Added by VC: TEAM 4

THE THIRD ANNUAL
ELLEN A. (NELL) HENNESSY EMPLOYEE BENEFITS
MOOT COURT COMPETITION

UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH DISTRICT

ENTERPRISE PERMANENTE, ENTERPRISE LIFE INSURANCE PLAN, and BORG LIFE ASSURANCE CO.,

Defendant-Appellees,

v.

JEAN LUC PICARD,

Plaintiff-Appellant.

On Appeal from the United States District Court
For the District of Columbia
19-cv-1701-BC
(The Honorable Brian Cooper)

BRIEF OF APPELLEES

Judge's Brief - TEAM #4

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JURISDICTIONAL STATEMENT

The district court has jurisdiction over the parties and the subject matter of this case pursuant to 29 U.S.C. § 1132 (e)(2) and (f) of the Employee Retirement Income Security Act of 1974 ("ERISA"). The district court's final opinion is appealable under 29 U.S.C. § 1291.

ISSUES PRESENTED

The first issue is whether a valid agreement between Appellant and Appellees to arbitrate a claim for benefits under ERISA is enforceable.

The second issue is whether a claim determined by the Plan Administrator should be upheld when such determination was reasonable and based on substantial evidence.

STATEMENT OF THE CASE

Defendant-Cross Appellee Enterprise Permanente ("Enterprise") is an integrated managed care consortium with its headquarters in Bethesda, Maryland. R., 1. Enterprise Life Insurance Plan ("Plan") is an employee welfare benefit plans as defined in the ERISA that provides two benefits to its participants: 1) a death benefit of $1,000,000 upon an employee's accidental death in the line of duty and only if such death was not due to the actual or attempted commission of a crime, and 2) life insurance covering one year of the participant's salary. Opinion & Order, No.

19-cv-1701-BC, 6-7, 10 (D.D.C. Nov. 9, 2019) (the "Opinion). Benefits under the Plan are funded through a group term life insurance policy ("Policy") that the Plan purchased from Borg Life Assurance Co. of Baltimore ("Borg"). *Id*. Collectively Defendants Enterprise and Borg defend this action as Appellees.

The Plan designates Enterprise as the Plan Administrator. R. at 2. The Plan grants Enterprise the authority to delegate its fiduciary duties and in turn, Enterprise delegated its fiduciary duties to Borg to "determine eligibility for claims and to construe the terms of the Plan." *Id*.; Plan §§ 10.1, 10.2, 10.3. The Policy gives Borg discretionary authority to make all initial and final decisions for claims. Policy §§ 3.2(a), (b). In addition, the Policy requires that "[a]ny controversy or claim arising out of or relating to this Policy … be settled by arbitration …." Policy § 8.2.

Plaintiff-Appellant Jean Luc Picard ("Appellant") is the surviving spouse of Beverly Crusher, M.D. (the "Deceased") and the beneficiary of her Policy. R. at 1. The Deceased was a participant in the Plan and at all relevant times a full-time employee of Enterprise at their Bethesda, Maryland location since 1992. *Id*. at 3. Since the Deceased began participating in the Plan, it has stated that benefits under the Plan are payable under the terms of the Policy. R. at 2.

On December 31, 2017, the Deceased was driving in Washington, D.C. *Id*. She was the "on call" cardiologist that weekend. *Id*. At 11:38 PM that night, the Deceased received a text message from her Enterprise co-worker regarding a patient

experiencing severe chest pains. The Deceased immediately texted Enterprise indicating that she was on her way to the hospital. *Id*. At 12:10 AM, the Deceased texted Enterprise that she was 15 minutes from the hospital. *Id*. at 4. At 12:11 AM on January 1, 2018, moments after she sent her text message, the Deceased drove her vehicle off the road and crashed into a utility pole where she was killed instantly. *Id*. The Washington D.C. Metropolitan Police Department's (the "MPD") investigation determined that the Deceased was traveling at an excessive speed while using her mobile phone that was not equipped with a hands-free accessory, in violation of D.C. Code § 50-1731. *Id*. at 4-5.

