No. 13-130

In the Supreme Court of the United States

SHARON THURBER, PETITIONER

v.

AETNA LIFE INSURANCE CO., ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

This case involves two remedial provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* ERISA Section 502(a)(3) allows a participant, beneficiary, or fiduciary to obtain an injunction or "other appropriate equitable relief" to redress statutory violations or to enforce ERISA or the terms of the plan. 29 U.S.C. 1132(a)(3). ERISA Section 502(a)(1)(B) allows a plan participant or beneficiary to sue "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. 1132(a)(1)(B). The questions presented are:

1. Whether an action by an ERISA fiduciary against a plan participant to recover an overpayment by the plan seeks "equitable relief" within the meaning of ERISA Section 502(a)(3), 29 U.S.C. 1132(a)(3), where the fiduciary has not identified a particular fund that is in the participant's possession and control at the time that the fiduciary asserts its claim.

2. Whether a court reviewing a fiduciary's administrative denial of a plan participant's claim for benefits under ERISA Section 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B), should apply the arbitrary-and-capricious standard of review where the plan vests the fiduciary with discretionary authority to construe the plan's terms and determine eligibility for benefits, but the participant has not received actual notice of that provision.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Petitioner worked at Quest Diagnostics, Inc., from 1993 until August 2007, when she was involved in a car accident that exacerbated damage to her knees from a previous accident. Pet. App. 29-30. At the time of the second accident, petitioner was a participant in a disability benefits plan (the Plan) administered by respondent and governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq*. Pet. App. 3. The Plan, which provided for payment of both short-term and long-term

disability benefits, gave respondent "discretionary authority to: determine whether and to what extent employees and beneficiaries are entitled to benefits." *Id.* at 8 n.1. The summary plan description (SPD) similarly explained that respondent "has the discretionary authority to determine eligibility for benefits, decide claim appeals, and to interpret provisions of the plan." *Ibid.* The Plan also provided that disability benefits "may be reduced" if a beneficiary receives "Other Income Benefits," including automobile no-fault wage-replacement benefits, for the same illness or injury for which Plan benefits were paid. *Id.* at 63-64.

After her August 2007 accident, petitioner applied for and was granted six months of short-term disability benefits under the Plan. Pet. App. 4. At the same time, petitioner applied under her own automobile insurance policy for no-fault wage-replacement benefits, and was granted $1,202.32 per month in such benefit payments. *Ibid.*

After receiving six months of short-term benefits under the Plan, petitioner applied for long-term disability benefits. Pet. App. 4. As part of that application, petitioner completed a questionnaire, in which she reported that she had received the no-fault wage-replacement payments under her automobile policy. *Id.* at 4, 54. Respondent ultimately denied petitioner's claim for long-term benefits, finding that she could still perform the functions of her position. *Id.* at 5.

2. Petitioner filed suit in the United States District Court for the Western District of New York challenging the denial of long-term disability benefits. Pet. App. 6-7. Respondent defended the denial of benefits and counterclaimed under ERISA Section 502(a)(3),

seeking "equitable restitution of $7,213.92" based on petitioner's receipt of the no-fault insurance benefits. *Id.* at 7; see 29 U.S.C. 1132(a)(3).

a. Applying an abuse-of-discretion standard based on the Plan language granting respondent discretion to determine benefit claims, Pet. App. 42-43; see *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 115 (1989), the district court granted summary judgment to respondent on petitioner's claim for benefits, Pet. App. 53, 58.

b. The district court rejected respondent's counterclaim for restitution, awarding petitioner summary judgment on that issue. Pet. App. 58. The court observed that "[r]estitution in equity is only available where the money in question can be identified as 'belonging in good conscience to the plaintiff.'" *Id.* at 56 (quoting *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 213 (2002)). In the court's view, the particular terms of the Plan at issue here did not establish that the money in question "'belong[ed]' to [respondent]." *Ibid.* Instead, the Plan used discretionary rather than mandatory language—stating that benefits "*may* be *reduced*" if other compensation is received and that the Plan "*may* require [benefit recipients] to return [any] overpayment within thirty (30) days." *Ibid.*

The district court determined that those Plan provisions did "not explicitly bind the Plan participant to reimburse overpaid funds, but simply grant[ed] [respondent] the ability to seek the funds." Pet. App. 56. Accordingly, the Plan gave respondent only "a contractual and legal right to exercise [its] option to seek recovery of the allegedly overpaid funds," but not an equitable "right to the funds themselves." *Id.* at 57.

