No. 20-55222

In The United States Court of Appeals For The Ninth Circuit

STEPHEN H. BRADFORD AND EVELYN L. WILSON, ON THEIR OWN BEHALVES AND ON BEHALF OF A CLASS OF SIMILARLY SITUATED PARTICIPANTS AND BENEFICIARIES, AND LAURA BAFFORD,

Plaintiffs-Appellants,

v.

NORTHROP GRUMMAN CORPORATION, ADMINISTRATIVE COMMITTEE OF THE NORTHROP GRUMMAN PENSION PLAN, AND ALIGHT SOLUTIONS LLC,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of California

BRIEF OF *AMICUS CURIAE* AMERICAN BENEFITS COUNCIL IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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RULE 26.1 DISCLOSURE

The American Benefits Council has no parent corporation. No publicly held company has any ownership interest in the American Benefits Council.

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INTEREST OF THE *AMICUS CURIAE*[1]

The American Benefits Council ("Council") is dedicated to protecting employer-sponsored benefit plans. The Council represents more major employers—over 220 of the world's largest corporations—than any other association that exclusively advocates on the full range of employee benefit issues. Members also include organizations supporting employers of all sizes. Collectively, Council members directly sponsor or support health and retirement plans covering virtually all Americans participating in employer-sponsored programs.

The Council frequently participates as *amicus curiae* before this Court in cases with potential to significantly affect the administration and sustainability of employee benefit plans under ERISA.[2] This is such a case. Affirmance is necessary to ensure that mere clerical mistakes in overestimating pension benefits do not impose massive—and unpredictable—costs on sponsors of defined benefit plans. Affirmance also will maintain ERISA's careful balance between providing plan sponsors with a predictable set of liabilities, while still protecting the benefits that participants have earned under their plans' terms.

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No party, no counsel for a party, and no person other than the Council, its members, and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] *See, e.g.*, *White v. Chevron Corp.*, 752 F. App'x 453 (9th Cir. 2018); *Santomenno v. Transamerica Life Ins. Co.*, 883 F.3d 833 (9th Cir. 2018).

SUMMARY OF ARGUMENT

Plaintiffs received thousands of dollars in extra pension benefits that they had not earned due to an alleged calculation mistake by Alight Solutions LLC ("Alight"), a third-party service provider to the Northrop Grumman Pension Plan (the "Plan). The district court correctly held that nothing in ERISA secures Plaintiffs' right to continue to receive that windfall. The Council highlights two aspects of the district court's sound decision that are of particular importance to its members.

First, the district court correctly applied the consensus rule that more than a mere clerical error in the preparation of benefit statements or calculations is required to sustain an ERISA breach of fiduciary duty claim. That rule maintains ERISA's careful balance between the interests of plan participants and sponsors. On one hand, it does nothing to impede ERISA's goal of protecting the benefits that participants have earned; here, it is undisputed that Plaintiffs received every dollar of the benefits they had earned. On the other hand, limiting fiduciary liability for clerical miscalculations preserves ERISA's protections for sponsors of defined benefit plans. Those sponsors must rely on plan terms to make funding and actuarial decisions for the plan. Transforming a clerical error into a substantial windfall of benefits *not* provided by the plan could have severe consequences for employers who sponsor plans, as well as the employees who participate in them.

Second, even if Alight's alleged calculation error could sustain an ERISA breach of fiduciary duty claim, the district court correctly rejected Plaintiffs' attempts to impose liability on Northrop Grumman and its Administrative Committee. ERISA permits fiduciaries to delegate plan-related functions to third-party service providers like Alight, and ERISA does not impute liability on fiduciaries for every alleged error committed by those service providers absent some independent wrongdoing. Here, Plaintiffs have no plausible allegation that the Plan's fiduciaries knew or should have known that two participants—in a plan of over 110,000 participants—received some incorrect benefit calculations from Alight. Imposing liability on the Plan's fiduciaries in these circumstances would amount to strict liability. Such a standard would gut the purpose of delegating plan-related functions in the first place, making the administration of defined benefit plans more difficult and costly, to the detriment of plan participants and sponsors alike.