Appellant subsequently filed a claim for $1,000,000 for the Deceased's death. *Id*. at 5. After reviewing the available evidence, Borg determined that the Deceased's death was "caused by, contributed to by, or resulting from an insured's attempt to commit or commission of a crime." *Id*. Appellant appealed this determination. *Id.* On September 1, 2018, Borg, on behalf of itself and the Plan, issued a final determination upholding the initial determination. *Id*. Borg indicated in its final determination that Appellant "ha[s] exhausted the internal appeals process" and that he "may initiate arbitration . . . ." *Id*.

Instead of initiating arbitration, on October 1, 2018, Appellant filed a Complaint with the United States District Court of Columbia. *Id*. In response, Borg filed a motion for summary judgment, in which Enterprise and the Plan joined

(collectively, the "Defendants"). *Id*. The Defendants argued in their summary judgment that: (1) the complaint should be dismissed for the plaintiff's failure to initiate arbitration in accordance with the Policy; and (2) Borg's decision should be upheld as reasonable. *Id*. The trial court judge held that while the arbitration clause was unenforceable, Borg, as the Plan Administrator, reasonably applied the crime exclusion provision and concluded that Appellant's claim was not eligible for benefits based on "sufficient evidence." Opinion at 6-7, 10.

STATEMENT OF THE FACTS

The Deceased found herself celebrating New Year's Eve at the Kennedy Center in Washington, D.C. while acting as the "on call" cardiologist for Enterprise the weekend of December 31, 2017. At 11:38 PM, the Deceased received an alert text message informing her that a patient who was experiencing severe chest pain and shortness of breath was admitted to the hospital. Opinion at 3. Recognizing that the patient needed her help as the on-call cardiologist, the Deceased texted the duty nurse that she would immediately go to the hospital. *Id*. However, thirty minutes later and one mile from the Kennedy Center, the Deceased was involved in an automobile accident as a result of responding to a text message. *Id*. The Deceased's driving while texting led her to collide with a utility pole resulting in injuries that caused her death. *Id*.

The Washington, D.C. Metropolitan Police Department ("MPD") conducted an investigation regarding the Deceased's cause of death and determined that she violated D.C.'s law at Code § 50- 1731.04 against distracted driving. R. at 4. This law restricts the use of devises that are not equipped with hands-free accessory technology, specifically criminalizing the use of a telephone, such as the Deceased's 2007 Nokia 6012 flip phone, while driving. *Id*. The investigation determined that the Deceased collided with the utility pole due to driving at an excessive rate of speed while texting on the flip phone, which predated hands-free accessory. *Id*. Even after considering Appellant's argument that D.C. Code § 50- 1731.04(b) excuses the Deceased from this crime because she was allegedly texting on her phone while driving as the result of an emergency situation, the MPD enforced the law against distracted driving and assessed a fine. *Id*. at 4-5.

Appellant filed a claim for both benefits under the Plan. *Id*. at 5. Borg, as the delegated fiduciary under the Plan, determined that Picard was entitled to a life insurance benefit of $250,000. *Id*. Appellant also made a claim for $1,000,000 under the theory that the Deceased's death was accidental and occurred in the line of duty. *Id.* This theory was denied based on an exclusion in section 2.2 of the Policy which explicitly exempts from accidental death coverage any "loss caused by, contributed to by, or resulting from" the actual or attempted "commission of a crime." *Id*. at 1.