3. The court of appeals affirmed in part and reversed in part. Pet. App. 1-27.

a. Based on petitioner's concession that both the underlying plan document and the SPD granted respondent discretion to make benefit determinations, the court of appeals concluded that the district court properly applied an abuse-of-discretion standard of review to respondent's denial of petitioner's claim for benefits. Pet. App. 7-8. Given the clear language in the Plan and SPD, the court found it "of no consequence" that petitioner purportedly did not have notice of the grant of discretion because the only document she allegedly received (a plan booklet) did not contain a clear reservation of discretion to respondent. *Id.* at 8, 11. The court then concluded that the district court correctly determined that respondent's denial of petitioner's claim for long-term disability benefits was supported by substantial evidence and consequently affirmed the grant of summary judgment to respondent on that claim. *Id.* at 12-14.

b. The court of appeals, however, reversed the district court's dismissal of respondent's counterclaim, concluding that the counterclaim "constituted an action for 'appropriate equitable relief.'" Pet. App. 15 (quoting 29 U.S.C. 1132(a)(3)).

The court of appeals disagreed with the district court that the Plan's language was insufficient to create an equitable lien by agreement. Pet. App. 23-25. The court thought it "immaterial" that other cases involving equitable liens by agreement "require[d]" participants to reimburse insurers, while the one at issue here provided that the insurer "may" seek recovery. *Id.* at 24.

The court of appeals explained that in *Sereboff* v. *Mid Atlantic Medical Services, Inc.*, 547 U.S. 356, 362-363 (2006), this Court had classified as equitable an insurer's claim for "specifically identifiable funds that were within the possession and control of the [participants]." Pet. App. 17-18. The court of appeals noted that this case differed from *Sereboff* in that petitioner had already spent the third-party benefits before respondent sought to recover the overpayment. *Id.* at 21. The court did not think that distinction made a difference, however, because it read *Sereboff* to mean that "[w]hen an ERISA plan creates an equitable lien by agreement between the insurer and the beneficiary, the insurer's ownership of the overpaid funds is established regardless of whether the insurer can satisfy strict tracing rules," *id.* at 22.

DISCUSSION

In the government's view, the petition for a writ of certiorari should be denied. On the first question presented, petitioner is correct (Pet. 9) that the courts of appeals are divided over the ability of an ERISA fiduciary to recover overpayments from a plan participant, as appropriate equitable relief under ERISA Section 502(a)(3), where the fiduciary has not identified a particular fund that is in the plan participant's possession and control. Petitioner is also correct that the court of appeals erred in holding that respondent could recover here. But there is a logically antecedent issue in this case regarding whether the particular plan language at issue is sufficient to create a claim for equitable relief at all. The presence of that case-specific issue could prevent the Court from deciding the first question presented, thus making this a poor

vehicle for resolving the conflict in the courts of appeals.

The second question presented involves the court of appeals' holding that, where a plan vests an ERISA fiduciary with discretionary authority to construe the plan's terms and determine eligibility for benefits, courts must review that fiduciary's benefit determinations under a deferential, abuse-of-discretion standard of review—regardless of whether the plan participant who is claiming benefits received actual notice of that grant of discretion. No court of appeals has held otherwise. Consequently, further review of the court of appeals' holding, which represents a straightforward application of this Court's decision in *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 115 (1989) (*Firestone*), is not warranted.

A. The First Question Presented Implicates A Conflict In The Courts Of Appeals, But This Petition Is A Poor Vehicle For Resolving It

1. The first question presented is "[w]hether an ERISA Plan may enforce an equitable lien by agreement under [ERISA Section] 502(a)(3) where it has not identified a particular fund that is in the defendant's possession and control at the time the Plan asserts its equitable lien." Pet. i. For the reasons discussed below, see pp. 15-20, *infra*, it does not appear that the Plan terms at issue here actually create an equitable lien by agreement in the first place, so the premise of this question presented appears to be absent in this case. Putting that issue aside, however, petitioner is correct (Pet. 11-15) that the courts of appeals are divided on this question.