For all these reasons, this Court should affirm the district court's decision, dismissing Plaintiffs' complaint.

ARGUMENT

I. ERISA's Assurance of Predictable Liabilities and Costs Is Critically Important for Defined Benefit Retirement Plans.

In enacting ERISA, Congress sought "to ensure that employees would receive the benefits they had earned," while also recognizing that employers were not required to offer "benefit plans in the first place." *Conkright v. Frommert*, 559 U.S. 506, 516 (2010). ERISA thus reflects "a careful balancing between" protecting participants' rights under retirement plans and encouraging employers to create those plans. *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 424 (2014) (quotation omitted). As part of this "careful balancing," ERISA "induces employers to offer benefits by assuring a predictable set of liabilities." *Conkright*, 559 U.S. at 517 (quoting *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002)). ERISA is designed to cut down on unpredictable "administrative costs [and] litigation expenses" that could "discourage employers from offering [ERISA] plans." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996).

ERISA provides predictability and limits costs through its requirement that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). That requirement allows plan participants and sponsors alike to "determine exactly what [their] rights and obligations are under the plan." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995)

(quoting H.R. Rep. No. 93-1280, at 297 (1974)). For sponsors, the plan's written terms are essential for forecasting and planning for their future liabilities under the plan. *See Gabriel v. Alaska Elec. Pension Fund*, 773 F.3d 945, 956 (9th Cir. 2014).

ERISA also provides predictability and limits costs by authorizing plan fiduciaries to delegate plan responsibilities to others—often third-party experts—with the assurance that the delegating fiduciary "shall not be liable for an act or omission of [the delegee] in carrying out such responsibility," absent some separate wrongdoing by the fiduciary. 29 U.S.C. § 1105(c)(1)-(2); *see also* 29 C.F.R. § 2509.75-8 at FR-11. That delegation generates important efficiencies and cost savings. As the Department of Labor's Advisory Council has observed: "Through outsourcing, plan sponsors can gain access to expertise and technology, achieve economies of scale, and reduce costs. Outsourcing also permits a plan sponsor to focus on its core business rather than managing its employee benefit plans."[3]

ERISA's assurances of predictability are critical for defined benefit plans like the Northrop Grumman Plan. Among other things, defined benefit plans often require multifaceted benefit and funding

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[3] U.S. Dep't of Labor Advisory Council on Employee Welfare and Pension Benefit Plans, *Outsourcing Employee Benefit Plan Services* (Nov. 2014), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2014-outsourcing-employee-benefit-plan-services.pdf [hereinafter DOL Advisory Council Report].

calculations.[4] *See Conkright*, 559 U.S. at 509; *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999). These calculations are part of the reason that sponsors of defined benefit plans inevitably hire third-party service providers, like actuaries, to assist with plan administration.

When Congress enacted ERISA in 1975, "the defined benefit plan was the norm of American pension practice," but their predominance has faded due to increased costs and risks. *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 255 (2008) (quotation omitted). In 2017, there were only 46,477 defined benefit plans, less than half the number when ERISA was enacted. *See* U.S. Dep't of Labor, *Private Pension Plan Bulletin Historical Tables and Graphs, 1975-2017* (Sept. 2017), at tbl. E1. The decline is attributable primarily to the increasing and unpredictable costs associated with the administration of pension plans. *See* Emp. Benefit Research Inst., *Retirement Trends in the United States Over the Past Quarter-Century*, at 1 (2007), https://www.ebri.org/pdf/publications/facts/0607fact.pdf.[5] That decline is directly contrary to Congress's intent that ERISA not impose "administrative costs [and] litigation expenses,"

[4] Defined benefit plan sponsors must fund their plans to ensure benefits can be paid. ERISA's funding rules also require sponsor contributions to ensure the plan is actuarially sound. *See* 29 U.S.C. §§ 1081-1085a; *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1619-20 (2020).

