No. 20-55222

IN THE

United States Court Of Appeals

FOR THE NINTH CIRCUIT

STEPHEN H. BAFFORD 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 (formerly known as Hewitt Associates LLC),

Defendants-Appellees.

On appeal from the United States District Court
Central District of California
2:18-10219
Honorable Otis D. Wright, II

BRIEF OF AMICI CURIAE PENSION RIGHTS CENTER AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

KELLER ROHRBACK L.L.P.
Jeffrey Lewis
300 Lakeside Drive, Suite 1000
Oakland, CA 94612
(510) 463-3900

PENSION RIGHTS CENTER
Norman Stein, Of Counsel
1730 M Street NW, Suite 1000
Washington, D.C. 20036
(205) 410-0989

Attorneys for Amici

PENSION RIGHTS CENTER'S CORPORATE DISCLOSURE STATEMENT

The Internal Revenue Service has determined that Pension Rights Center ("PRC") is organized and operated exclusively for charitable or educational purposes pursuant to section 501(c)(3) of the Internal Revenue Code and is exempt from income tax. PRC is also organized and operated as a non-profit corporation under the laws of the District of Columbia. PRC has no parent corporation, nor has it issued shares or securities.

NATIONAL EMPLOYMENT LAWYERS ASSOCIATION CORPORATE DISCLOSURE STATEMENT

The Internal Revenue Service has determined that the National Employment Lawyers Association ("NELA") is organized and operated exclusively for advancing employee rights and serving lawyers who advocate for equality and justice in the American workplace pursuant to section 501(c)(6) of the Internal Revenue Code and is exempt from income tax. NELA is also organized and operated as a not for profit corporation under the state laws of Ohio. NELA has no parent corporation, nor has it issued shares or securities.

TABLE OF CONTENTS

PENSION RIGHTS CENTER'S CORPORATE DISCLOSURE STATEMENT i

NATIONAL EMPLOYMENT LAWYERS ASSOCIATION CORPORATE DISCLOSURE STATEMENT i

STATEMENT OF INTEREST 1

ARGUMENT 3

I. The District Court Applied an Unfair and Unjustified Pleading Standard That Would Effectively Doom Claims Seeking to Enforce ERISA's Duty to Monitor Requirement, Which Is an Essential Part of the Statutory Scheme. 3

II. The District Court Erred in Holding at the Pleading Stage That Hewitt/Alight Was Not a Fiduciary and That the Administrative Committee Was Thereby Relieved of Fiduciary Responsibility. 11

A. Plaintiffs' Allegations. 12

B. The Court's Framing and Disposition of the Issues. 13

C. Plaintiffs Sufficiently Alleged That Hewitt Was a Fiduciary When It Developed Procedures and Interpretations Under Which It Performed Benefit Calculations. 14

D. Plaintiffs Sufficiently Alleged That the Administrative Committee Acted as a Fiduciary in Its Oversight of Hewitt/Alight's Benefit Calculations. 18

III. The District Court's Holding That Plaintiffs' State Law Claims Against Hewitt/Alight are Preempted, Even if Alight Was Not a Fiduciary, is Contrary to Ninth Circuit Law and Would Create a Huge Gap in the Protection of Plan Participants. 20

CONCLUSION 34

TABLE OF AUTHORITIES

Cases

Abraham v. Norcal Waste Sys., Inc.,
265 F.3d 811 (9th Cir. 2001) 26

Allen v. GreatBanc Tr. Co.,
835 F.3d 670 (7th Cir. 2016) 8

Arista Records, LLC v. Doe 3,
604 F.3d 110 (2d Cir. 2010) 8

Arizona State Carpenters Pension Trust Fund v. Citibank,
125 F.3d 715 (9th Cir. 1997) 28, 31

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 7

Batchelor v. Oak Hill Med. Grp.,
870 F.2d 1446 (9th Cir. 1989) 24

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) 7, 8

Bouvy v. Analog Devices, Inc.,
No. 19-cv-881 DMS (BLM), 2020 WL 3448385 (S.D. Cal. June 24, 2020) 9

Braden v. Wal-Mart Stores, Inc.,
588 F.3d 585 (8th Cir. 2009) ..... *passim*

Cal. Div. of Labor Standards Enf't v. Dillingham Constr., N.A., Inc.,
519 U.S. 316 (1997) 22, 23

Coyne & Delany Co. v. Selman,
98 F.3d 1457 (4th Cir. 1996) 23, 28

Erickson v. Pardus,
551 U.S. 89 (2007) 7

Fernandez v. Franklin Res., Inc.,
No. 17-cv-06409-CW, 2018 WL 1697089 (N.D. Cal. Apr. 6, 2018) 9

Garayalde–Rijos v. Municipality of Carolina,
747 F.3d 15 (1st Cir. 2014) 8

Gen. Am. Life Ins. Co. v. Castonguay,
984 F.2d 1518 (9th Cir. 1993) 26, 29

Gerosa v. Savasta & Co.,
329 F.3d 317 (2d Cir. 2003) 26

Geweke Ford v. St. Joseph's Omni Preferred Care, Inc.,
130 F. 3d 1355 (9th Cir. 1997) 28, 31

Gobeille v. Liberty Mut. Ins. Co.,
136 S. Ct. 936 (2016) 21

Golden Gate Restaurant Ass'n v. City & Cty. of S.F. (GGRA),
546 F.3d 639 (9th Cir. 2008) 22, 23, 24

Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.,
530 U.S. 238 (2000) 25

Innova Hosp. San Antonio, Ltd. P'ship v. Blue Cross & Blue Shield of Ga., Inc.,
892 F.3d 719 (5th Cir. 2018) 8

Lebahn v. Nat'l Farmers Union Uniform Pension Plan,
828 F.3d 1180 (10th Cir. 2016) 18