After conducting a full review of the record and considering the MPD's findings that the Deceased violated the distracted driver law, Borg determined that the accidental death was "caused by, contributed to by, or result[ed] from [the Deceased's] attempt to commit or commission of a crime" and denied Appellant's claim for the accidental death benefit. *Id*. at 5. More specifically, in reviewing the record and considering the claim for accidental death benefits, Borg, as it has consistently done, enforced the provisions requiring that participants must not have been involved in the "commission of a crime." *Id*. at 3. Functionally, the claims review process involves the consideration of facts and circumstances and the Borg has occasionally found that violations of traffic laws have not amounted to a "commission of a crime." In the case of Appellant's claim for accidental death benefits, Borg determined that the violation of D.C. Code amounted to a "commission of a crime" and denied his appeal of the initial determination. *Id*. at 5.

Borg's denial provided Appellant with the opportunity to initiate arbitration. *Id*. The Policy requires in Section 8.2 for a mandatory submission of disputes to binding arbitration stating: "Any controversy or claim arising out of or relating to this Policy, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association … and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof." *Id*. The

mandatory arbitration provision is included in the Plan's summary plan description, which is provided to all employees participating in the Plan. *Id*. at 5.

Instead of abiding by the mandatory arbitration provision in Section 8.2 of the Policy, Appellant petitioned the United States District Court for the District of Columbia to review the Plan's denial of his claim for an accidental death benefit. *Id*. While Borg has not initiated arbitration, it filed a motion for summary judgment to dismiss Appellant's complaint for failure to initiate arbitration in accordance with Section 8.2 of the Policy. *Id*. It argued in the alternative in its Motion that the denial of the accidental death claim should be upheld as a reasonable application of the "crimes exclusion" provision in Section 2.2 of the Policy. *Id*. Unsatisfied with the District Court's decision to uphold the denial of the claim for accidental death benefits, Appellant now brings the instant appeal before this Honorable Court and as such Defendant-Appellees respond and cross appeals.

STATEMENT OF THE ARGUMENT

Congress enacted ERISA out of its concern with the need for a careful balance between setting equitable standards and promoting the expansion of ERISA plans by providing certain freedoms to plan sponsors.[1] As a means to promote the expansion of ERISA plans, plan sponsors should have the freedom to choose arbitration as a dispute mechanism. Generally, arbitration has been a means to reduce

[1] H.R.Rep. No. 93–533 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4647.

the costs and burdens of resolving matters through litigation. Likewise, arbitration includes those traditional mechanisms found in courts, including fact-finding, neutral evaluation, while providing faster, less expensive, and more effective dispute resolution.

Several courts of appeals for this Court's sister circuits have held that agreements to binding arbitration of ERISA claims are enforceable. Likewise, several circuits have put to rest dated misconceptions that arbiters are unequipped to arbitrate claims involving federal statutes. The judicial pendulum as supported by numerous public policies currently sits on the side of enforcing valid agreements to arbitrate ERISA claims. Appellant and Appellees held a binding agreement to arbitrate claims and neither does the lower court nor Appellant submit a viable argument to negate the validity of said agreement. As such, Appellees respectfully request this Honorable Court to dismiss the instant appeal and remand with instructions to arbitrate Appellant's claim due to the lower court's failure to enforce a valid and binding arbitration agreement between Appellant and Appellees to arbitrate.

In the alternative, should this Court hold that it has jurisdiction over this appeal, it should affirm Judge Cooper's finding that the arbitrary and capricious standard applies to the review of Borg's decision to deny Appellant's claim for benefits. The proper standard of review of Borg's decision by the district court is the

deferential standard for two reasons. First, the Supreme Court held that even though "a denial of benefits challenged under § 1132(a)(1)(B) must be reviewed under a de novo standard" a deferential standard of review is appropriate when "the benefit plan expressly gives the plan administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the plan's terms".[2] Second, Borg's determination was reasonable and based on substantial evidence as required by the relevant caselaw. Specifically, Appellee's claims procedures satisfy all of the factors that are considered in deciding whether a plan administrator's decision was reasonable, such as: (1) the language of the plan; (2) the adequacy of the materials considered to make the decision; (3) whether the plan administrator's decision was consistent; (4) whether the decision making process was reasoned and principled; (5) whether the decision was consistent with the procedural and substantive requirements of ERISA; and (6) any conflict of interest the plan administrator may have.[3] The satisfaction of these factors and ERISA regulations confirms the trial court's decision that Borg reasonably determined Appellant's claim for benefits and based its determination on substantial evidence. Accordingly, Appellees respectfully request this Court to affirm the summary judgment.