[5] *See also* D. Rajnes, *An Evolving Pension System: Trends in Defined Benefit and Defined Contribution Plans*, Employee Benefit Research Institute Issue Brief No. 249 (Sept. 2002), https://www.ebri.org/content/an-evolving-pension-system-trends-in-defined-benefit-and-defined-contribution-plans-166.

that "unduly discourage employers from offering [ERISA] plans in the first place." *Varity*, 516 U.S. at 497.

II. A Mistake in Overestimating Pension Benefits Cannot by Itself Sustain an ERISA Breach of Fiduciary Duty Claim.

Plaintiffs have received every dollar—and several thousand more—in pension benefits to which they were entitled under the Plan. Yet they still seek hundreds of thousands of dollars more based on a mistaken overestimate of their benefits by Alight, the Plan's third-party service provider. The district court correctly held that such an error cannot sustain an ERISA breach of fiduciary duty claim. That decision is not only correct under settled law, it is also faithful to ERISA's statutory objectives. Transforming a clerical, calculation mistake into a substantial windfall of additional benefits would upend ERISA's careful balance between the interests of plan participants and sponsors. And it would potentially undermine the health of ERISA defined benefit plans like the Northrop Grumman Plan, harming other plan participants and beneficiaries.

A. A clerical mistake in overestimating pension benefits is not actionable under ERISA.

There is broad consensus among courts "that more than a mere clerical error in the preparation of benefit statements or the performance of benefit calculations is required to sustain a breach of fiduciary duty claim" under ERISA. *Keohane v. Keene*, 2006 U.S. Dist. LEXIS 26987, at *10-12 (N.D. Ga. May 8, 2006) (collecting cases). As "numerous courts

around the country have found," including the district court here, "simply providing estimates or projections of future pension benefits is not a fiduciary act." *Hawkes v. Wells Fargo & Co.*, 2018 U.S. Dist. LEXIS 240324, *10 (N.D. Cal. Jan. 30, 2018); *see* Pls.' Excerpts of Record ("ER") at 16.[6] Nor does ERISA impose liability for "a mere mistake" that results in "overpayments" of pension benefits. *Sundt v. Telcordia Techs., Inc.*, 2012 U.S. Dist. LEXIS 162646, at *9-13 (D.N.J. Nov. 9, 2012).[7] To hold otherwise would allow a participant to reap a "windfall" of "twice the amount of benefits that he was entitled to, as a result of a pension plan administrator's mistake in benefit calculations." *Id.* (quotation omitted).[8]

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[6] *See, e.g.*, *Lebahn v. Nat'l Farmers Union Uniform Pension Plan*, 828 F.3d 1180, 1183-87 (10th Cir. 2016); *Livick v. Gillette Co.*, 524 F.3d 24, 29-30 (1st Cir. 2008); *Stark v. Mars, Inc.*, 879 F. Supp. 2d 752, 773 (S.D. Ohio 2012), *aff'd*, 518 F. App'x 477 (6th Cir. 2013); *Harris v. Ventyx Inc.*, 2011 U.S. Dist. LEXIS 89985, at *14 n.5 (E.D. Cal. Aug. 12, 2011); *Christensen v. Qwest Pension Plan*, 376 F. Supp. 2d 934, 944 (D. Neb. 2005), *aff'd*, 462 F.3d 913 (8th Cir. 2006); *Fitch v. Chase Manhattan Bank, N.A.*, 64 F. Supp. 2d 212, 229 (W.D.N.Y. 1999); *accord* 29 C.F.R. § 2509.75-8 ("[c]alculation of benefits" and "preparation of employee communications material" are not fiduciary acts).

