's choice. *See* the Third Circuit Appendix at 207-10; *id*. at 209, ¶¶8-11. As he put it: "the decision was foisted on me without any involvement on my part and without my agreement or consent." *Id*. at ¶11. Without Mr. Robertson's agreement, the Committee's forum selection cluase is unenforceable. *Dumont*, *supra*, 192 F.Supp.3d at 214; *Mezyk v. U.S. Bank Pension Plan*, 2009 WL 3853878, at *4 (S.D. Ill. Nov. 18, 2009).

CONCLUSION

For the reasons stated, the Petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — THE ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PANEL REHEARING AND REHEARING *EN BANC* (FEBRUARY 1, 2019)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-2812

In re: JEFFREY A. ROBERTSON,

Petitioner.

(Related to E.D. Pa. No. 2-18-cv-00246)

SUR PETITION FOR REHEARING

Present: SMITH, *Chief Judge*, CHAGARES, JORDAN, SHWARTZ, RESTREPO, BIBAS, and NYGAARD*, *Circuit Judges*

The Petition for rehearing filed by petitioner in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court *en banc* is DENIED.

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* Judge Nygaard's vote is limited to panel rehearing only

Appendix A

By the Court,

/s/ Stephanos Bibas
Circuit Judge

Dated: February 1, 2019

APPENDIX B — THE JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT (AUGUST 16, 2018)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-2812

In re: JEFFREY A. ROBERTSON,

Petitioner.

August 16, 2018
BCO-105

(Related to E.D. Pa. No. 2-18-cv-00246)

Present: RESTREPO, BIBAS and NYGAARD, *Circuit Judges*

1. Petition for Writ of Mandamus filed by Petitioner Jeffrey Robertson;

2. Response by Respondents Fidelity Executive Services and Pfizer Retirement Committee in Opposition to the Petitioner's Writ of Mandamus;

3. Reply by Petitioner Jeffrey Robertson in Support of the Petition for Writ of Mandamus.

Respectfully,
Clerk/JK

Appendix B

ORDER

The Petition for writ of mandamus is denied.

By the Court,

s/Stephanos Bibas
Circuit Judge

APPENDIX C — THE DISTRICT COURT'S MEMORANDUM OPINION (JULY 27, 2018)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

CIVIL ACTION NO. 18-0246

JEFFREY A. ROBERTSON,

Plaintiff,

v.

PFIZER RETIREMENT COMMITTEE, *et al.*,

Defendants.

July 27, 2018, Decided
July 27, 2018, Filed

MEMORANDUM OPINION

INTRODUCTION

Jeffrey A. Robertson ("Plaintiff") filed a civil action premised on a claim for breach of fiduciary duty against Defendant PRC Retirement Committee ("Defendant PRC") and Defendant Fidelity Workplace Services d/b/a Fidelity Employer Workplace Services Company,

LLC,[1] ("Defendant Fidelity") (collectively, "Defendants") pursuant to Section 502(a)(3) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(3). [ECF 1]. Before this Court is Defendants' motion to dismiss for improper venue filed pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(3) or, alternatively, a motion to transfer venue to the United States District Court for the Southern District of New York. [ECF 11]. Specifically, the basis for the motion centers on a forum-selection clause in the Pfizer Consolidated Pension Plan, which is governed by ERISA. [ECF 11-1 at 1]. Plaintiff opposes the motion. [ECF 15]. The issues raised by the parties have been fully briefed and are ripe for disposition.[2] For the reasons set forth, Defendants' motion is granted, *in part*, and, accordingly, the matter is transferred to the United States District Court for the Southern District of New York.

BACKGROUND

The procedural and factual histories are known to the parties. Thus, only the pertinent facts to the motion to dismiss and/or transfer will be discussed; *to wit*:

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1. Defendant Fidelity Workplace Services LLC was incorrectly identified in the complaint as Fidelity Executive Services d/b/a Fidelity Employer Services Company, LLC.

2. This Court has also considered Defendants' reply, [ECF 18], Plaintiff's motion for oral argument and/or hearing on Defendants' motion to dismiss or transfer venue, [ECF 19], and Defendants' motion to strike and opposition to Plaintiff's motion for oral argument and/or hearing. [ECF 20].

Appendix C

Plaintiff was employed by Pfizer, Inc., in a variety of sales positions commencing in 1983. [ECF 1 at ¶ 5]. As an employee of Pfizer, Plaintiff participated in and was a beneficiary of the Pfizer Consolidated Pension Plan ("Plan").[3] [*Id.* at ¶ 3]. Defendant PRC was the Plan administrator. Defendant Fidelity acted as a contracted agent of Defendant PRC, providing retirement information services to the Plan's beneficiaries. [*Id.* at ¶¶ 13, 15].