Livick v. Gillette Co.,
524 F.3d 24 (1st Cir. 2008) 17

Mackey v. Lanier Collection Agency & Serv., Inc.,
486 U.S. 825 (1988) 25

Marshall v. Northrop Grumman Corp.,
No. CV 16-06794-AB, 2017 WL 2930839 (C.D. Cal. Jan. 30, 2017) 4

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.,
514 U.S. 645 (1995) ..... *passim*

Painters Dist. of Phila. Council No. 21 Welfare Fund v. Price Waterhouse,
879 F.2d 1146 (3d Cir. 1989) 28

Paulsen v. CNF, Inc.,
559 F.3d 1061 (9th Cir. 2009) ..... *passim*

Providence Health Plan v. McDowell,
385 F.3d 1168 (9th Cir. 2004) 26

Shaw v. Delta Air Lines, Inc.,
463 U.S. 85 (1983) 24

Simon Levi Co. v. Dun & Bradstreet Pension Servs., Inc.,
55 Cal. App. 4th 496 (Cal. Ct. App. 1997) 28

Solis v. Webb,
931 F. Supp. 2d 936 (N.D. Cal. 2012) 3

PBGC ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.,
712 F.3d 705 (2d Cir. 2013) 8

Terraza v. Safeway Inc.,
241 F. Supp. 3d 1057 (N.D. Cal. 2017) 9

Tibble v. Edison Int'l,
135 S. Ct. 1823 (2015) 4

Varity Corp. v. Howe,
116 S. Ct. 1065 (1996) 12

Statutes

29 U.S.C. § 1242 27

Cal. Civ. Code § 1714(a) 23

ERISA § 2, 29 U.S.C. § 1001 24

ERISA § 3(1), 29 U.S.C. § 1002(1) 20, 32

ERISA § 3(14), 29 U.S.C. § 1002(14) 24

ERISA § 3(16), 29 U.S.C. § 1002(16) 29

ERISA § 3(21), 29 U.S.C. § 1002(21) 14

ERISA § 105, 29 U.S.C. § 1025 ..... 15, 19, 29

ERISA § 406(a), 29 U.S.C. § 1106(a) 24

ERISA § 514(a), 29 U.S.C. § 1144(a) 21, 22, 23

Rules

Fed. R. App. P. 29(a) 2

Fed. R. Civ. P. 8 ..... 6, 7, 20

Fed. R. Civ. P. 11 ..... 10, 11

Regulations

20 C.F.R. § 901.20 (2011) 27

29 C.F.R. § 2509.75-8 (1975) ..... *passim*

Other Authorities

Ivelisse Berio LeBeau et al., *Employee Benefits Law*, Bloomberg BNA (4th ed. 2017) 25

STATEMENT OF INTEREST

The Pension Rights Center ("PRC") is a Washington, D.C. nonprofit consumer organization that has been working for four decades to protect and promote the retirement security of American workers, retirees, and their families. PRC provides legal and strategic advice on retirement income issues, and helps individuals communicate their concerns about these issues to policymakers, the public, and the courts.

The National Employment Lawyers Association ("NELA"), founded in 1985, is the largest bar association in the country focused on empowering workers' rights plaintiffs' attorneys. NELA and its sixty-nine circuit, state and local affiliates have a membership of over 4,000 attorneys who are committed to protecting the rights of workers in labor, employment, wage and hour, and civil rights disputes.

The issues in this case have a direct impact on the tens of thousands of participants in ERISA retirement plans that fail to comply with disclosure and other substantive ERISA provisions and has a potential indirect effect on all ERISA plans to the extent the issues suggest artificial ways for plan fiduciaries, administrators and third

party administrators to insulate themselves against liability for errors and wrongdoing.

Amici have been concerned about an alarming trend of benefit calculation errors in defined benefit plans, such as the ones sponsored by Northrop Grumman. Participants depend on these calculations to make decisions concerning when they (and sometimes when their spouse) should retire and how much to save outside the defined benefit plan so that they can maintain their standard of living in retirement. These are not trivial concerns, as illustrated by this case, where one of the retirees faced a demand to repay over $32,000 at the same time that her monthly benefits were reduced by more than fifty percent.

All parties have consented to the filing of this amicus brief. Fed. R. App. P. 29(a)(2).

STATEMENT OF AUTHORSHIP AND FINANCIAL SUPPORT

No counsel for a party authored this brief in whole or in part, and no person (other than amici curiae or their counsel) made a monetary contribution intended to fund the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E)(i-iii).

ARGUMENT

I. The District Court Applied an Unfair and Unjustified Pleading Standard That Would Effectively Doom Claims Seeking to Enforce ERISA's Duty to Monitor Requirement, Which Is an Essential Part of the Statutory Scheme.

Under the express terms of the Northrop Grumman Pension Plan (the "Plan"), the Administrative Committee of the Northrop Grumman Pension Plan (the "Committee") is the Plan Administrator. Excerpts of Record ("ER") 336-37 (First Am. Compl. ("Complaint" or "FAC") ¶ 9). The Committee is appointed by and must be monitored by Northrop Grumman Corp. ("Northrop"). ER 336 (FAC ¶ 8) (Northrop "has the authority to appoint the Northrop Plan's Plan Administrator and exercises discretion in selecting and monitoring the Plan Administrator and/or other fiduciaries."); Pls.' Mem. Opp'n Mtn. Dismiss at 9, Dist. Ct. Dkt. # 49 (citing the applicable Plan language). "Implicit within the duty to select and retain fiduciaries is a duty to *monitor* their performance." *Solis v. Webb*, 931 F. Supp. 2d 936, 953 (N.D. Cal. 2012); 29 C.F.R. § 2509.75-8 at FR-17 (Department of Labor Interpretive Bulletin issued in 1975: "At reasonable intervals the performance of trustees and other fiduciaries should be reviewed by the appointing fiduciary in such manner as may be reasonably expected to ensure that

their performance has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan. No single procedure will be appropriate in all cases; the procedure adopted may vary in accordance with the nature of the plan and other facts and circumstances relevant to the choice of the procedure."). The Supreme Court has held that the duty to monitor is part of ERISA's fiduciary duty standard. *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1828-29 (2015) (addressing monitoring plan investments).