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[2] *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 102 (1989); *see also Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105, 115 (2008).
[3] *See Champion v. Black & Decker (U.S.) Inc.*, 550 F.3d 353, 359 (4th Cir. 2008); *see also* 29 C.F.R. § 2560.503-1.

ARGUMENT

I. This Court Should Dismiss This Appeal in Light of the Valid Agreement Between Appellee and Appellant to Arbitrate an ERISA Claim and Compel Arbitration.

A. The Agreement to Arbitrate ERISA Claims is Enforceable

The United States Supreme Court has long recognized a "liberal federal policy favoring arbitration agreements."[4] The courts and Congress have consistently promoted the important national policy rationale of enforcing valid arbitration agreements.[5] This policy is supported by the understanding that arbitration agreements are like any other contract and the terms must be rigorously enforced.[6] Understanding this importance, Congress enacted The United States Arbitration Act in 1925, referred to as the Federal Arbitration Act (FAA).[7] The FAA embodies this strong policy of favoring enforcement of arbitration agreements.[8] Courts have

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[4] *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).
[5] *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985) (holding that the FAA embodies a strong federal policy favoring arbitration.); *see also Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) ("national policy"); *and Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) ("liberal federal policy").
[6] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 337-38 (2011); *see also Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010); *and Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 221 (1985).
[7] 9 U.S.C. § 1, et seq.
[8] *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (holding that there is nothing unfair about arbitration—even arbitration on an individual basis—as long as individuals can vindicate their statutory rights in the arbitral forum.).

interpreted it to mean that, "parties challenging the enforceability of an arbitration agreement bear the burden of proving that the provision is unenforceable."[9] The "principal purpose" of the FAA is "ensuring that private arbitration agreements are enforced according to their terms."[10]

The Supreme Court has held on several occasions that agreements to arbitrate claims that allege a violation of a federal statute are enforceable like any other arbitration agreement absent a "contrary congressional command."[11] Multiple circuit courts have considered whether an agreement to arbitrate an ERISA claim is enforceable and found nothing in ERISA to indicate that Congress has precluded ERISA claim arbitration.[12] This pronouncement of the various circuits further solidifies that a valid arbitration agreement should be enforced in the ERISA context.

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[9] *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1157 (9th Cir. 2013); *see also Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 91 (2000) ("[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration.").

[10] *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989).

[11] *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013); *see also CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012).

[12] *See, e.g.*, *Dorman v. Charles Schwab Corp.*, 934 F.3d 1107, 1112 (9th Cir. 2019) (holding that ERISA claims can be subject to mandatory arbitration.); *Williams v. Imhoff*, 203 F.3d 758, 767 (10th Cir. 2000) ("Congress did not intend to prohibit arbitration of ERISA claims."); *Kramer v. Smith Barney*, 80 F.3d 1080, 1084 (5th Cir. 1996) ("We agree that Congress did not intend to exempt statutory ERISA claims from the dictates of the Arbitration Act."); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1118 (3d Cir. 1993) (same); *Bird v. Shearson Lehman / Am. Express, Inc.*, 926 F.2d 116, 122 (2d Cir. 1991) (same); *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475, 479 (8th Cir. 1988) (same).