Prior to retiring, Plaintiff utilized the services of Defendant Fidelity to understand the Plan's benefits and create a retirement plan to fit his needs. [*Id.* at ¶¶ 28, 33]. After consulting with Defendants about his potential retirement plan, Plaintiff decided to retire on October 31, 2016. [*Id.* at ¶¶ 37-40]. In January of 2017, nine weeks after retiring, Plaintiff first learned that there were IRS limits on his retirement plan. [*Id.* at ¶¶ 42, 44]. The IRS limits required that $715,507.00 of the Plan's payments be shifted from a qualified plan to a non-qualified plan, thus, subjecting the payments to federal and state taxes upon distribution. [*Id.* at ¶¶ 5-7, 42-44]. In his complaint, Plaintiff alleges that prior to retiring, Defendants did not inform him that his pension would be subject to IRS limits, thus thereby, breaching their fiduciary duty. [*Id.*].

3. The Plan is docketed at ECF 21-1.

Appendix C

On January 11, 2017, Plaintiff wrote a letter to Amy Manning, Pfizer's Director of Retirement Plans, detailing his complaints and seeking review. [ECF 1 at Ex. C]. By letter dated April 4, 2017, Ms. Manning advised Plaintiff that his "inquiries are being treated as a claim under the Plan" and "[a]fter a thorough review of the facts presented in your correspondence and the Plan provisions your claim for additional benefits or relief from the Plan has been denied." [ECF 15 at Exhibit 2]. Plaintiff was also advised that he could appeal this decision to Defendant PRC in writing within sixty days. [*Id.*]. By letter dated May 20, 2017, Plaintiff appealed the decision to Defendant PRC. [ECF 1 at ¶¶ 17-20; ECF 18 at 2-3]. Defendant PRC responded to Plaintiff on August 11, 2017, denying Plaintiff's appeal, and advised Plaintiff of his right to bring a civil action under § 502 of ERISA in the United States District Court for the Southern District of New York. [ECF 18-2]. Thereafter, Plaintiff filed a civil action in the United States District Court for the Eastern District of Pennsylvania.

In January of 2016, while Plaintiff was still employed by Pfizer, a forum-selection clause was added to the Plan. [ECF 18-1 at ¶ 14]. The Plan was reissued to Plaintiff to reflect this amendment in March of 2017. [*Id.* at ¶ 15]. The forum-selection clause provision provides:

> Any claimant whose claim for benefits has been denied shall have such further rights of review as are provided in sections 502 and 503 of ERISA, and the Retirement Committee shall retain right, authority and discretion as provided in or not expressly limited by sections 502 and 503 of ERISA. Legal action cannot be taken with respect to any denial of a claim hereunder more than one year after the Retirement Committee has made a final determination that such claim shall be denied. **The venue for such legal action shall be the Southern District of New York for claims submitted on or after February 1, 2016**.

(Plan at A-6) (emphasis added).

LEGAL STANDARD

As noted, Defendants move to dismiss this case for improper venue pursuant to Rule 12(b)(3) or, in the alternative, to transfer venue to the Southern District of New York in accordance with the forum-selection clause in the Plan. Under Rule 12(b)(3), a court must grant a motion to dismiss if venue is improper. Fed. R. Civ. P. 12(b)(3). "[V]enue is proper so long as the requirements of [the federal venue statute] are met, irrespective of any forum-selection clause . . . ." *See Atl. Marine Const. Co.*

v. U.S. Dist. Court for W. Dist. of Texas, 571 U.S. 49, 57 (2013). As such, the appearance of a forum-selection clause in a contract agreed to by the parties, however, does not render venue "wrong" or "improper," if a party files an action in a venue different than the one provided for in the clause. *Id.* at 55, 57.

The applicable venue provision under ERISA specifically provides that:

> Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

29 U.S.C. § 1132(e)(2).

Even where venue is proper, a district court may still transfer a case to another federal district pursuant to 28 U.S.C. § 1404(a) on the basis of *forum non conveniens*. Section 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." 28 U.S.C. § 1404(a). Where the parties have agreed to a forum-selection clause, a motion to transfer should be considered pursuant to 28 U.S.C. § 1404(a). *Atl. Marine*, 571 U.S. at 52.

Appendix C

Forum-selection clauses are "treated as a manifestation of the parties' preferences as to a convenient forum." *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 880 (3d Cir. 1995). "When parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation." *Atl. Marine*, 571 U.S. at 64. Such clauses are considered to be "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972). In the absence of a forum-selection clause, a court should weigh certain public and private interests to determine whether transfer is warranted. *Jumara*, 55 F.3d at 879. However, when a forum-selection clause exists, the court "must deem the private-interest factors to weigh entirely in favor of the preselected forum" and consider the public-interest factors only. *Atl. Marine*, 571 U.S. at 64.