Like the court of appeals in this case, the First, Third, Sixth, and Seventh Circuits have held that plan

fiduciaries may enforce an equitable lien against plan participants and beneficiaries who have recovered both plan benefits and other recoveries subject to offset, even where the funds over which the lien is asserted have been dissipated. See, *e.g.*, *Cusson* v. *Liberty Life Assurance Co.*, 592 F.3d 215, 231 (1st Cir. 2010) (finding it irrelevant that, "unlike the insurer in *Sereboff*, Liberty has not identified a specific account in which the funds are kept or proven that they are still in Cusson's possession" because "the contract between Cusson and Liberty put Cusson on notice that she would be required to reimburse Liberty for an amount equal to what she might get from Social Security") (citing *Sereboff* v. *Mid Atl. Med. Servs., Inc.*, 547 U.S. 356 (2006)); *Funk* v. *CIGNA Grp. Ins.*, 648 F.3d 182, 194 (3d Cir. 2011) (Because "there was an equitable lien by agreement that attached to the Social Security award as soon as Funk received it, dissipation of the funds was immaterial."); *Longaberger Co.* v. *Kolt*, 586 F.3d 459, 466-467 (6th Cir. 2009); *Gutta* v. *Standard Select Trust Ins. Plans*, 530 F.3d 614, 621 (7th Cir. 2008).

By contrast, in *Bilyeu* v. *Morgan Stanley Long Term Disability Plan*, 683 F.3d 1083 (2012), cert. denied, 133 S. Ct. 1242 (2013), the Ninth Circuit held that, where the participant "has spent the overpaid benefits," the insurer "is not seeking to recover a specified fund that is preserved and in [the participant's] possession" (as is required for enforcement of an equitable lien by agreement), but is instead seeking payment of "money out of [the participant's] general assets" (a legal remedy unavailable under ERISA Section 502(a)(3)). *Id.* at 1094. In reaching that conclusion, the Ninth Circuit "recognize[d] that a number

of circuits" had held that "a fiduciary can assert an equitable lien—presumably against a beneficiary's general assets—even if the beneficiary no longer possesses the specifically identified funds." *Ibid.* (citing, *inter alia*, *Funk*, 648 F.3d at 194 n.14; *Cusson*, 592 F.3d at 231; *Longaberger Co.*, 586 F.3d at 466; *Gutta*, 530 F.3d at 621). The Ninth Circuit determined that those decisions were based on a misreading of *Sereboff*'s "discussion of tracing rules." *Ibid.* The court explained that "[t]he tracing issue in *Sereboff* was whether [the insurer] could obtain an equitable lien against specifically identified funds when [the insurer] had never possessed those funds itself—an issue that has no relevance here." *Id.* at 1095 (citing 547 U.S. at 364-365). In the Ninth Circuit's view, "[n]othing in *Sereboff* suggests that a fiduciary can enforce an equitable lien against a beneficiary's *general assets* when specifically identified funds are no longer in a beneficiary's possession." *Ibid.*

In *Treasurer, Trustees of Drury Industries, Inc. Health Care Plan & Trust* v. *Goding*, 692 F.3d 888 (2012), cert. denied, 133 S. Ct. 1644 (2013), the Eighth Circuit likewise held that a plan's attempt to recover benefits sought legal, not equitable, relief and thus was not within the scope of relief permitted by ERISA Section 502(a)(3). *Id.* at 897. Specifically, the court held that an ERISA-covered health-care plan could not recover money from the law firm that represented a participant in a third-party tort suit. See *ibid.* Although the firm initially held the settlement funds in a trust for its client, by the time the plan sued, the firm had already distributed the money to its client (the plan participant) and "thus no longer ha[d] any money

to which [the plan] claims an [equitable] interest." *Ibid.*

2. In the government's view, the court of appeals in this case erred in concluding that a plan fiduciary can enforce an equitable lien regardless of whether the funds at issue have been dissipated. Accord *Bilyeu*, 683 F.3d at 1094-1095.