Here, the District Court mistakenly held that arbiters lack the competence to interpret federal statutes and based its decision on the overruled precedent in *Amaro*.[13] Opinion at 6. The District Court's fear that arbitrators lack the necessary competence to decide issues involving federal claims has been put to rest by numerous Supreme Court decisions.[14] Additionally, more recently the Ninth Circuit Court of Appeals overruled its thirty-four year old precedent in *Amaro* that ERISA claims might not be arbitrable due to a fear that arbitrators lack the competence to interpret federal statutes.[15] It held in *Dorman* held that a plaintiff's ERISA claim can be subject to mandatory individual arbitration and based its reasoning on the Supreme Court's pronouncement that arbiters *are* competent to interpret and apply federal statutes.[16]

The District Court found support in *Amaro*, now overruled by *Dorman*, to deny an otherwise enforceable arbitration agreement. Given the *Dorman* decision

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[13] *See Amaro v. Cont'l Can Co.*, 724 F.2d 747 (9th Cir. 1984).

[14] *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 268 (2009) (calling it a "misconception" that arbitrators lack the competence to decide legal issues); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985) ("[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.").

[15] *Dorman v. Charles Schwab Corp.*, 934 F.3d 1107, 1111 (9th Cir. 2019) (overruling *Amaro v. Cont'l Can Co.*, 724 F.2d 747 (9th Cir. 1984)).

[16] *Id.*; *see also Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (holding that agreements to arbitrate claims brought under federal statutes should be enforced absent contrary dictate by Congress.).

and that the arbitrability of ERISA claims is well established outside the Thirteenth Circuit, the Thirteenth Circuit Court of Appeals should now join its sister circuits and apply the Supreme Court's holding that agreements to arbitrate ERISA claims are enforceable.

B. A Valid Agreement To Arbitrate Must Be Enforced

The district court's failure to dismiss the Plaintiff's complaint and compel arbitration was a fundamental error, as arbitration must be ordered "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."[17] Once a court establishes that a dispute falls within the scope of an arbitration agreement, the court must order the parties to arbitration unless the agreement is unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract."[18] If in doubt, a court should resolve a dispute in favor of arbitration.[19]

The FAA sets out the mechanism for enforcing valid arbitration agreements and requires district courts to make an order directing the parties to proceed to arbitration in accordance with the terms of an arbitration agreement when a party claims to have been aggrieved by the failure, neglect, or refusal of another to

[17] *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986).
[18] 9 U.S.C. § 2; *see First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943-44 (1995).
[19] *Id.*

arbitrate under a written arbitration agreement.[20] As discussed by the Ninth Circuit Court of Appeals "the FAA mandates that district courts *shall* direct . . . parties [] to proceed to arbitration on issues as to which an arbitration agreement has been signed. The FAA limits courts' involvement to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." ((emendation and quotation marks omitted))[21]

An agreement to arbitrate has been upheld and enforced whether or not the parties signed the document.[22] The Seventh Circuit Court of Appeals and a Ninth Circuit District Court have also held that providing documents such as a membership agreement that contained a sufficiently clear description of the arbitration provision informed the person of the arbitration and bound that person to arbitration.[23]

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[20] 9 U.S.C. § 4.

[21] *United Computer Sys., Inc. v. AT&T Corp.*, 298 F.3d 756, 766 (9th Cir. 2002); *see also Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008).

[22] *Pinto v. USAA Ins. Agency Inc. of Texas (FN),* 275 F. Supp. 3d 1165 (D. Ariz. 2017) (finding that there is sufficient evidence the plaintiff employee was made aware of the arbitration clause in the employer's dispute resolution program where the employer posted the dispute resolution materials on the company's intranet and the employee acknowledged his review of program materials by entering his employee ID and social security number).

[23] *R.J. O'Brien & Assocs., Inc. v. Pipkin*, 64 F.3d 257, 260-61 (7th Cir. 1995) (a party was bound to arbitrate where his membership application incorporated by reference the requirements of the organization, including a duty to arbitrate disputes among and between members); *see also Bothell v. Hitachi Zosen Corp.*, 97 F. Supp. 2d 1048, 1053 (W.D. Wash. 2000) (finding an arbitration agreement enforceable when that the parties exchange three purchase orders with reference to a separate attachment that described an arbitration provision that was sufficiently clear to draw the arbitration provision to the attention of the parties).