The district court dismissed the duty to monitor claim against Northrop because the Plaintiffs' allegations were not as robust as those discussed in an unpublished decision in an unrelated case against Northrop. ER 10 (Order Granting Mot. Dismiss ("Order") at 7) (citing *Marshall v. Northrop Grumman Corp.*, No. CV 16-06794-AB (JCx), 2017 WL 2930839, at *11 (C.D. Cal. Jan. 30, 2017)). This was reversible error. The question is not whether the allegations in this case are the same as, more, or less detailed than those in *Marshall*. The question is whether the allegations here are plausible, "[t]aken as true, and considered as a whole[.]" *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 596 (8th Cir. 2009). As the court stated in *Braden*, "it is sufficient for a

plaintiff to plead facts indirectly showing unlawful behavior, so long as the facts pled "'give the defendant fair notice of what the claim is and the grounds upon which it rests,'" … and 'allow [ ] the court to draw the reasonable inference' that the plaintiff is entitled to relief. 588 F.3d at 595 (alteration in original) (citations omitted).

Specifically, the district court faulted Plaintiffs for failing to allege, *inter alia*, that Northrop had a particular process in place for monitoring the Committee, failed to follow that process, failed to ensure that the Committee had an adequate process in place for monitoring Hewitt Associates LLC ("Hewitt")/Alight Solution LLC's ("Alight") fees (which are irrelevant to the present action), or failed to remove the Committee members whose performance was inadequate. ER 10 (Order at 7).

That is the wrong standard. Instead, the court should have asked whether Plaintiffs allege facts from which one can reasonably infer that Northrop's monitoring process—if any such process existed—was flawed in design and/or application and therefore violated Northrop's fiduciary duty.

Plaintiffs do allege such facts. They allege repeated errors in calculating the benefits of numerous plan participants over a time span of at least six years (2010 to 2016), ER 341 (FAC ¶ 34); the errors were manifested in numerous pension benefit statements provided to participants (including at least twelve statements for Mr. Bafford and two statements for Ms. Wilson, ER 342-43 (FAC ¶¶ 37, 39-40), pension election paperwork provided to participants, ER 343-44 (FAC ¶¶ 43-44), and pension checks provided to participants, ER 343-44 (FAC ¶¶ 41-42, 46). These systemic errors were not uncovered until an audit was performed in 2016: the kind of basic monitoring the fiduciaries should have been performing all along. ER 344 (FAC ¶¶ 47-48). These allegations support a reasonable inference that the systemic errors could not have slipped below the radar of adequate monitoring. The fact that the errors were easily caught the first time anyone actually paid attention (the 2016 audit) demonstrates that earlier, competent monitoring would have avoided the catastrophic injuries of which Plaintiffs complain.

This is enough to satisfy Fed. R. Civ. P. 8(a)(2) using the appropriate standard articulated in *Braden*. Even when the alleged

facts do not "directly address[ ] the process by which the [p]lan was managed," a claim alleging a breach of fiduciary duty may still survive a motion to dismiss if the court, based on circumstantial factual allegations, may reasonably "infer from what is alleged that the process was flawed." *Braden*, 588 F.3d at 596. Indeed, "ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail unless and until discovery commences." *Id*. at 598. *See also Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam) (Fed. R. Civ. P. 8(a)(2) does not require a plaintiff to plead "[s]pecific facts" explaining precisely how the defendant's conduct is unlawful).

Amici urge the Court to follow the Eighth Circuit in *Braden*, which carefully weighed the pleading burden imposed by Rule 8, *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and their progeny when alleging failures of an internal monitoring process that is completely opaque from the outside. As the Eighth Circuit cogently observed:

> No matter how clever or diligent, ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail unless and until discovery commences. Thus, while a plaintiff must offer sufficient factual allegations to show that he or she is not merely engaged in a fishing expedition or strike suit, we must also take account of their

> limited access to crucial information. If plaintiffs cannot state a claim without pleading facts which tend systemically to be in the sole possession of defendants, the remedial scheme of the statute will fail, and the crucial rights secured by ERISA will suffer. These considerations counsel careful and holistic evaluation of an ERISA complaint's factual allegations before concluding that they do not support a plausible inference that the plaintiff is entitled to relief.

Braden, 588 F.3d at 598. *See also id.* at 597 n.8 (The Secretary of Labor, charged with administering ERISA, "has expressed concern over the erection of unnecessarily high pleading standards in ERISA cases.") (citation omitted); *Innova Hosp. San Antonio, Ltd. P'ship v. Blue Cross & Blue Shield of Ga., Inc.*, 892 F.3d 719, 728 (5th Cir. 2018) (applying *Braden*'s pleading standard where plaintiffs lacked inside information necessary to make out their claims in detail); *Allen v. GreatBanc Tr. Co.*, 835 F.3d 670, 678 (7th Cir. 2016) (same); *Garayalde–Rijos v. Municipality of Carolina*, 747 F.3d 15, 25 (1st Cir. 2014) (same); *PBGC ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 718 (2d Cir. 2013) (same); *cf. Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010) ("The *Twombly* plausibility standard, which applies to all civil actions, … does not prevent a plaintiff from 'pleading facts alleged "upon information and belief" where the facts are peculiarly within the

possession and control of the defendant … or where the belief is based on factual information that makes the inference of culpability plausible[.]") (citations omitted).[1]

District courts in this Circuit, in contrast to the court in this case, regularly apply the *Braden* pleading standard. *E.g., Bouvy v. Analog Devices, Inc.*, No. 19-cv-881 DMS (BLM), 2020 WL 3448385, at *3 (S.D. Cal. June 24, 2020) ("To state a claim for breach of fiduciary duty, a complaint does not need to contain factual allegations that refer directly to the fiduciary's knowledge, methods, or investigations at the relevant times. … Even in the absence of such direct allegations, the court may be able to reasonably infer from the circumstantial factual allegations that the fiduciary's decision-making process was flawed.") (citing and quoting in part *Terraza v. Safeway Inc.*, 241 F. Supp. 3d 1057, 1070 (N.D. Cal. 2017)); *Fernandez v. Franklin Res., Inc.*, No. 17-