a. This Court has addressed a plan's attempt to recoup plan benefits from a participant under ERISA Section 502(a)(3) in two key cases. First, in *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204 (2002) (*Great-West*), the Court determined that Section 502(a)(3) did not permit a reimbursement action against a plan participant who received medical benefits following a car accident. *Id.* at 207. The plan provisions in that case allowed for a "first lien" upon any third-party recovery up to the amount of benefits paid by the plan and also purported to make the beneficiary "personally liable * * * up to the amount of the first lien." *Ibid.* The participant had obtained a recovery in a tort settlement with third parties. The state court's order approving the settlement provided that defendants would pay the relevant settlement proceeds directly into a special needs trust, which had not been named as a party in the reimbursement action. *Id.* at 208, 214, 220.

The Court in *Great-West* explained that "a plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." 534 U.S. at 213 (citations omitted). But where the plaintiff did not seek to impose the con-

structive trust or equitable lien on particular funds in the defendant's possession, the Court explained, the suit was not for equitable relief but instead sought "the imposition of personal liability," a legal remedy. *Id.* at 214. Because the settlement funds in *Great-West* had been placed directly in a special needs trust and were not in the participant's possession, the Court held that the fiduciary sought, "in essence, to impose personal liability on [the beneficiary] for a contractual obligation to pay money—relief that was not typically available in equity," and thus not available under ERISA Section 502(a)(3). *Id.* at 210; see *CIGNA Corp.* v. *Amara*, 131 S. Ct. 1866, 1878-1879 (2011) (discussing holding in *Great-West*).

Subsequently, in *Sereboff*, the Court addressed a claim for reimbursement by the sponsor of a health-care plan under a plan provision that required beneficiaries who had been injured by a third party to reimburse the plan for benefits they received from any recoveries from the third party. 547 U.S. at 359. Because the beneficiaries in *Sereboff* had placed the third-party settlement proceeds of their tort suit in investment accounts that remained in their possession and control at the time of the ERISA suit, the Court concluded that the "impediment to characterizing the relief in [*Great-West*] as equitable [was] not present." *Id.* at 362. The Court recognized that, like the plan in *Great-West*, the plan in *Sereboff* "alleged breach of contract and sought money, to be sure, but it sought its recovery through a constructive trust or equitable lien on a specifically identified fund, not from the [beneficiaries'] assets generally, as would be the case with a contract action at law." *Id.* at 363; see *US Air-*

ways, Inc. v. *McCutchen*, 133 S. Ct. 1537, 1544-1545 (2013) (following *Sereboff*).

b. In *Sereboff*, the "particular fund" in question still existed and was in the beneficiaries' possession and control in their investment account, 547 U.S. at 360, so the question presented here was not directly implicated. The logic of *Sereboff* nonetheless suggests an answer to the question in this case because where, as here, the "particular fund" identified by the Plan has been dissipated, the Plan's only choice is to seek recovery from the participant's "assets generally." *Id.* at 362-363. *Sereboff* establishes that such a recovery would be legal, not equitable, and thus unavailable under ERISA Section 502(a)(3). *Ibid.*

That conclusion is consistent with the principles of equity to which this Court has looked when analyzing the type of relief available under ERISA Section 502(a)(3). *E.g.*, *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 256 (1993) (Section 502(a)(3) authorizes only "those categories of relief that were *typically* available in equity."). An equitable lien "constitutes a charge or encumbrance upon [a particular] thing, so that the very thing itself may be proceeded against in an equitable action, and either sold or sequestered under a judicial decree," with the proceeds "applied upon the demand of the creditor in whose favor the lien exists." 4 Spencer W. Symons, *Pomeroy's Equity Jurisprudence* § 1233, at 692 (5th ed. 1941) (*Pomeroy*). That general rule holds when the equitable lien is established by agreement: the contract in question "recognizes, *in addition to the personal obligation*, a peculiar right over the thing concerning which the contract deals." *Id.* § 1234, at 695. When an agreement establishes such a right, "the plaintiff is enabled

to follow the identical thing, and to enforce the defendant's obligation by a remedy which operates directly upon that thing." *Ibid.*