Here the Decedent was a participant in the Plan. R. at 1. Her acceptance of the benefits of the plan and being informed of the arbitration provision that was included in the Plan's summary plan description establishes that she accepted and was bound by the arbitration agreement.[24] Moreover, the Plan document's mandatory arbitration provision states that: "[a]ny controversy or claim arising out of or relating to this Policy . . . shall be settled by arbitration administered by the American Arbitration Association . . . ." R. at 5. In the context of arbitration agreements, the phrase "any claim" and "arising out of or relating to" are considered "broad and far reaching."[25] Appellant's claim that he is entitled to an accident death benefit falls directly within the Plan's language and therefore falls within the scope of the Plan's arbitration agreement. The District Court did not hold otherwise, but instead held that it would not compel arbitration based on its mistaken notion that arbitrators lack competence to arbitrate claims under federal statutes. The agreement by the Plan and Appellant to arbitrate the asserted claims is enforceable. Therefore the district court was required to compel arbitration, so this Court should dismiss this appeal and remind with instructions to arbitrate Appellee's claim.

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[24] *Pratt v. Petroleum Prod. Mgmt. Inc. Emp. Sav. Plan & Trust*, 920 F.2d 651, 661 (10th Cir. 1990) ("A pension plan is a unilateral contract which creates a vested right in those employees who accept the offer it contains by continuing in employment for the requisite number of years." (quotation marks omitted)).

[25] *Chiron Corp. v. Ortho Diagnostic Sys. Inc.*, 207 F.3d 1126, 1131 (9th Cir. 2000).

II. In the Alternative, Should This Court Hold the Arbitration Clause to be Unenforceable, It Should Affirm the District Court's "Deferential" Standard.

As discussed above, this Court should dismiss this appeal because the district court failed to remand Appellant's claim for arbitration. However, should this Court affirm the District Court's order that the arbitration clause is not enforceable, it would need to determine whether Borg reasonably denied Appellant's claim for benefits. The District Court held, after a thorough examination, that Borg's decision was entitled to deferential review. Opinion at 7. The Plan language clearly and unambiguously granted Enterprise the authority to interpret policy and determine eligibility of all claims. *Id*. at 2. In addition, ERISA regulations and the Plan both allowed Enterprise to delegate authority to Borg to interpret policy and determine eligibility of all claims that are filed for death benefits. This delegated power, combined with the Plan's consistent application of its claims procedures, should lead this Court to affirm the District Court's holding that Borg reasonably denied Appellant's claim for death benefits.

A. The District Court Properly Held That the "Deferential" Standard Applies

Since ERISA is silent as to the standard of review that courts should apply in adjudicating benefit denial claims,[26] the Supreme Court has held that the "principles

[26] JEFFREY LEWIS ET AL., EMPLOYEE BENEFITS LAW § 13.22-23 (4th ed. 2018 & Supp. 2019).

of the law of trusts - which must guide the present determination under ERISA's language and legislative history and this Court's decisions interpreting the statute - establish that a denial of benefits challenged under § 1132(a)(1)(B) must be reviewed under a de novo standard . . ."[27] However, an "abuse of discretion" (or commonly known as "deferential") standard of review is appropriate when "the benefit plan expressly gives the plan administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the plan's terms."[28] In addition, the language giving the plan administrator or fiduciary discretionary authority must be clear and unambiguous.[29] For such discretionary authority to be clear and unambiguous, the vast majority of this Court's sister circuits have held that there is no "magic word" or required use of the words "discretion" or "deference" that triggers the deferential standard.[30]

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[27] *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 102 (1989).