[1] The district court ignored *Braden*'s reasoning, instead attempting to distinguish *Braden* factually on the basis that in *Braden* "Plaintiffs claim involved retail-class mutual funds, and alleged that the retail-class mutual funds paid kickbacks to the plan's trustee." ER 10 (Order at 7). There is no logical reason the Court's purported distinction would make any difference to the pleading standard applied.

cv-06409-CW, 2018 WL 1697089, at *7 (N.D. Cal. Apr. 6, 2018) (sustaining duty to monitor claim because "[a] plaintiff is not required to plead specific facts about the fiduciary's internal processes because such information is typically in the exclusive possession of a defendant.").

Here, defendants are in sole and exclusive possession of information as to whether Northrop had any process in place for monitoring the Committee and/or Hewitt/Alight, what that process might have been, whether Northrop failed to follow that process, and what remedial action Northrop took, if any, to address inadequate performance by the Committee and/or Hewitt/Alight. Plaintiffs did not allege such direct evidence of failure to monitor because it is not possible, without discovery, to allege those secret facts. By requiring Plaintiffs to allege facts they could not reasonably know, the district court created a pleading standard that would effectively extinguish most if not all duty to monitor claims, thereby eviscerating ERISA's carefully balanced remedial scheme.

Moreover, requiring plaintiffs' counsel to allege unknown and unknowable facts will put them in jeopardy of violating Rule 11 because

counsel cannot know what fact (e.g., here, no monitoring system at all, an inadequate system, failure to follow an adequate system) "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. P. 11(b)(3). The better rule is articulated in *Braden*: "it is sufficient for a plaintiff to plead facts indirectly showing unlawful behavior, so long as the facts pled "'give the defendant fair notice of what the claim is and the grounds upon which it rests,'" … and 'allow [ ] the court to draw the reasonable inference' that the plaintiff is entitled to relief." *Braden*, 588 F.3d at 595 (alteration in original) (citations omitted). The district court's order to the contrary should be reversed.

II. The District Court Erred in Holding at the Pleading Stage That Hewitt/Alight Was Not a Fiduciary and That the Administrative Committee Was Thereby Relieved of Fiduciary Responsibility.

The district court opinion, in its structure and substance, distorts Plaintiffs' allegations and the counts in the operative Complaint. Thus, we believe it would be useful at the outset to summarize what plaintiffs have alleged and the somewhat different questions that the district court incorrectly answered.

A. Plaintiffs' Allegations.

As indicated above, Plaintiffs allege that the Committee is the Plan's named fiduciary under ERISA. *See also Varity Corp. v. Howe*, 116 S. Ct. 1065, 1071-73 (1996) (providing benefits information to participants is a fiduciary function). And when it provides information to participants, a fiduciary must comply with ERISA's fiduciary standards.

It is undisputed that the Committee caused the Plan to contract with Hewitt/Alight to perform the Plan's benefit calculations. ER 337-38 (FAC ¶¶ 11-13). Department of Labor regulations have long provided that performing such calculations "within a framework of policies, interpretations, rules, practices, made by other persons," 29 C.F.R. § 2509.75-8 at D-2, is a ministerial function and the fact that a person does the calculations under such a framework does not in itself result in fiduciary status.[2] But whether Hewitt/Alight was a fiduciary does not

[2] Thus, the question of whether Hewitt was acting as a fiduciary does not turn on whether they were performing benefit calculations but whether they were performing them within such a framework. The Plaintiffs alleged, as discussed below, that Hewitt was a fiduciary because it developed, or helped develop, the framework for performing calculations and thus performed a discretionary administrative function under ERISA. ER 350 (FAC ¶ 76).

bear on the question of whether the *Committee* was fiduciary. As the fiduciary that engaged Hewitt/Alight, regardless of Hewitt/Alight's fiduciary status, the Committee had the responsibility to monitor Hewitt/Alight's performance, to hire and monitor the performance of plan auditors, and to accurately and completely transmit all relevant Plan documents, interpretations and data to Hewitt/Alight. Moreover, if Hewitt/Alight was not a fiduciary, the Committee was also behaving in a fiduciary capacity when it developed (or failed to develop) "a framework of policies, interpretations, rules, practices," under which Hewitt/Alight operated when it calculated benefits. 29 C.F.R. § 2509.75-8 at D-2.

B. The Court's Framing and Disposition of the Issues.

It is unclear whether the district court even considered the question of whether the Committee had fiduciary responsibilities with respect to Hewitt/Alight's role in calculating benefits. Rather, the district court seemed to believe that the sole issue before it concerning the Committee was whether the Committee would have had "derivative" liability if the court held that Hewitt/Alight had been

acting as a fiduciary. The court then held that Hewitt/Alight was not a fiduciary and thus the Committee could have no derivative liability. The court based its holding that Hewitt was not a fiduciary on two circuit court opinions. As explained below, the district court read those opinions more broadly than their narrow holdings warrant. As a result, the court never reached the issue of whether the Committee had fiduciary responsibilities to monitor Hewitt/Alight, to provide complete and accurate Plan documents and rules, or to prudently create "a framework of policies, interpretations, rules, and practices and procedures" under which Hewitt/Alight performed its calculations. *Id.*

As discussed below, had the district court applied the correct analysis, rather than its flawed derivative liability approach, it should have held that Plaintiffs adequately alleged that the Committee was a fiduciary.

C. Plaintiffs Sufficiently Alleged That Hewitt Was a Fiduciary When It Developed Procedures and Interpretations Under Which It Performed Benefit Calculations.