At equity, it followed from these general principles that an "equitable lien [could] be established and enforced only if there [was] some property which [was] subject to the lien." Restatement of Restitution and Unjust Enrichment § 161, cmt. e (1936) (Restatement); see *Pomeroy* § 1233, at 692 ("It is the very essence of [the equitable lien] that while the lien continues the possession of the thing remains with the debtor or the person who holds the proprietary interest subject to the encumbrance."). To be sure, "[w]here property is subject to an equitable lien and the owner of the property disposes of it and acquires other property in exchange, he holds the property so acquired subject to the lien." Restatement § 161, cmt. e; see *id.* §§ 202(b), 203. Similarly, when the property in question was "mingled with other property in one indistinguishable mass, the lien can be enforced against the mingled mass." *Id.* § 161, cmt. e.

As particularly relevant here, however, where "the property subject to the equitable lien can no longer be traced, the equitable lien cannot be enforced." Restatement § 161, cmt. e. Thus, "where a person wrongfully disposes of the property of another but the property cannot be traced into any product, the other has merely a personal claim against the wrongdoer and cannot enforce a constructive trust or lien upon any part of the wrongdoer's property." *Id.* § 215(1).[1]

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[1] In this case, there was nothing wrongful in petitioner's having spent the no-fault insurance benefits because the Plan did not obligate petitioner to hold those funds for respondent. See pp. 15-20, *infra*.

This Court made that very point in *Great West*, noting that "where 'the property [sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor,' and the plaintiff 'cannot enforce a constructive trust of or an equitable lien upon other property of the [defendant].'" 534 U.S. at 213-214 (quoting Restatement § 215, cmt. a, at 867) (brackets in original).

Moreover, any trust in this case was constructive, not express, thus making the type of personal, make-whole relief sought by respondent against petitioner unavailable. This Court recently held that ERISA Section 502(a)(3) allows a suit *by* a plan participant for make-whole monetary relief against a plan fiduciary, "whom ERISA typically treats as a trustee." *CIGNA Corp.,* 131 S. Ct. at 1879. ERISA fiduciaries, whether they are the formal trustees of the plan or the individuals or entities that control or manage plans and their assets, see 29 U.S.C. 1002(21)(A), are expressly charged under the statute with the highest trust-law duties of loyalty and care, *Donovan* v. *Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir.), cert. denied, 459 U.S. 1069 (1982), and stand at the heart of the statutory scheme. See *Mertens,* 508 U.S. at 253, 262-263 (contrasting the central role of fiduciaries and their correspondingly greater liability with the role of third-party service providers); see also *Harris Trust & Sav. Bank* v. *Salomon Smith Barney Inc.*, 530 U.S. 238, 250-251 (2000). But nothing in the statutory scheme itself imposes similar fiduciary obligations on plan participants and beneficiaries.

Nor does equity appear to have imposed personal liability on a merely *constructive* trustee, such as a

plan participant or beneficiary in an overpayment case, who dissipated the assets at issue. See, *e.g.*, *Barnes* v. *Eastern & W. Lumber Co.*, 287 P. 2d 929, 949 (Or. 1955) (in banc) (rejecting joint and several liability for constructive trustees and holding instead that a constructive trust is "simply a procedural device" that "enables a court to lay hold of an item of property in the possession of one who gained it wrongfully"). That was so because a "constructive trust, unlike an express trust, is not a fiduciary relation." Restatement § 160 cmt. a; see generally 5 Austin Wakeman Scott, *The Law of Trusts* § 462.1, at 3415 (3d ed. 1967) (Scott) (same).