DISCUSSION

In their motion to dismiss, Defendants contend that because this action was brought in the United States District Court for the Eastern District of Pennsylvania, rather than in the United States District Court for the Southern District of New York in accordance with the forum-selection clause, venue in the Eastern District of Pennsylvania is improper and the complaint should be dismissed pursuant to Rule 12(b)(3). In his response, Plaintiff argues that venue is proper in the Eastern District of Pennsylvania, in accordance with the statutory

venue requirements of ERISA. Plaintiff further argues that the motion to dismiss, which is premised on the enforcement of the forum-selection clause, should instead be considered as a motion to transfer on the basis of *forum non conveniens* pursuant to 28 U.S.C. § 1404(a). This Court agrees. *See e.g., Atl. Marine*, 571 U.S. at 52.

As noted, the existence of a forum-selection clause does not render venue improper. *See id.* at 57. Thus, this action can only be dismissed if it was improperly brought in this forum. As discussed, ERISA's venue provision allows for a claim to be brought in a district where a breach under the Plan took place. *See* 29 U.S.C. § 1132(e)(2). Here, Plaintiff contends, and does not dispute, that the alleged breach occurred in this district. This Court agrees. Therefore, venue is proper and the motion is denied.

Alternatively, Defendants argue that this case should be transferred to the Southern District of New York pursuant to § 1404(a) consistent with the Plan's forum-selection clause. Plaintiff, however, challenges the validity and enforceability of the forum-selection clause, as well as the scope of the forum-selection clause, the compatibility of the clause with ERISA's venue provision, and whether the Plaintiff acquiesced to, or had notice of, the clause.

Because forum-selection clauses are "treated as a manifestation of the parties' preferences as to a convenient forum," they are typically given deference. *Jumara*, 55 F.3d at 880. Thus, this Court will consider the arguments to determine whether the forum-selection clause is valid and enforceable and, if so, whether the relevant public-interest factors weigh in favor of or against transferring

the action to the Southern District of New York. *See Atl. Marine*, 571 U.S. at 66 (holding that the party opposing the motion has the burden of showing that "public-interest factors overwhelmingly disfavor a transfer.").

Validity and Enforceability of Forum-Selection Clause[4]

Defendants argue that the forum-selection clause of the Plan is valid and enforceable. Plaintiff disagrees and argues that his claim for breach of fiduciary duty is outside the scope of the clause, that the forum-selection clause is inconsistent with the venue provision of ERISA, and that he did not consent to or receive proper notice of the forum-selection clause. This Court will consider each of the parties' arguments below.

The scope of the forum-selection clause

Plaintiff argues that his breach of fiduciary duty claim does not fall within the scope of the forum-selection clause. Specifically, Plaintiff contends that the forum-selection clause only applies to benefits claims, and not to claims for breach of fiduciary duty. Defendants disagree and argue that the forum-selection clause applies to any and all claims submitted through the administrative appeals process provided by the Plan, including Plaintiff's breach of fiduciary duty claim here.

4. Though Plaintiff argues that Defendant Fidelity has not consented or moved to transfer this action to the Southern District of New York, Plaintiff is mistaken. The underlying motion was clearly filed jointly by both Defendants. [*See* ECF 11].

Typically, "[t]he question of the scope of a forum-selection clause is one of contract interpretation." *John Wyeth & Bro. Ltd. v. CIGNA Intern. Corp.*, 119 F.3d 1070, 1073 (3d Cir. 1997). The law that governs the Plan will govern the interpretation of the forum-selection clause. *See Martinez v. Bloomberg, L.P.*, 740 F.3d 211, 220 (2d. Cir. 2014) ("To ensure that the meaning given to a forum-selection clause corresponds with the parties' legitimate expectations, courts must apply the law contractually chosen by the parties to interpret the clause."). While the Plan states that it is to be governed by New York Law, (*See* Plan at A-26), the parties do not rely on any distinctive features of New York law when briefing this issue. Thus, this Court will apply general principles of contract law to the interpretation of the forum-selection clause. *See John Wyeth*, 119 F.3d at 1074 (applying general contract principles to a forum-selection clause that was governed by English contract law where the parties "did not rely on any distinctive features of English law."). When considering the meaning of a contract, "the 'initial resort should be to the 'four corners' of the agreement itself.'" *American Flint Glass Workers Union, AFL-CIO v. Beaumont Glass Co.*, 62 F.3d 574, 581 (3d Cir. 1995) (quoting *Washington Hospital v. White*, 889 F.2d 1294, 1300 (3d Cir. 1989)). A court must determine whether the provision of the contract unambiguously expresses the intentions of the parties; an unambiguous "contract clause must be reasonably capable of only one construction." *Wyeth*, 119 F.3d at 1074. When examining the intent of the parties, "a court must examine the entire agreement." *Williams v. Metzler*, 132 F.3d 937, 947 (3d Cir. 1997). "'A writing is interpreted as a whole, and all writings that are part of the

same transaction are interpreted together.'" *Id.* (quoting *Restatement (Second) of Contracts* § 202(2)).