Under ERISA, the definition of fiduciary includes a person who has discretionary authority or discretionary responsibility for the administration of [a] plan. ERISA § 3(21), 29 U.S.C. § 1002(21). Plan

administration at its heart is designed to result in the payment of accurately calculated benefits. And ERISA expressly includes as a plan administrative function the preparation of benefit statements to participants. ERISA § 105, 29 U.S.C. § 1025. One cannot plausibly argue that ERISA mandates calculation of benefits for plan payments and statutorily required disclosures but is indifferent to whether the statements are accurate or, as in this case, wildly inaccurate.

There are two administrative tasks involved in preparing benefit calculations. The first, by far the more important, is establishing the policies, procedures, interpretations, etc. that form the framework for preparing benefit calculations—this includes procedures to ensure that accurate data is transmitted for the benefit calculation, ensuring that the formulas used mirror the plan language, creating checks on accuracy of calculations, and monitoring the performance of any service providers and employees doing the actual calculation. The second task is the ministerial task of plugging numbers into the benefit formula.

The first task, establishing the framework in which benefit calculations are made, requires discretionary fiduciary judgment. There is no single right way to create a process that will result in the accurate

benefit calculations that ERISA requires; the responsible plan fiduciary must design and construct and operate and monitor a framework that ensures that errors in benefit calculations are rare, not systemic, and when errors occur, they are picked up and corrected quickly. The fiduciary must exercise its duties of prudence and loyalty in designing and operating this plan machinery. The Complaint alleges that Hewitt/Alight at the very least played a significant role in the development of the methods, interpretations, and procedures for preparing the calculations, and specifically identifies Hewitt/Alight's creation of "requirement documents." ER 350 (FAC ¶ 76) ("In particular, Hewitt prepared summaries of the Northrop Plan provisions—sometimes referred to as 'requirements documents.'").

At the core of this case is the allegation that the procedures developed by Hewitt/Alight resulted in a trail of errors over at least six years, errors that may have affected hundreds of participants. The errors did not occur because of a random keystroke mistake or because a Plan record incorrectly listed a participant's year of birth as 1967 rather than 1976. The errors occurred because of a faulty plan interpretation and methodology at the heart of the calculation process.

If, as alleged, Hewitt/Alight made that faulty interpretation or established, in whole or in part, that inadequate or incorrect methodology, then Hewitt/Alight acted as a fiduciary.

Again, Department of Labor regulations provide that benefit calculations are considered non-fiduciary ministerial functions only if they are made "within a framework of policies, interpretations, rules, practices, made by other persons," 29 C.F.R. § 2509.75-8 at D-2. By definition, the entities who devise the policies, practices, etc. are plan fiduciaries.

The two cases relied upon by the district court are not to the contrary. In each case, the court merely held that calculating benefits in accordance with a framework of policies and procedures made by other persons is not a discretionary activity. Neither case involved the issue of whether an individual or entity exercises discretion when it designs, develops, maintains, and monitors a framework for making calculations. *Livick v. Gillette Co.*, 524 F.3d 24, 29 (1st Cir. 2008) (a person who performs [benefit calculations] *within a framework of policies, interpretation, rules, practices and procedures made by other persons* is not a fiduciary," at 29) (emphasis added) (citation omitted);

Lebahn v. Nat'l Farmers Union Uniform Pension Plan, 828 F.3d 1180, 1184, 1185 (10th Cir. 2016) ("calculating and reporting pension benefits, *without more*, does not establish fiduciary status," and is not "*per se* discretionary") (emphasis added).

The Complaint alleged that Hewitt/Alight participated in the design and implementation of framework of policies, interpretations, rules, practices and procedures used in calculating the benefits of the Plaintiffs. These were fiduciary functions. The participants deserve their day in court to prove that the fiduciaries who designed these procedures and policies failed to satisfy their statutory duties of prudence and loyalty.[3]

D. Plaintiffs Sufficiently Alleged That the Administrative Committee Acted as a Fiduciary in Its Oversight of Hewitt/Alight's Benefit Calculations.

The Committee is the Plan's administrator and its named fiduciary. The Committee's core fiduciary functions include ensuring

[3] In a footnote, the district court seems to concede the possibility that Hewitt/Alight would have been a fiduciary if it had established its own policies and procedures, but then said the participants failed to meet their pleading obligations to identify any particular policy or procedure. For the reasons stated in Part I and this section, participants clearly satisfied the pleading standard in this regard.

that the Plan pay correct benefit amounts and to ensure compliance with Plan disclosure provisions, including ERISA § 105, 29 U.S.C. § 1025. The Committee may engage a party to act as fiduciary in its stead for some or all of the functions related to its various obligations and it may also engage a non-fiduciary to provide purely ministerial services under a framework of policies, procedures, etc., prepared by another person or entity acting as a fiduciary. *In neither case,* however, would the Committee shed its own fiduciary status, although an appointment of Hewitt/Alight, whether as fiduciary or ministerial actor, might have altered the nature of the Committee's obligations. For example, as the Plan's named fiduciary, the Committee has a duty to prudently select and monitor service providers, whether or not the service providers are themselves fiduciaries. Second, the Committee would be performing core fiduciary functions when it created or participated in the creation of the "framework" of policies, interpretations, procedures, etc., under which Hewitt/Alight prepared its calculations.

III. The District Court's Holding That Plaintiffs' State Law Claims Against Hewitt/Alight are Preempted, Even if Alight Was Not a Fiduciary, is Contrary to Ninth Circuit Law and Would Create a Huge Gap in the Protection of Plan Participants.

As discussed above, the Complaint alleges that Hewitt/Alight was a fiduciary. At the same time, Plaintiffs alleged in the alternative that if Hewitt/Alight was not a fiduciary, it would be liable under California law for professional negligence and/or negligent misrepresentation.[4] However, the district court held that these state law claims were preempted by ERISA even though Hewitt/Alight was not, in the court's opinion, a fiduciary. If the district court's view of ERISA's preemption provision were to be upheld, it would create a major regulatory hole that Congress did not intend to leave when it adopted that provision. Indeed, in recognition of that, most courts, including this Circuit, have found that state law claims against non-fiduciary service providers to plans are not preempted.