c. In arguing that it may enforce an equitable lien by agreement even without identifying a fund still in petitioner's possession, respondent relies (Br. in Opp. 27) on the Court's statement in *Sereboff* that the plan's "inability to satisfy the 'strict tracing rules' for 'equitable restitution' is of no consequence." 547 U.S. at 365. But that statement quite clearly was not meant to negate the need to identify a fund to which the equitable lien attached—a requirement the Court had just described at length, *id.* at 362-363—but was instead aimed solely at rejecting the argument that the funds sought by the plan in that case had to be traceable back to the plan itself. *Id.* at 364 (discussing requirements where "an asset belonging to the plaintiff had been improperly acquired by the defendant and exchanged by him for other property"); accord *Bilyeu*, 683 F.3d at 1092 (reading *Sereboff*'s rejection of "strict tracing" to mean only that, "to satisfy the requirements for an equitable lien by agreement, Mid Atlantic was not required to trace the funds in the Sereboffs' tort recovery *back to Mid Atlantic's own*

possession"). *Sereboff* establishes that a fund need not be traced back to the plaintiff for an equitable lien by agreement to attach, but that distinct holding does not dispense with the requirement that there be a fund in the defendant's possession in the first place.

We recognize that this result can leave a gap in ERISA's mechanisms for enforcing plan terms, where the participant or beneficiary has received and spent the funds out of which reimbursement was to be made before the plan took action to obtain or recover those funds. But the Court concluded in *Great-West* that that consequence is insufficient to overcome the text of Section 502(a)(3), which, "by its terms, only allows for *equitable* relief." 534 U.S. at 221.

3. This petition for a writ of certiorari is not an appropriate vehicle for addressing the availability of equitable relief for reimbursement of benefits paid by a plan because it does not appear that the relevant Plan terms actually established an equitable lien by agreement of the kind this Court has found enforceable under ERISA Section 502(a)(3). That predicate and case-specific question of plan interpretation could prevent the Court from reaching the first question presented.

a. In this Court's previous reimbursement cases, the relevant plan language imposed a clear and mandatory obligation on participants and beneficiaries, such that the plan itself could be understood to have imposed an equitable lien by agreement on third-party recoveries the moment they were received. For example, the plan in *Sereboff* "require[d] a beneficiary who 'receives benefits' under the plan for * * * injuries [caused by a third party] to 'reimburse [Mid Atlantic]' for those benefits from '[a]ll recoveries from

a third party (whether by lawsuit, settlement, or otherwise).'" 547 U.S. at 359 (first, third, and fourth pairs of brackets in original); see Pet. App. 38a, *Sereboff*, *supra* (No. 05-260) ("All recoveries from a third party * * * must be used to reimburse the Company * * * for benefits paid."). The relevant provision in *US Airways* similarly provided that "[i]f [US Airways] pays benefits for any claim you incur as the result of negligence, willful misconduct, or other actions of a third party, . . . [y]ou will be required to reimburse [US Airways] for amounts paid for claims out of any monies recovered from [the] third party." 133 S. Ct. at 1543 (second, third, fourth, and fifth pairs of brackets in original).[2] Plan provisions at issue in other court of appeals decisions addressing the availability of relief under Section 502(a)(3) even in the absence of an identifiable fund in the defendant's possession also use mandatory language, imposing an obligation on participants and beneficiaries from the moment they receive other benefits.[3]

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[2] The quoted provision was from the summary plan description, not the plan itself, but the Court treated it as if it came from the plan because the parties had litigated the case on that basis. See *US Airways*, 133 S. Ct. at 1543 n.1.

[3] See, *e.g.*, *Bilyeu*, 683 F.3d at 1090 ("I agree to reimburse the Insurer any such overpayment within thirty (30) days of my receipt of such funds."); *Funk*, 648 F.3d at 194 ("The Plan provides that a Social Security offset 'shall be . . . payable . . . by the recipient.'"); *Longaberger Co.*, 586 F.3d at 467 ("[T]he explicit terms of the Plan state that it 'shall automatically have a first priority lien upon the proceeds of any recovery by you or your Dependent(s) from such party to the extent of any benefits provided to you or your Dependent(s) by the Plan.'"); *Gutta*, 530 F.3d at 620 ("Each month your Maximum LTD [Long Term Disability] Benefit will be reduced by the Income From Other Sources for the

The plan provisions here are different, as they appear to merely vest discretion in the Plan to recover the relevant category of overpayments, rather than impose a free-standing repayment obligation on petitioner. As the district court explained, "the Plan does not explicitly bind the Plan participant to reimburse overpaid funds, but simply grants [respondent] the ability to seek the funds." Pet. App. 56.