[28] *Id.*; *see also Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105, 115 (2008); *Doroshow v. Hartford Life & Acc. Ins. Co.*, 574 F.3d 230, 233 (3d Cir. 2009) (holding that when a fiduciary has discretion to determine eligibility for benefits, a district court's decision must be reviewed under a deferential standard).

[29] *Herzberger v. Standard Ins. Co.*, 205 F.3d 327, 331 (7th Cir. 2000) (stating that the plan must indicate with "minimum clarity that a discretionary determination is envisaged"); *Sandy v. Reliance Standard Life Ins. Co.*, 222 F.3d 1202, 1207 (9th Cir. 2000) ("unless plan documents unambiguously say in sum or substance that the Plan Administrator or fiduciary has authority, power, or discretion to determine eligibility or to construe the terms of the Plan, the standard of review will be de novo.").

[30] *Gross v. Sun Life Assurance Co. of Can.*, 734 F.3d 1, 13 (1st Cir. 2013) (stating that there are no "magic words" but finding that the language in question did not meet "minimum clarity" required); *Block v. Pitney Bowes Inc.*, 952 F.2d 1450, 1454, (D.C. Cir. 1992) (ruling that deferential review was appropriate where the plan

Based on the Plan documents, Enterprise is designated as the Plan Administrator and named fiduciary. Plan § 10.1. As the Plan Administrator and named fiduciary, "Enterprise is authorized to delegate its fiduciary duties." Plan § 10.2. In turn, Enterprise exercised such authority and "delegate[d] fiduciary duties under Section 10.2" to Borg, which received "discretionary authority to interpret and administer the Plan and to make all factual determinations, including whether the claimant is entitled to benefits under the Plan" and "agreed to act as Enterprise's agent for purposes of processing all claims for benefits under the Plan" and "provide 'expertise and make all initial" and "final decisions regarding claims that are filed' under the Plan." Plan §§ 10.1 (emphases added), 10.2; Policy §§ 3.1, 3.2(a), (b). The discretionary authority, which was properly delegated to Borg, is clear in its scope – discretionary authority for *all* factual, policy, and entitlement decisions. Based on such clear and unambiguous discretionary authority granted to Borg, it is necessary for this Court to review whether the Plan Administrator was reasonable in denying Appellee's claim under the deferential standard.[31]

After the Supreme Court decided the standard of review in *Firestone*, the decision caused a split among various circuit courts concerning whether a conflict

granted power to the administrator to interpret the plan, because "[w]hat counts, in sum, is the character of the authority exercised by the administrators under the plan," rather than any specific words).

[31] *Firestone*, 489 U.S. at 115.

of interest will affect the standard of review in ERISA benefit claim cases.[32] After 19 years of split decisions among the circuit courts, the Supreme Court clarified that its decision in *Firestone* was not intended to imply that a conflict should affect "a change in the *standard* of review, say, from deferential to *de novo* review."[33] The Supreme Court explained that trust law will continue to apply a deferential standard of review to a conflicted fiduciary, while trial courts should examine whether said fiduciary abused its discretion.[34] The Court further reasoned that it would not overturn *Firestone* and force a *de novo* review of all claim denials because Congress never "intended such a system of review" – otherwise, Congress "would not have left to the courts the development of review standards but would have said ore on the subject."[35]

The Supreme Court cannot be anymore clear about what standard should apply in denial of ERISA benefit claims cases. As long as a plan gives discretion to a fiduciary or a properly delegated fiduciary in determining facts, interpreting plan policies, and deciding claims based on a complete record, courts should defer to that

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[32] The portion of the Supreme Court's decision reads: "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weight as a facto[r] in determining whether there is an abuse of discretion." *Id*. (citing Restatement (Second) of Trusts § 187, Comment *d* (1959)); *see also*, LEWIS, EMPLOYEE BENEFITS LAW at § 13.23.
[33] *Glenn*, 554 U.S. at 115.
[34] *Id*.
[35] *Id*.

decision.[36] Therefore, this Court should adopt a deferential standard in reviewing Enterprise's reasonable decision to deny Appellant's claims.