ERISA includes an express preemption provision. It states that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plans described in section

[4] *See* Fed. R. Civ. P. 8(d) (allowing pleading in the alternative).

1003(a) of [ERISA]." ERISA § 514(a), 29 U.S.C. § 1144(a). While the Supreme Court at one time held this provision to be broadly preemptive of state laws, it has subsequently narrowed the provision's scope.

In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995), the Supreme Court began to restrain the provision's preemptive force to re-focus the ERISA preemption inquiry on whether the state law at issue in fact undermines ERISA's regulatory regime. The Court stated that "[i]f 'relate to' were taken to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for '[r]eally, universally, relations stop nowhere.'" *Id.* at 655 (second alteration in original) (citation omitted). Moreover, because it had previously interpreted "relate to" as meaning either making a "reference to" or "having a connection with" an employee benefit plan,[5] the Court in *Travelers* went on to state that "[f]or the same reason that infinite relations cannot be the measure of pre-emption, neither can infinite

[5] S*ee, e.g., Paulsen v. CNF, Inc.*, 559 F.3d 1061, 1082 (9th Cir. 2009). This is still the standard. *See Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943 (2016).

connections." *Id.* at 656. Thus, an "uncritical literalism" in applying the "connection with" standard "offer[s] scant utility in determining Congress' intent as to the extent of [ERISA] § 514(a)'s reach." *Id.* *See also Cal. Div. of Labor Standards Enf't v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997).[6]

Travelers further stated that preemption analysis must begin with the presumption against preemption in areas of traditional state regulation. It stated that "where federal law is said to bar state action in fields of traditional state regulation, [the Supreme Court has] worked on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" 514 U.S. at 655. (citations omitted). Accordingly, the Court stated that to read "relate to" literally "would be to read Congress's words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality." *Id. See also Golden Gate Restaurant Ass'n v. City & Cty. of S.F. (GGRA)*, 546 F.3d 639, 647

[6] The district court here rejected defendants' "reference to" argument. Amici do not address that part of the preemption test in this brief.

(9th Cir. 2008).[7] *Travelers* concluded that "[w]e simply must go beyond the unhelpful text and the frustrating difficulty of defining [the ERISA preemption provision's] key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." 514 U.S. at 656.[8]

In keeping with this clear Supreme Court law, this Court has stated:

> "[T]o determine whether a state law has the forbidden connection, we look both to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive, as well as to the nature of the effect of the state law on ERISA plans." (quoting *Dillingham,* 519 U.S. at 325) (internal citations and quotation marks

---

[7] In California, negligence, which is the basis for both of Plaintiffs' state law claims, is embodied in a statute. *See* Cal. Civ. Code § 1714 (a) ("Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person[.]"). In other words, by enacting the standard, California has exercised its police powers and, therefore, the presumption against preemption applies in this case. *See also, e.g., Coyne & Delany Co. v. Selman,* 98 F.3d 1457, 1471 (4th Cir. 1996) (holding malpractice claim against attorney not preempted and stating that "[c]ommon law professional malpractice, along with other forms of tort liability, has historically been a state concern.").

[8] This Court has recognized that *Travelers* significantly narrowed the scope of ERISA's preemption provision. *See GGRA*, 546 F.3d at 654 ("We read *Travelers* as narrowing the Court's interpretation of the scope of [ERISA] § 514(a).")

> omitted); *see also GGRA,* 546 F.3d at 654 (employing a "'holistic analysis guided by congressional intent'" (citation omitted)). We have recognized that "'[t]he basic thrust of the pre-emption clause [is] to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans.'" (citation omitted).

Paulsen v. CNF, Inc., 559 F.3d 1061,1082 (9th Cir. 2009) (all but first alteration in original).

The objectives of ERISA were to protect employee benefit plan participants. *See* ERISA §§ 2(a), (b), 29 U.S.C. §§ 1001(a), (b). *See, e.g., Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983) (ERISA "is designed to promote the interests of employees and their beneficiaries in employee benefit plans"); *Batchelor v. Oak Hill Med. Grp.*, 870 F.2d 1446, 1449 (9th Cir. 1989) (in construing ERISA, courts must remember that it is "remedial legislation which should be liberally construed in favor of protecting participants in employee benefit plans"). Other than in very limited respects, ERISA does not regulate the conduct of non-fiduciaries who provide services to plans.[9] In fact,

[9] ERISA § 406(a), 29 U.S.C. § 1106(a), prohibits certain transactions between plans and non-fiduciary "part[ies] in interest", as that term is defined in the statute. *See* ERISA § 3(14), 29 U.S.C. § 1002(14). However, it does not directly regulate parties in interest. Rather, it prohibits fiduciaries from entering into such transactions. Non-fiduciaries who are parties to those transactions may be sued only in

even before *Travelers*, the Supreme Court held that ERISA plans may be sued under state law in certain types of cases—"for run-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan." *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 833 (1988). If ERISA plans may be sued for torts, it follows logically that they may also sue third parties for such torts and, where state law allows, participants in those plans may sue the third parties.

Consequently, most courts, including this one, have held that state law claims by plans and their participants against non-fiduciary service providers are not preempted.[10] And many of these decisions even pre-date the presumption against preemption set forth in *Travelers*. This Court's decisions are in line with that majority view.

---

limited circumstances for recovery of plan assets. *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 251 (2000) (equitable relief may be obtained against a non-fiduciary service provider if it had "actual or constructive knowledge of the circumstances that rendered the transaction unlawful").

[10] *See* Ivelisse Berio LeBeau et al., *Employee Benefits Law* 11-49, Bloomberg BNA (4th ed. 2017).