[7] *See, e.g.*, *Stark v. Mars, Inc.*, 518 F. App'x 477, 483-84 (6th Cir. 2013); *Brosted v. Unum Life Ins. Co. of Am.*, 421 F.3d 459, 466 (7th Cir. 2005); *Christensen v. Qwest Pension Plan*, 462 F.3d 913, 917-18 (8th Cir. 2006); *Hart v. Equitable Life Assurance Soc'y*, 75 F. App'x 51, 53-54 (2d Cir. 2003); *Keohane*, 2006 U.S. Dist. LEXIS 26987, at *8-12; *Hofsas v. Montgomery Hosp. Med. Ctr.*, 2000 U.S. Dist. LEXIS 14602, at *7 (E.D. Pa. Oct. 5, 2000); *Gramm v. Bell Atl. Mgmt. Pension Plan*, 983 F. Supp. 585, 593 (D.N.J. 1997); *Kuehl v. Chrysler Pension Plan*, 895 F. Supp. 1147, 1155 (E.D. Wis. 1995).

[8] *See, e.g.*, *Sheward v. Bechtel Jacobs Co. LLC Pension Plan for Grandfathered Emples.*, 2010 U.S. Dist. LEXIS 19696, at *15-16 (E.D. Tenn. Mar. 4, 2010); *Szydlowski v. Pension Ben. Guar. Corp.*, 2006 U.S. Dist. LEXIS 87986, at *23-25 (E.D. Mo. Apr. 7, 2006).

That consensus is in accord with this Court's precedent. As this Court has noted, performing a "[c]alculation of benefits" and "prepar[ing] employee communications material" are not fiduciary acts. *CSA 401(K) Plan v. Pension Prof'ls, Inc.*, 195 F.3d 1135, 1138 & n.2 (9th Cir. 1999) (quoting 29 C.F.R. § 2509.75-8). This Court also has specifically refused to impose ERISA liability for "negligently inadequate communications," *Peralta v. Hispanic Bus., Inc.*, 419 F.3d 1064, 1076 (9th Cir. 2005),[9] and has cautioned that ERISA does not permit "windfall" recoveries beyond the terms of the plan, *Bance v. Alaska Carpenters Retirement Plan*, 829 F.2d 820, 825 (9th Cir. 1987). The district court's dismissal of Plaintiffs' breach of fiduciary duty claims was in keeping with that precedent.

B. ERISA's statutory objectives support precluding liability for clerical mistakes in estimating pension benefits.

This consensus that a mistaken benefit estimate cannot by itself sustain an ERISA breach of fiduciary duty claim is consistent with ERISA's statutory objectives.

When interpreting ERISA, courts should consider the legislative objectives animating ERISA. *See Conkright*, 559 U.S. at 516; *Varity*, 516 U.S. at 497. As discussed, ERISA strikes a careful balance between the

[9] In *Mathews v. Chevron Corp.*, this Court refused to adopt a theory of ERISA "liab[ility] for negligent misstatements." 362 F.3d 1172, 1083 (9th Cir. 2004); *see also Parsons v. Bd. of Trs. of the Nev. Resort Ass'n-I.A.T.S.E. Local 702 Ret. Plan*, 2013 U.S. Dist. LEXIS 134816, at *17 (D. Nev. Sep. 20, 2013) ("The Ninth Circuit [has] declined to extend [ERISA] liability for negligent misstatements.").

interests of plan participants and plan sponsors—simultaneously protecting participants' vested plan benefits while ensuring a predictable set of liabilities for sponsors and cutting down on the costs of plan administration. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993) ("ERISA . . . resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiff."). Here, the district court's decision maintains that careful balance and promotes a number of ERISA's important objectives.

First, the district court's decision is consistent with ERISA's goal of ensuring that participants receive their promised plan benefits. As the Supreme Court has explained, "Congress enacted ERISA to ensure that employees would receive the *benefits they had earned*." *Conkright*, 559 U.S. at 516 (emphasis added); *see also Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985) (ERISA's "purpose [is] to protect contractually defined benefits"). Here, Plaintiffs received every dollar of benefits they were entitled to under the Plan, in addition to thousands of dollars in additional benefits that the Plan has not recouped. *See* ER 355-56 (¶¶ 50-53). As such, the district court's decision does not undermine the participants' interests that ERISA was designed to promote. To the contrary, Plaintiffs' claims, if successful, would confer "an unintended . . . windfall" to participants, which "cannot be the result envisioned by Congress" under ERISA. *Bance*, 829 F.2d at 825; *see also Livick*, 524 F.3d

at 33 ("Nothing in ERISA secures [a plaintiff] a windfall when a ministerial [agent] makes a mistake in estimate" of benefits).