The forum-selection clause at issue appears in the section of the Plan, Article 2, which provides, *inter alia*, the process by which a Plan beneficiary can administratively appeal the denial of a benefits claim. (Plan at A-5). Specifically, it provides that a claimant must submit a written appeal to Defendant PRC within 60 days of receiving a notice of denial. (Plan at A-5). Defendant PRC must then respond within 60 days of receiving a written appeal. (Plan at A-6). If a claimant seeks further review beyond the administrative level, the Plan provides that "[l]egal action cannot be taken with respect to *any denial of a claim hereunder* more than one year after the Retirement Committee has made a final determination that such claim shall be denied. The venue *for such legal action* shall be the Southern District of New York for claims submitted on or after February 1, 2016." (Plan at A-6) (emphasis added). This Court finds that this provision requires that "any legal action" with respect to "any denial of a claim hereunder" applies to all claims submitted by a claimant through the administrative claims and appeals process.

It is undisputed that Plaintiff submitted his underlying claim to the claims and appeals process provided by Article 2 of Plan. After a review of the facts presented, Plaintiff's claim was initially denied by Pfizer's Director of Retirement Plans. [*See* ECF 15 at Ex. 2]. Per the relevant provision of the Plan, the denial letter advised Plaintiff that if he wished to appeal the decision, he was required to

appeal the denial to Defendant PRC in writing within 60 days. [ECF 15 at Exhibit 2]. Plaintiff invoked this process and appealed the denial of his claim to Defendant PRC, explicitly asserting that he was appealing the denial of the claim. [ECF 15 at Ex. 3]. Plaintiff's appeal was again denied, and Plaintiff was advised of his right to bring a civil action under § 502 of ERISA in the Southern District of New York, as contemplated by the forum-selection clause. [ECF 18-2]. Plaintiff instead brought his civil action under § 502 of ERISA in this forum.

Clearly, Plaintiff submitted his claim through the claims and appeals process provided by the Plan. The factual allegations of the claim Plaintiff submitted to the claims and appeals process are the same as those underlying Plaintiff's civil action before this Court.[5]

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5. In the complaint, Plaintiff asserts a breach of fiduciary duty claim under § 502 of ERISA. The United States Court of Appeals for the Third Circuit has noted that breach of fiduciary duty claims typically do not have to be administratively exhausted. *See Mallon v. Trover Solutions, Inc.*, 613 F. App'x 142, 143-144 (3d Cir. 2015) (noting that "[a] plaintiff is required to exhaust administrative remedies prior to bringing an ERISA action to recover benefits under a plan" but "exhaustion is not required for claims arising from substantive statutory provisions of ERISA, such as claims for breach of fiduciary duties. . . ."); *Harrow v. Prudential Ins. Co. of America*, 279 F.3d 244, 252 (3d Cir. 2002) (noting that "[w]e apply the exhaustion requirement to ERISA benefit claims, but not to claims arising from violations of substantive statutory provisions."). Though Plaintiff was not required to administratively exhaust his claim, he affirmatively chose to avail himself of the Plan's administrative review process. In doing so, this Court finds that once Plaintiff chose to submit

Plaintiff does not dispute that he brought this claim through the claims and appeals process and exhausted the administrative process and remedies afforded by the Plan. By adhering to the claims and appeals process of the Plan, Plaintiff triggered the forum-selection clause therein, which applies to "any denial of a claim hereunder." (Plan at A-6). Once Plaintiff proceeded to follow the claims and appeals process, he was not at liberty to pick and choose which directive to follow and which not to follow. As noted, the forum-selection clause provides that the venue for legal action following the denial of claims hereunder shall be the Southern District of New York for claims submitted on or after February 1, 2016. (*See* Plan at A-6). Because Plaintiff chose to avail himself of the claims and appeals provision of the Plan which includes the forum-selection clause, this Court finds that Plaintiff's alleged breach of fiduciary duty claim falls within the scope of the forum-selection clause.