For instance, in *Paulsen*, this Court held that participants' state law claims for professional negligence against their plan's actuary were not preempted under the applicable "relationship test":

> We have employed a "relationship test" in analyzing "connection with" preemption, under which a state law claim is preempted when the claim bears on an ERISA-regulated relationship, *e.g.,* the relationship between plan and plan member, between plan and employer, between employer and employee. *Providence Health Plan v. McDowell,* 385 F.3d 1168, 1172 (9th Cir. 2004*); see also Gen. Am. Life Ins. Co. v. Castonguay,* 984 F.2d 1518, 1521 (9th Cir. 1993) …; *Abraham [v. Norcal Waste Sys., Inc.,* 265 F.3d 811], 820-21 [(9th Cir. 2001)] …; *accord Gerosa v. Savasta & Co.,* 329 F.3d 317, 324 (2d Cir. 2003).

559 F.3d at 1082-83.

Applying that test, *Paulsen* then found as follows:

> The duty giving rise to the negligence claim runs from a third-party actuary, *i.e.,* a non-fiduciary service provider, to the plan participants as intended third party beneficiaries of the actuary's service contract. The [e]mployees' claims against Towers Perrin do not interfere with relationships between the plans and a participant, between the plans and CNF or CFC [the plan sponsors], or between those companies and their employees. At most they might interfere with a relationship between the plan and its third-party service provider. … Here, ERISA does not regulate the relationship at issue and, therefore, there is no express preemption under the "connection with" prong. Moreover, there is no indication that the negligence would result in a multiplicity of regulation, Congress's chief concern in enacting the ERISA pre-emption statute.

Id. at 1083.[11]

Virtually the exact words of *Paulsen* apply here. Plaintiffs assert that the duty at issue in their negligence claims run from a non-fiduciary provider of administrative services to the Plan participants, who are third party beneficiaries of Hewitt/Alight's service contract with the Plan.[12] These negligence claims do not interfere with the relationship between the Plan and its participants. That relationship is not at issue in the negligence claims because those alternative claims assume for arguments' sake that Plaintiffs' ERISA claims were properly dismissed and that Hewitt/Alight was not a Plan fiduciary. Nor do Plaintiffs' state law claims interfere with their employment relationships with their former employers.

---

[11] This was the case even though ERISA does provide a process for "enrollment" of actuaries and certain regulations containing standards that apply to such persons. *See* 29 U.S.C. § 1242; 20 C.F.R. § 901.20. In contrast, ERISA provides no such process for enrollment of third party administrators such as Hewitt/Alight and, as discussed in the main text below, no regulations applicable to them.

[12] Amici do not address whether that allegation is supported by the facts or California law, but assume that the allegation is true for purposes of this appeal of a motion to dismiss.

This Circuit has found that state law claims were not preempted by ERISA in other cases against service providers to plans, including in one case a claim against a third party administrator. In that case, *Geweke Ford v. St. Joseph's Omni Preferred Care, Inc.*, 130 F. 3d 1355, 1358-60 (9th Cir. 1997), it held that state law claims for breach of contract brought by an employer against an entity that processed benefits for the medical plan sponsored by the employer were not preempted. In *Arizona State Carpenters Pension Trust Fund v. Citibank*, 125 F.3d 715, 722-24 (9th Cir. 1997), this Court held that a bank providing nondiscretionary custodial trustee services to a plan was not a fiduciary and, therefore, that state law claims for breach of contract, common law fiduciary obligations, bad faith, negligence, and fraud were not preempted. *See also, e.g.*, *Painters Dist. of Phila. Council No. 21 Welfare Fund v. Price Waterhouse*, 879 F.2d 1146, 1153 n.7 (3d Cir. 1989) (noting lack of evidence of congressional intent that professional malpractice claim against plan auditor is preempted) (dicta); *Coyne & Delany Co.,* 98 F.3d at 1470-71 (explaining that Congress did not intend to preempt professional malpractice claims against nonfiduciary service providers); *Simon Levi Co. v. Dun &*

Bradstreet Pension Servs., Inc., 55 Cal. App. 4th 496, 502-03 (Cal. Ct. App. 1997) (applying this Court's relationship test and holding that breach of contract and negligence claims against non-fiduciary contract administrator were not preempted).

In contrast, this Circuit held that ERISA preempted a state law that would impose additional liability *on plan fiduciaries*. *Gen. Am. Life Ins. Co. v. Castonguay,* 984 F.2d 1518 (9th Cir. 1993). Of course, regulation of fiduciary conduct and remedies for breaches of fiduciary duty are at the very heart of ERISA. In contrast, ERISA does not impose any standards on non-fiduciaries who provide claims and other administrative services to plans. Thus, while ERISA requires, e.g., that plans provide annual benefit statements to participants, *see* ERISA § 105, 29 U.S.C. § 1025, that duty is placed on the plan administrator, a fiduciary.[13]

[13] *See* ERISA § 3(16)(A), 29 U.S.C. § 1002(16)(A), providing that the plan administrator is the person (or entity) so designated in the plan document or, if none is designated, the plan sponsor. The plan administrator is a fiduciary. *See* 29 C.F.R. § 2509.75-8 at D-3. Hewitt/Alight does not claim to be the plan administrator; rather, it maintains that it is merely a provider of services. Of course, if a third-party administrator has or exercises discretion as to certain plan functions, it may be a fiduciary under the facts of a particular case.

The state laws at issue here would not interfere with the uniform administration of employee benefit plans because ERISA does not impose any duties at all on non-fiduciary claims processing service providers. Surely, wherever in the U.S. they may operate and no matter how many states they do business in, companies like Hewitt/Alight have a duty to carry out their duties in a non-negligent manner and to not make misrepresentations to plan participants. The continued imposition of such state law duties on these service providers will not result in subjecting *plans or their fiduciaries* to inconsistent standards. In fact, even if there were some differences in state negligence standards, those differences would not affect *plans or their fiduciaries* because neither the plans nor their fiduciaries would have liability imposed on them by such claims. If anything, all plans would benefit from imposition of duties of care on their nonfiduciary service providers despite any differences (in state laws imposing such duties.