At the same time, the district court's decision preserves ERISA's protections for defined benefit plan sponsors like Northrop Grumman. ERISA is designed to limit unpredictable "administrative costs [and] litigation expenses." *Varity*, 516 U.S. at 497. Imposing fiduciary liability for clerical errors in calculating benefits would create *unpredictable* liability for plan fiduciaries and sponsors who cannot guarantee that such mistakes will never occur. *See Conkright*, 559 U.S. at 509 ("People make mistakes. Even administrators of ERISA plans."); *Frahm v. Equitable Life Assurance Soc'y of the United States*, 137 F.3d 955, 959 (7th Cir. 1998) ("Efforts to administer any . . . plan fall short of the ideal."). These concerns are particularly acute in the class-action context, where a class representative may seek additional benefits on behalf of dozens or potentially thousands of plaintiffs. In such suits, innocent clerical errors could result in massive class-wide liability.

A rule that creates an unpredictable risk of very large monetary judgments based on mistakes in over-calculating benefits will force employers to prepare as best they can for that possibility—potentially by scaling back their benefit offerings or voluntary contributions. That result would harm all plan participants and undermine ERISA's statutory objectives. *See Conkright*, 559 U.S. at 517 (ERISA "induces employers to offer benefits by assuring a predictable set of liabilities");

Dudenhoeffer, 573 U.S. at 424 (noting ERISA's aim to cut down on "economically burdensome lawsuits"); *Cummings v. Briggs & Stratton Ret. Plan*, 797 F.2d 383, 389 (7th Cir. 1986) (explaining how unpredictable liabilities "jeopardize[] the pension rights of others legitimately entitled to receive them.").

Indeed, this potential threat of unpredictable liabilities for clerical mistakes in over-calculating benefits could cause employers to think twice about continuing to offer employee benefit plans—let alone sponsor new ones. ERISA plans are voluntary. No employer is required to offer employees a retirement plan, and employers are generally free to terminate or modify unvested retirement benefits "for any reason at any time." *Lockheed Corp. v. Spink*, 517 U.S. 882, 890-91 (1996) (quotation omitted). Imposing fiduciary liability for clerical errors in over-calculating benefits may cause sponsors to not offer ERISA plans in the first instance or to terminate existing ones—in direct contravention of ERISA's goal of encouraging sponsors to offer plans. *See Cooper v. IBM Pers. Pension Plan*, 457 F.3d 636, 642 (7th Cir. 2006) (observing that the result of ERISA litigation was that the sponsor "eliminated the cash-balance option for new workers and confined them to pure defined-contribution [401(k)] plans").

In sum, the district court's decision properly maintains ERISA's careful balance of protecting participants' benefits while encouraging sponsors to offer those benefits. Nothing in ERISA secures Plaintiffs a

windfall due to a mistaken pension estimate, especially when they have no plausible allegation of any harm and only threadbare allegations of reliance. *See* Brief of Appellee Northrop Grumman at 57-61.

III. Dismissal of the Derivative Claims Was Also Correct and Consistent with ERISA's Statutory Objectives.

Plaintiffs acknowledge that Alight prepared the pension estimates, but they seek to impose liability on Northrop Grumman and its Administrative Committee under "agency" and "monitoring" theories of liability. The district court correctly dismissed those derivative breach of fiduciary duty claims. ERISA does not impute liability on plan fiduciaries for every alleged error committed by a plan's third-party service provider. Such a rule would defeat the purpose of delegating plan-related functions in the first place—which ERISA permits—and would make plan administration more difficult and costly, to the detriment of plan participants and sponsors alike.