Plaintiff's argument that the forum-selection clause is inconsistent with the ERISA venue provision argument

Plaintiff argues that the enforcement of the forum-selection clause in this cause would interfere with the Congressional intent for venue under § 1132(e)(2) of ERISA. Specifically, Plaintiff contends that because the ERISA venue provision is explicit and provides that an action "may be brought in the district where the plan is

himself to the protections and provisions of the Plan's claims and appeals process, he also submitted to the requirements of the forum-selection clause at issue.

administered, where the breach took place, or where a defendant resides or may be found," a venue-selection clause provision is not allowed. Plaintiff further argues that venue is not appropriate in the Southern District of New York because the Plan was not administered there, the breach did not occur there, and Defendant PRC is principally located in New Jersey.[6] Thus, allowing a transfer to the Southern District of New York would be incompatible with the venue provision of ERISA. Defendants disagree and argue that the venue provision of ERISA is permissive in nature, and that the forum-selection clause does not interfere with the venue provision of ERISA.

The Third Circuit has not yet determined whether a forum-selection clause is incompatible with the ERISA venue provision of 29 U.S.C. § 1132(e)(2). *See Mathias v. Caterpillar*, 203 F. Supp. 3d 570, 578 (E.D. Pa. 2016). However, courts in this district have adopted the reasoning set forth in the Sixth Circuit's decision, *Smith v. Aegon Companies Pension Plan*, 769 F.3d 922 (6th Cir. 2014), which held that the language of 29 U.S.C. § 1132(e)(2) is permissive, and a forum-selection clause can be upheld, "even if the venue selection clause laid venue outside of the three options provided by § 1132 . . . ." *Id.* at 932. In

6. Plaintiff argues that Defendant PRC is primarily located in Peapack, New Jersey. Defendants argue that Defendant PRC is located in New York, New York, but note that it is not a relevant inquiry due to the existence of the forum-selection clause. Because we find that ERISA's venue provision is permissive and compatible with a forum-selection clause, it is not necessary to determine where exactly Defendant PRC is located.

Smith, the court explained that "if Congress had wanted to prevent private parties from waiving ERISA's venue provision, Congress could have specifically prohibited such action." *Id.* at 931. In *Mathias v. Caterpillar*, the Honorable Eduardo C. Robreno, expressly adopted the reasoning of *Smith* and held that because the ERISA's venue provision uses the language "may be brought," the venue provision does "not invalidate the [ERISA] plan's venue selection clause. . . ." 203 F. Supp. 3d at 578; *see also In Re Mathias*, 867 F.3d 727, 728 (7th Cir. 2017) (holding that § 1132(e)(2) is permissive and "does not preclude the parties from contractually channeling venue to a particular federal district."). Likewise, other courts within this Circuit have also adopted the persuasive reasoning set forth in *Smith*. *See also Shah v. Wellmark Blue Cross Blue Shield*, 2017 U.S. Dist. LEXIS 47279, 2017 WL 1186341, at *2 (D.N.J. Mar. 30, 2017) (holding that a forum-selection clause does not infringe upon the public policy of ERISA); *University Spine Center v. 1199SEIU Nat'l Benefit Fund*, 2018 U.S. Dist. LEXIS 42340, 2018 WL 1327109, at *2 (D.N.J. Mar. 15, 2018) (following the reasoning of *Smith* and *Shah* and holding the same).[7]

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7. To support his contention, Plaintiff relies on the reasoning of *Boyd v. Grand Trunk Western R. Co.*, 338 U.S. 263, 265, 70 S. Ct. 26, 94 L. Ed. 55 (1949), which held that a forum-selection clause in an action arising under the Federal Employers Liability Act was invalid as it was inconsistent with the legislative history of the Act. This case differs from *Boyd* since it pertains to the Employee Retirement Income Security Act rather than the Federal Employers Liability Act. In addition, the "legislative history of ERISA clearly demonstrates that Congress desires open access to several venues for beneficiaries seeking to enforce their rights." *Smith*, 769 F.3d at 935. Thus, *Boyd* is inapposite.

This Court is guided and persuaded by the reasoning set forth in *Smith* and *Mathias* and, further, finds that § 1132(e)(2) is permissive as to where an ERISA action "may be brought." 29 U.S.C. § 1132(e)(2). Since it is permissive, the venue provision of § 1132(e)(2) does not render invalid the Plan's forum-selection clause.[8]

Agreement to and notice of the forum-selection clause

Plaintiff contends that he did not agree to the forum-selection clause, which was added to the Plan in January 2016 and, further, that he did not receive proper notice of its implementation. Specifically, Plaintiff asserts that he was not aware that the Plan administrators were considering adding a forum-selection clause, that he "had no opportunity to be heard on the venue issue,