In contrast with this type of analysis of the relationships at issue which the law of this Circuit requires, the district court applied a

---

See Section II.C. above (arguing that Hewitt/Alight was a fiduciary under the circumstances of this case.

simplistic "but for" test, holding that "but for the Plan, Plaintiffs' entitlement to a pension benefit consistent with its terms and Hewitt's role in calculating benefits under the Plan, Plaintiffs would have no claim against Hewitt." ER 16 (Order at 13). But if that were the test, *Paulsen*, *Geweke Ford*, and *Arizona State Carpenters* would not and could not have been decided as they were; *e.g.*, but for the existence of the plan in *Paulsen*, the actuary defendant in that case would not have made calculations of the amount of plan assets that were necessary to pay plaintiffs' benefits. In essence, the district court applied the type of analysis explicitly rejected in *Travelers*.

If participant claims seeking tort damages from nonfiduciary third party administrators of plans, *not plan benefits*, were to be preempted, this would imply that Congress, in enacting a law designed to protect the rights of participants, intended to leave a gaping hole in that protection. Third party administrators are in wide use by both pension and welfare benefit plans. The Society of Professional Benefits Administrators ("SPBA") estimates "that about 60% (and growing) of U.S. workers with non-federal health employee benefits are in health

plans using some degree of [t]hird [p]arty [a]dministration (TPA) firm.[14] Obviously, this group of plans includes ERISA-governed plans. *See* ERISA § 3(1), 29 U.S.C. § 1002(1) (defining employee welfare benefit plans as including health plans). Pension plans also frequently employ such administrators to provide various ministerial services. Thus, one publication conducted a "survey of 128 third-party administrators who play a crucial role in handling the day-to-day details of retirement plans" and found, *inter alia*, that "[e]mployer-sponsored plans are still a big chunk of business—61 percent of firms represent more than 500 of them. Nearly 40 percent of firms represent less than that and 45 percent of those are worth $1 billion or more."[15] A 2012 article on the Society of Professional Benefits Administrators website stated:

> **HOW BIG IS THE TPA MARKET?**
> Based on the various statistics & reports and occasional access to raw survey data and market terminology, my best estimate based on cross-referencing relevant parts of the

[14] *Everything You Wanted to Know About TPAs But Were Afraid to Ask*, SPBA, https://spbatpa.org/node/1600 (last visited Aug. 7, 2020).

[15] *A Look at Third-Party Administrators: Plansponsor Reveals Survey Results*, Paylocity, https://www.paylocity.com/resources/resource-library/blog-a-look-at-third-party-administrators-plansponsor-reveals-survey-results/ (last visited Aug. 7, 2020).

> various data, is that 52-55% of all US covered workers in non-federal-government plans are in plans administered to some degree by a TPA entity. That is a conservative number, because there is also the term ASO (Administrative Services Only) used to describe the insurance companies providing TPA services to self-funded plans. Today, over 90% of the business of some of the largest US insurance companies is ASO (which is simply a different marketing term to describe TPA). There are also many law firms, CPAs, consultants and others who perform TPA-like duties. Indication of how many entities are doing "TPA" work but not calling it TPA can be seen by looking at the US Dept. of Labor filings of outside administrators filing Form 5500 for ERISA plans. There are about 10 times as many administrative entities filing 5500 forms as SPBA would consider comprehensive service employee benefits TPA firms. So, the percentage of workers in plans being administered by an entity doing TPA-like duties (no matter what they call themselves) is probably vastly larger than my conservative 52-55% estimate.

Numbers: How Many TPAs are There? Explanation and Legal Liability Factors, SPBA (Jan. 2012), https://spbatpa.org/node/1889.[16]

In summary, if third party administrators whose actions and/or duties do not make them fiduciaries under the facts of specific cases may evade potential liability for their actions, it would leave a gaping hole in the protection of plan participants never envisioned by Congress, which sought to protect those participants.

[16] A Google search using the search term "pension plan third party administrators" reveals page after page of entries, most of which are links to businesses providing such services.

CONCLUSION

For the reasons stated above, it is the considered view of *amici* that the Court should reverse the district court's rulings on the issues addressed herein.

RESPECTFULLY SUBMITTED this 10th day of August, 2020.

By: *s/ Jeffrey Lewis*

KELLER ROHRBACK L.L.P.
Jeffrey Lewis
300 Lakeside Drive, Suite 1000
Oakland, CA 94612
(510) 463-3900

PENSION RIGHTS CENTER
Norman Stein, Of Counsel
1730 M Street NW, Suite 1000
Washington, D.C. 20036
(205) 410-0989

Attorneys for Amici

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 6,838 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I relied on the word count of Microsoft Word Office 365 in preparing this certificate.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the brief—in both its text and its footnotes—has been prepared in 14-point Century Schoolbook font.

I declare under penalty of perjury that the foregoing is true and correct.

s/ *Jeffrey Lewis*
Jeffrey Lewis

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 15. Certificate of Service for Electronic Filing

Instructions for this form: http://www.ca9.uscourts.gov/forms/form15instructions.pdf

9th Cir. Case Number - 20-55222

I hereby certify that I electronically filed the foregoing/attached document(s) on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

Service on Case Participants Who Are Registered for Electronic Filing:
[ ] I certify that I served the foregoing/attached document(s) via email to all registered case participants on this date because it is a sealed filing or is submitted as an original petition or other original proceeding and therefore cannot be served via the Appellate Electronic Filing system.

Service on Case Participants Who Are NOT Registered for Electronic Filing:
[ ] I certify that I served the foregoing/attached document(s) on this date by hand delivery, mail, third party commercial carrier for delivery within 3 calendar days, or, having obtained prior consent, by email to the following unregistered case participants *(list each name and mailing/email address)*:

Description of Document(s) *(required for all documents)***:**

BRIEF OF AMICI CURIAE PENSION RIGHTS CENTER AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

Signature s/ Jeffrey Lewis **Date:** August 10, 2020