The Plan places "other income benefits" received by a participant into three categories. First, it provides that "[i]ncome earned from a part-time return to work at Quest Diagnostics or earnings received while on an approved rehab program *will* result in a reduction of the disability benefit." Pet. App. 64 (emphasis added). That is the only category of mandatory offset in the plan. Second, the Plan specifies certain categories of "other income benefits" that "*will not* reduce * * * [Plan] benefits," including severance pay and disbursements from retirement savings accounts. *Id.* at 66-67 (emphasis added). Third, and as directly relevant here, the Plan establishes a middle category of "other income benefits" the receipt of which means that a participant's disability benefits under the Plan "*may be* reduced." *Id.* at 63 (emphasis added); see *id.* at 64-65 (listing those categories, including "automobile no-fault wage replacement benefits," the category of other income benefits at issue here).

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same monthly period.") (brackets in original); Br. of Defendants-Appellees at 21, *Cusson*, *supra* (No. 08-2381) ("I understand that I must repay this overpayment to Liberty Life."). Except for the provision in *Longaberger*, the quoted provisions did not explicitly state that the overpayments or third-party payments constituted a fund out of which reimbursement was to be made, but they were nonetheless understood to be sufficient to create an equitable lien by agreement on particular funds.

Consistent with the generally discretionary nature of the reduction provision, the Plan provides that "[i]f payments are made in amounts greater than the benefits [a participant is] entitled to receive, the plan *may*" take one of several steps. Pet. App. 67 (emphasis added). Among the Plan's choices are to "[r]equire [the participant] to return the overpayment within thirty (30) days" or to "[p]lace a lien, if not prohibited by state law, in the amount of the overpayment on the proceeds of any other income." *Ibid.*

The mandatory plan provision at issue in *Sereboff* made the plan participant effectively a constructive "trustee as soon as he" received a third-party recovery because he had already entered into "a contract to convey" that recovery "even before it [was] acquired." 547 U.S. at 363-364 (quoting *Barnes* v. *Alexander*, 232 U.S. 117, 121 (1914)). That is consistent with the nature of an equitable lien by agreement, through which "the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, * * * described or identified [in the contract], a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security." *Pomeroy* § 1235, at 696. If the property has not yet been acquired at the time the agreement is executed, the lien attaches when the property is ultimately acquired. See *id.* § 1236, at 699-701; see also Scott § 462.4, at 3420 ("Where the title to property is acquired by one person under such circumstances that he is under a duty to surrender it, a constructive trust immediately arises.").

In its attempt to situate this case in those equitable authorities, respondent contends (Br. in Opp. 24) that

"the equitable lien by agreement" in this case "attached at the very instant petitioner came into possession of the no-fault benefits." But respondent cites no provision of the Plan that would have had that effect. Nothing in the Plan appears to have imposed a self-executing obligation on petitioner to provide her no-fault benefits to respondent (or to hold them for its benefit) as soon as she received them. Instead, the Plan merely authorized respondent, in its discretion, to seek repayment at some point in the future. Similarly, the Plan itself did not impose a lien on the no-fault benefits when petitioner received them; instead, the Plan authorized respondent, in its discretion, to later "*[p]lace* a lien" on the benefits (Pet. App. 67 (emphasis added)), something it effectively attempted to do only when it filed its counterclaim in this case. At that point, the payments had been dissipated, and there was no fund (or substitute asset) in petitioner's possession to which any such lien could attach.

b. The court of appeals rejected this analysis on the ground that is was "overly formalistic." Pet. App. 24. But a certain amount of formalism is inevitable when construing and applying a statutory term, like "appropriate equitable relief," 29 U.S.C. 1132(a)(3), that reflects principles from the time of the "divided bench, * * * with its technical refinements." *Mertens*, 508 U.S. at 256-257. Nor is it "overly formalistic" (Pet. App. 24) to carefully examine and apply plan terms as written, for, as the Court has explained, "[t]he agreement itself becomes the measure of the parties' equities." *US Airways*, 133 S. Ct. at 1548. Indeed, "[t]he statutory scheme, [this Court has] often noted, 'is built around reliance on the face of writ-

ten plan documents.'" *Ibid.* (quoting *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 83 (1995)).