8. Plaintiff also argues that because Defendant PRC does not maintain its primary office and mailing address in New York City, venue in the Southern District of New York is improper under the relevant venue statute. Defendants do not specifically address this argument, but argue instead that Defendant PRC's primary place of business "is not the relevant inquiry here due to the existence of a forum-selection clause." [ECF 18 at 10]. Defendants are correct. As the parties have consented to venue in New York through the forum-selection clause, it is not necessary for this Court to decide whether the Southern District of New York would otherwise be a proper venue. *See Insurance Corp. of Ireland, Ltd.v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703-4, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982) (holding that by contract, parties may agree to submit themselves to the jurisdiction of a court); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) (noting that parties may consent to the jurisdiction of a court by agreeing to a forum-selection clause).

no idea why the Southern District of New York was chosen, no opportunity to bargain about its selection and no opportunity to accept or reject this amendment to the Pension Plan." [ECF 15-1 at 4-5]. In response, Defendants argue that Plaintiff was put on sufficient notice of the amendment to the Plan which added the forum-selection clause because Plaintiff was properly notified consistent with the statutory requirements of ERISA; and that Plaintiff agreed to the forum-selection clause when he sought benefits under the Plan at the time of his retirement.

Though Plaintiff argues that he did not have the opportunity to negotiate the addition of the forum-selection clause in the Plan or to be heard on the issue, extensive participation in negotiating a forum-selection clause is not necessary. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 591, 595, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991) (holding a form contract on a cruise ticket that contained a forum-selection clause to be enforceable, although "it would be entirely unreasonable for us to assume that respondents--or any other cruise passenger--would negotiate with petitioner the terms of a forum-selection clause . . . ."); *see also Danganan v. Guardian Protection Servs.*, 2015 U.S. Dist. LEXIS 140899, 2015 WL 6103386, at *2, 4 (E.D. Pa. Oct. 16, 2015) (upholding the enforceability of a forum-selection clause even though the plaintiff did not have the chance to negotiate the terms of the clause). Further, as Plaintiff sought benefits under the terms of the Plan after the addition of the forum-selection clause, it is evident that the provisions within the Plan had been accepted by Plaintiff. *See, e.g., Kemmerer v. ICI*

Americas Inc., 70 F.3d 281, 287 (3d Cir. 1995) (noting that a pension plan "constitutes an offer that the employee, by participating in the plan, electing a distributive scheme, and serving the employer for the requisite number of years, accepts by performance"); *see also Mathias*, 203 F. Supp. 3d at 576 (finding that "it was clear that acceptance of the benefits provided by [defendant] was conditioned upon the acceptance of the terms in the various plan documents," including a forum-selection clause).

Plaintiff also argues that he did not receive proper notice of the forum-selection clause because the clause was added to the Plan in January 2016, and he did not receive actual notice of the amended Plan until March 2017, five months after his retirement in October 2016. Defendants disagree and argue that Plaintiff received proper notice per the statutory requirements of ERISA.

The statutory guidelines of ERISA must be followed when providing notice of any change in a plan's benefits or other modifications to the ERISA governed plan.[9] *Lettrich*

9. ERISA's notice requirements reflect Congress' intent to limit employers' liability with respect to notice, as the requirements are evident of "'Congress's judgment that employees themselves are best served by an enforcement regime [of ERISA] that minimizes employers' expected liability for reporting and disclosure violations.'" *Jordan v. Fed. Exp. Corp.*, 116 F.3d 1005, 1013-14 (3d Cir. 1997) (quoting *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1170 (3d Cir. 1990)); *see, e.g., Conkright v. Frommert*, 559 U.S. 506, 517, 130 S. Ct. 1640, 176 L. Ed. 2d 469 (2010) (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 497, 116 S. Ct. 1065, 134 L. Ed. 2d 130 (1996)) (explaining that the provisions of ERISA were drafted to not "unduly discourage employers from

v. J.C. Penney Co., Inc., 213 F.3d 765, 769 (3d Cir. 2000). ERISA provides that:

> If there is a modification or change . . .(other than a material reduction in covered services or benefits provided in the case of a group health plan . . .) a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan. If there is a modification or change . . . of this title that is a material reduction in covered services or benefits provided under a group health plan . . .a summary description of such modification or change shall be furnished to participants and beneficiaries not later than 60 days after the date of the adoption of the modification or change.

29 U.S.C. § 1024(b)(1)(B).

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offering [ERSIA] plans in the first place."). Generally, as long as the statutory notice requirements of ERISA are followed, notice is deemed to be satisfactory. *See, e.g,. Lettrich v. J.C. Penney Co., Inc.*, 213 F.3d 765, 771 (3d Cir. 2000) (noting "the general rule that [ERISA] plan amendments are valid in spite of inadequate notice," but "participants may recover the benefits under the plan before the amendment if they can demonstrate cognizable prejudice from the company's failure to fully comply with ERISA's disclosure requirements. . . .").