A. Plan administrators are not automatically liable for every mistake by plan service providers.

Administering an ERISA pension plan is a time-consuming affair that "requires specific expertise that in many cases can only be provided by third parties." DOL Advisory Council Report at 5. Given that reality, ERISA authorizes plan fiduciaries to delegate plan-related responsibilities to others, including third-party service providers. *See* 29 U.S.C. § 1105(c)(1)-(2); 29 C.F.R. § 2509.75-8 at FR-11.

While a delegating fiduciary has a duty to monitor third party service providers, that duty is "limited." *In re Computer Scis. Corp. ERISA Litig.*, 635 F. Supp. 2d 1128, 1144 (C.D. Cal. 2009), *aff'd sub nom.*, 623 F.3d 870 (9th Cir. 2010).[10] "ERISA imposes no duty on plan fiduciaries to continuously audit operational affairs" of either fiduciaries or non-fiduciary service providers, *Pugh v. Tribune Co.*, 521 F.3d 686, 700 (7th Cir. 2008), nor does it impose an "obligation to review the decisions of [delegees] for every single purported error and take steps to correct those errors." *Hudson v. NFL Mgmt. Council*, 2019 U.S. Dist. LEXIS 152545, at *46 (S.D.N.Y. Sep. 5, 2019). Rather, ERISA allows a fiduciary to "rely on information, data, statistics or analyses furnished by persons performing ministerial functions for the plan, provided that he has exercised prudence in the selection and retention of such persons." 29 C.F.R. § 2509.75-8 at FR-11; *accord Hart*, 75 F. App'x at 53-54.

Given the limited nature of the duty to monitor, a plaintiff cannot state a breach of fiduciary duty claim against appointing fiduciaries merely by alleging that the plan's third-party service provider made a mistake in benefit calculations or communications. Courts have

[10] *See also, e.g.*, *Coyne & Delany Co. v. Selman*, 98 F.3d 1457, 1466 n.10 (4th Cir. 1996) ("courts have properly taken a restrictive view of the scope of this duty [to monitor] and its attendant potential for liability"); *In re Calpine Corp. ERISA Litig.*, 2005 U.S. Dist. LEXIS 9719, at *19-20 (N.D. Cal. Mar. 30, 2005) (similar).

repeatedly rejected such claims.[11] Rather, to state a viable claim, a plaintiff must plausibly allege that the appointing fiduciary had "some reason to suspect that [the delegee] may be imprudent—that is, there must be something akin to a 'red flag' of misconduct." *Pugh*, 521 F.3d at 700; *accord* 29 C.F.R. § 2509.75-8 at FR-11 (the fiduciary must have "reason to doubt the competence, integrity or responsibility of" the service provider); *Stark*, 518 F. App'x at 483-84 (rejecting fiduciary breach claim based on calculation error where the "Committee did not have reason to doubt [the delegee's] competence").

Here, the district court correctly concluded that Plaintiffs failed to plausibly allege that the Administrative Committee had any reason to know of Alight's mistaken calculations. ER 13-14. Plaintiffs allege that Alight made errors in benefit calculations for two participants in a plan of over 110,000 participants over a four-year period (ER 537-38 (¶¶ 60, 63)), but there is no plausible allegation that the Committee knew or even should have known of those errors.[12] Those scant allegations do not state a plausible breach of fiduciary duty claim. The district court's decision was in keeping with the Supreme Court's instruction that district courts should rigorously apply pleading standards in ERISA cases—"divid[ing]

[11] *See, e.g.*, *Stark*, 518 F. App'x at 483-84; *Christensen*, 462 F.3d at 918; *Brosted*, 421 F.3d at 496; *Hart*, 75 Fed. App'x at 53-54; *Schmidt v. Sheet Metal Workers' Nat'l Pension Fund*, 128 F.3d 541, 547-48 (7th Cir. 1997).

[12] Plaintiffs have offered no allegation to support their conclusory claim that Alight's miscalculations were "systemic." *See* Brief of Appellee Northrop Grumman at 31-34.

the plausible sheep from the meritless goats"—to ensure that plan fiduciaries are not plagued by "meritless, economically burdensome lawsuits." *Dudenhoeffer*, 573 U.S. at 424-25. Allowing such implausible claims to go forward would frustrate ERISA's objective of reducing "litigation costs" that could "discourage employers from offering [ERISA] plans." *Varity Corp.*, 516 U.S. at 497.