c. Petitioner has not sought review of this question of plan interpretation. But even if she had, review would not be warranted. There is no indication that the plan terms at issue here are common; nor is there any disagreement in the courts of appeals on how to interpret them. A holding by this Court construing and applying those plan terms would therefore likely not have any broader significance. And if the Court held that the plan terms here did not establish an equitable lien by agreement (or even a self-executing repayment obligation), that holding presumably would dispose of the case without any occasion to address the circuit conflict petitioner suggests using her petition to resolve.

B. The Second Question Presented Does Not Warrant This Court's Review

There is no conflict in the courts of appeals on the second question presented, and it does not otherwise merit this Court's review.

1. As this Court has explained, "a denial of benefits challenged under [29 U.S.C.] 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone*, 489 U.S. at 115; accord *Metropolitan Life Ins. Co.* v. *Glenn*, 554 U.S. 105, 116 (2008) (declining to "overturn *Firestone*" by "adopting a rule that in practice could bring about near universal review by judges *de novo*—*i.e.*, without deference—of the lion's share of ERISA plan claims denials"). The Plan in this case, as explained clearly in the SPD, does confer such discretion, a

proposition that petitioner does not dispute. Pet. App. 8. Therefore the district court and court of appeals correctly concluded that a deferential standard of review was warranted under *Firestone*.

As petitioner acknowledges, numerous courts of appeals in addition to the Second Circuit in this case have given effect to discretionary clauses—even when the plan participants were not given notice of these clauses in an SPD. Pet. 23 n.7 (citing cases from the First, Fourth, Sixth, Eighth, Ninth and Eleventh Circuits). Although petitioner argues (Pet. 23) that the Seventh Circuit held to the contrary in *Herzberger* v. *Standard Ins. Co.*, 205 F.3d 327 (2000), that is incorrect.

Contrary to petitioner's suggestion, *Herzberger* said nothing about what must be disclosed in the plan summary or whether a claimant must receive actual notice of a discretionary clause, either in an SPD or in other materials like the supplemental booklet provided to petitioner here. The only issue in *Herzberger* was whether the language in the plan documents themselves—which merely stated that benefits would be paid when the administrator decided there was adequate proof of disability—conferred discretion on the insurance company so that a denial of benefits would be reviewed by a court under a deferential rather than de novo standard of review. 205 F.3d at 331. The court held that that plan language, which merely "states the obvious" fact that benefits would not be paid unless a claimant was found disabled, "does not give the employee adequate notice that the plan administrator is to make a judgment largely insulated from judicial review by reason of being dis-

cretionary," and thus was not sufficient to confer discretion under *Firestone*. *Id.* at 332.

Accordingly, as the court of appeals here recognized, *Herzberger* "did not in any way involve, and the court's language did not address, a situation," like the one at issue in this case, "in which the plan's language *did* unambiguously provide for discretion (as did the SPD), but the employee seeking benefits had not received a copy of either document." Pet. App. 10. This reading of *Herzberger* is confirmed by the Seventh Circuit's later decision in *Raybourne* v. *Cigna Life Ins. Co.*, 576 F.3d 444 (2009), where that court gave force to a discretionary grant contained in a plan document that the participant "did not receive until * * * litigation was underway." *Id.* at 448-449.

2. Petitioner contends (Pet. 26) that "the Second Circuit's ruling undermines ERISA's disclosure requirements." More specifically, she contends that this Court should grant review to resolve a dispute about "whether SPDs must disclose the existence of a discretionary clause that would trigger a deferential standard of review," and should hold that the SPD must contain such a disclosure under the statutes and governing regulations. Pet. 27. This case does not present an appropriate vehicle for resolving this asserted dispute because the SPD in this case *did* disclose the discretionary clause. See Pet. App. 8. Moreover, the Department of Labor's regulations governing the content of plan summaries do not require that a grant of discretionary authority be included in the SPD. See 29 C.F.R. 2520.102-3(*l*); see also 29 C.F.R. 2520.102-3(t).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2014