The requirements for notice, therefore, depend on whether the modification to the plan is material or non-material. The notice requirement mandates that participants of ERISA-governed plans must be informed of changes related to a "**material reduction** in covered services or plan benefits," within 60 days of the date in which the change is adopted. *See* 29 U.S.C. § 1024(b)(1)(B) (emphasis added). A material reduction, under ERISA, is considered to be:

> [A]ny modification to the plan or change in the information required to be included in the summary plan description that, independently or in conjunction with other contemporaneous modifications or changes, would be considered by the average plan participant to be an important reduction in covered services or benefits under the plan...
>
> A "reduction in covered services or benefits" generally would include any plan modification or change that: eliminates benefits payable under the plan; reduces benefits payable under the plan, including a reduction that occurs as a result of a change in formulas, methodologies or schedules that serve as the basis for making benefit determinations; increases premiums, deductibles, coinsurance, copayments, or other amounts to be paid by a participant or beneficiary; reduces the service area covered by a health maintenance organization; establishes new conditions or requirements (e.g.,

> preauthorization requirements) to obtaining services or benefits under the plan.

29 C.F.R. § 2520.104b-3(d)(3)(i)-(ii).

Based on the above definition, the addition of the forum-selection clause was not a material modification of the Plan. The adoption of a forum-selection clause is not a plan modification or change that eliminates benefits of an ERISA plan, reduces benefits payable under an ERISA plan, increases premiums, deductibles, coinsurance, copayments, or other amounts to be paid under an ERISA plan. Additionally, a forum-selection clause does not reduce the service area by a health organization, nor does it establish new conditions or requirements to obtain benefits under the plan. Thus, the addition of a forum-selection clause does not constitute a material reduction in plan benefits, and is not subject to the 60-day notice requirement. *See Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226, 236 (3d Cir. 1994) (noting that a material term of a plan is one that establishes a benefit of the plan). Instead, the inclusion of a forum-selection clause constitutes a non-material change. ERISA requires plan participants to be informed of non-material changes within 210 days of the end of the plan year in which the change was added. *See* 29 U.S.C. § 1024(b)(1)(B). Thus, Plaintiff must have been notified of the addition of the forum-selection clause within the 210-day notice requirement.

Here, the Plan was amended to include the forum-selection clause on January 1, 2016. (*See* Plan at B-10). As the plan year ended on December 31, 2016, (*see id.*), to

receive proper notice under ERISA, Plaintiff must have been notified of the amendment within the first 210 days of 2017. *See* 29 U.S.C. § 1024(b)(1)(B). It is uncontested that a copy of the Plan was provided to Plaintiff to reflect this amendment in March of 2017. Because March 2017 falls within the 210-day notice requirement, the statutory notice requirement was satisfied. *See Nationwide Mut. Ins. Co. v. Teamsters Health and Welfare Fund of Philadelphia and Vicinity*, 695 F.Supp. 181, 185 (E.D. Pa. 1998) (finding that because an insurance plan participant governed by ERISA was notified of a plan amendment within the 210-day requirement of § 1024(b)(1)(B), the notice requirement was satisfied); *Nationwide Mut. Ins. Co. v. Teamsters Health & Welfare Fund*, 695 F. Supp. 181, 185 (E.D. Pa. 1998) (noting that notice of an ERISA plan amendment was sufficient because it was within the 210-day requirement of § 1024(b)(1)(B)). Accordingly, Plaintiff's lack of notice argument is without merit.

In sum, after considering Plaintiff's arguments, this Court finds the Plan's forum-selection clause is not incompatible with the venue provision of ERISA and that Plaintiff received adequate notice of the amendment including the clause. Therefore, the clause is valid and enforceable. In light of this finding, this Court will next consider whether the public factors identified in *Jumara* disfavor a transfer.

PUBLIC FACTORS

As noted, when a forum-selection clause exists, the court "must deem the private-interest factors to weigh

entirely in favor of the preselected forum" and consider the public-interest factors only. *Atl. Marine*, 571 U.S. at 64. The party opposing the enforcement of a forum-selection clause "bear[s] the burden of showing that public-interest factors overwhelmingly disfavor a transfer." *Id.* at 66. The Third Circuit has considered public-interest factors including:

> [T]he enforceability of the judgment; practical considerations that could make the trial easy, expeditious, or inexpensive; the relative administrative difficulty in the two fora resulting from court congestion; the local interest in deciding local controversies at home; the public policies of the fora; and the familiarity of the trial judge with the applicable state law in diversity cases.