B. Plaintiffs' "agency" theory of liability is contrary to the text and objectives of ERISA.

Plaintiffs cannot end run around ERISA's rules by claiming that their Plan's Administrative Committee is liable for Alight's error merely because Alight acted as the Committee's "agent." Appellants' Brief at 20-21. Such an "agency" theory of liability, which would amount to a strict liability standard, conflicts with ERISA's text and objectives, as well as this Court's precedent. *See Skinner v. Northrop Grumman Ret. Plan B*, 673 F.3d 1162, 1167 (9th Cir. 2012) (rejecting theory that ERISA fiduciaries are "strictly liable for every mistake").

First, Plaintiffs' agency theory of liability is squarely at odds with ERISA, which permits delegation and limits the scope of liability of delegating fiduciaries. *See* 29 U.S.C. § 1105(c); 29 C.F.R. § 2509.75-8 at FR-11; *Ariz. State Carpenters Pension Tr. Fund v. Citibank*, 125 F.3d 715, 719 (9th Cir. 1997) ("the named fiduciary is not liable for an act or omission of [a delegee] in carrying out such [delegated] responsibility").

Second, Plaintiffs' agency theory of liability conflicts with this Court's precedent recognizing that ERISA generally only "imposes liability" on a fiduciary where he "himself exercises the fiduciary responsibility allegedly breached." *Gelardi v. Pertec Comput. Corp.*, 761 F.2d 1323, 1325 (9th Cir. 1985), *overruled on other grounds*, 642 F.3d 1202 (9th Cir. 2011). "[T]he Ninth Circuit has plainly signaled that common law theories, such as respondeat superior, are not to be imported into ERISA actions so as to expand the bases for liability that the statute provides." *Monper v. Boeing Co.*, 104 F. Supp. 3d 1170, 1181 (W.D. Wash. 2015); *see Tool v. Nat'l Emple. Benefit Servs.*, 957 F. Supp. 1114, 1120-21 (N.D. Cal. 1996) (agreeing that "the doctrine of respondeat superior is not applicable in an ERISA breach of fiduciary duty claim"); *Carr v. Int'l Game Tech.*, 770 F. Supp. 2d 1080, 1090 (D. Nev. 2011) (same).

Third, Plaintiffs' agency theory of liability would gut the purpose of delegating plan-related functions in the first place, harming plan participants and sponsors. If a delegating fiduciary were liable for every error committed by its delegee, that fiduciary effectively would have to "review the decisions of the [delegee] for every single purported error and take steps to correct those errors." *Hudson*, 2019 U.S. Dist. LEXIS 152545, at *46. Such a standard of liability "would defeat the purpose of having [delegees] appointed to run a benefits plan in the first place." *Howell v. Motorola, Inc.*, 633 F.3d 552, 573 (7th Cir. 2011).

That result would make plan administration more difficult and costly, in direct contravention of ERISA's statutory objective to minimize "administrative costs" and "litigation expenses" faced by plan fiduciaries and sponsors. *Varity Corp.*, 516 U.S. at 497. As the Department of Labor's Advisory Council has explained, delegation "plays a key role in helping plan sponsors and other ERISA plan fiduciaries meet the increasingly complex task of managing and administering their employee benefit plans." DOL Advisory Council Report at 4.

For all these reasons, the district court correctly declined to impose liability on the Plan's Administrative Committee based on Plaintiffs' agency theory. To hold otherwise would undermine the important function that delegation plays in ERISA benefits plans and thereby harm plan participants and sponsors.

CONCLUSION

This Court should affirm the decision of the district court.

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CERTIFICATE OF COMPLIANCE

This brief complies with the requirements of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(5), and (a)(7) in that it is printed in 14-point, proportionally-spaced typeface utilizing Microsoft Word 2016, and it contains 4,213 words, including headings, footnotes, and quotations.

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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2020, I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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