Jumara v. State Farm Ins. Co., 55 F.3d 873, 879-80 (3d Cir. 1995).

Because this action involves an ERISA claim arising under, federal law, most of the public factors are irrelevant or invalid. *See Carnegie Mellon Univ. v. Marvell Tech. Group Ltd.*, 2009 U.S. Dist. LEXIS 85976, 2009 WL 3055300, at *5 (W.D. Pa. Sept. 21, 2009) (noting that "enforceability of the judgment, public policies of the fora, and familiarity of the trial judge with the applicable state law need not be considered since the conflicts between the parties arise under federal law."); *see also Irwin v. CSX Transp., Inc.*, 2010 U.S. Dist. LEXIS 27181, 2010 WL 1071428, at *5 (E.D. Pa. Mar. 22, 2010) (noting that

"the enforceability of the judgment and the choice of law factors are largely irrelevant in this matter because a federal statute is at issue and because the judgment would be enforceable in either district."). Plaintiff has not argued that there are any practical considerations that could make trial easier, expeditious or inexpensive, nor has Plaintiff made any arguments related to local interests in deciding local controversies at home. Similarly, Plaintiff has not offered any arguments related to administrative difficulties in the fora from court congestion. As Plaintiff has the burden of showing that such factors overwhelmingly weigh against transfer, Plaintiff has not done so and, therefore, these factors are either neutral or weigh in favor of the transfer. *See Keller v. McGraw-Hill Global Educ. Holding, LLC*, 2016 U.S. Dist. LEXIS 98548, 2016 WL 4035613, at *7 (E.D. Pa. July 28, 2016) (reasoning that because the plaintiff did not provide any arguments that the public-interest factors weighed against transfer, the court rendered the relevant factors as neutral).

Overall, Plaintiff has not met his burden of showing that such public-interest factors overwhelmingly weigh against transfer. Consequently, transfer to the Southern District of New York is appropriate. Defendants' motion to transfer is granted.[10]

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10. Plaintiff filed a motion requesting oral argument and/or a hearing. [ECF 19]. Local Rule of Civil Procedure for the Eastern District of Pennsylvania 7.1(f) provides that "[t]he court may dispose of a motion without oral argument." L.R. 7.1(f). The Court has discretion regarding whether to grant or deny a motion for oral argument. *See 7 Eleven Inc v. Sodhi*, 706 F. App'x 777, 779 (3d Cir. 2017) (noting that the "District Court has discretion to determine

Appendix C

CONCLUSION

For the reasons set forth herein, Defendants' motion to dismiss pursuant to Rule 12(b)(3) is denied, and Defendants' motion to transfer the case to the United States District Court for the Southern District of New York is granted. An Order consistent with this Memorandum Opinion follows.

NITZA I. QUIÑONES ALEJANDRO, J.

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whether to hold oral argument on a motion."). As the arguments Plaintiff sought to address by way of oral argument have been considered herein, the request for oral argument is denied. In light of this ruling, Defendants' motion to strike Plaintiff's request for oral argument and/or a hearing is denied, as moot. [ECF 20].

APPENDIX D — THE DISTRICT COURT'S ORDER (JULY 27, 2018)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 18-0246

JEFFREY A ROBERTSON,

Plaintiff,

v.

PFIZER RETIREMENT COMMITTEE, *et al.*,

Defendants.

July 27, 2018, Decided
July 27, 2018, Filed

ORDER

AND NOW, this 27th day of July 2018, upon consideration of Defendants PRC Retirement Committee and Defendant Fidelity Workplace Services d/b/a Fidelity Employer Workplace Services Company, LLC's ("Defendants") *motion to dismiss for improper venue or, alternatively, transfer*, [ECF 11], Plaintiff's opposition thereto, [ECF 15], and Defendants' reply, [ECF 18], it is hereby **ORDERED**, for the reasons set forth in the accompanying Memorandum Opinion filed on this day,

that Defendants' motion to transfer is **GRANTED**. The Clerk of Court is directed to **TRANSFER** this matter to the United States District Court for the Southern District of New York pursuant to 28 U.S.C. § 1404(a), and to mark this matter **CLOSED**.

It is further **ORDERED** that Plaintiff's *motion for oral argument and/or hearing*, [ECF 19], is **DENIED**. Defendants' *motion to strike Plaintiff's motion for oral argument and/or hearing*, [ECF 20], is **DENIED**, as moot.

BY THE COURT:

/s/ Nitza I. Quiñones Alejandro
NITZA I. QUIÑONES ALEJANDRO
Judge, United States District Court