B. The Plan Administrator's Determination Was Reasonable and Based on Substantial Evidence

As discussed above, when a plan administrator has "discretionary authority to determine eligibility for benefits or to construe the terms of the plan," courts review the plan administrator's decision under a deferential standard.[37] Under the deferential standard, a plan administrator's determination must be upheld unless the determination was unreasonable.[38] Moreover, "a plan administrator's decision is an abuse of discretion if it is not supported by substantial evidence."[39] When the same entity both insures the plan and makes benefits determinations, the court gives that conflict of interest some weight in the abuse of discretion analysis.[40]

1. Borg's Determination Was Reasonable (Eight Factor Test)

The Fourth Circuit developed an eight-factor test for courts to determine whether a plan administrator abused its discretion in denying an ERISA claim.[41] Those eight factors are:

(1) the language of the plan;
(2) the purposes and goals of the plan;

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[36] *See Id*.; *see also McClelland*, *infra*.
[37] *Barnhart v. UNUM Life Ins. Co. of Am.*, 179 F.3d 583, 587 (8th Cir. 1999).
[38] *King v. Hartford Life & Accident Ins. Co.*, 414 F.3d 994, 999 (8th Cir. 2005).
[39] *McClelland v. Life Ins. Co. of N. Am.*, 679 F.3d 755, 759 (8th Cir. 2012).
[40] *Id*.
[41] LEWIS, EMPLOYEE BENEFITS LAW at § 13.40.

> (3) the adequacy of the materials considered to make the decision and the degree to which they support it;
> (4) whether the fiduciary's interpretation was consistent with other provisions in the plan and with earlier interpretations of the plan;
> (5) whether the decisionmaking process was reasoned and principled;
> (6) whether the decision was consistent with the procedural and substantive requirements of ERISA;
> (7) any external standard relevant to the exercise of discretion; and
> (8) the fiduciary's motives and any conflict of interest it may have.[42]

Even though satisfying these factors appears overwhelming, Borg's decision to deny Appellant's claim was both reasonable and based on substantial evidence.

The first factor requires examination of the language of the Plan and whether there was any ambiguity as to the crime exclusion provision. With respect to ERISA plans, a plan administrator can consider extrinsic evidence in resolving ambiguities in a contract.[43] In addition, as discussed above, Borg has the discretionary authority to "interpret and administer the Plan and to make all factual determinations, including whether the claimant is entitled to benefits under the Plan." Plan § 10.1.

In resolving an ambiguous term, many circuit courts have read such a term in its plain, ordinary and popular sense.[44] Black's Law Dictionary defines crime as "an

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[42] *Champion v. Black & Decker (U.S.) Inc.*, 550 F.3d 353, 359 (4th Cir. 2008) (citing *Booth v. Wal-Mart Stores, Inc. Assocs. Health & Welfare Plan*, 201 F.3d 335 (4th Cir. 2000)).
[43] *Tompkins v. Cent. Laborers' Pension Fund*, 712 F.3d 995, 1002 (7th Cir. 2013) (citing GCIU *Empire Ret. Fund v. Chi. Tribune Co.*, 66 F.3d 862, 865 (7th Cir. 1995)).
[44] *See Halbach v. Great-West Life & Annuity Ins. Co.*, 561 F.3d 871, 877 (8th Cir. 2009).

act committed or omitted, in violation of a public law, either forbidding or commanding it; a breach or violation of some public right or duty due to a whole community, considered as a community."[45] Oxford Learner's Dictionaries' most common and popular definition is "activities that involve breaking the law."[46] Moreover, Merriam-Webster Dictionary's most common and popular definition of crime is "an illegal act for which someone can be punished by the government."[47] The common denominator among these three sources is an activity in violation of law. Hence, Borg was logical and reasonable to decide that a violation of D.C. law was indeed a crime.

The third[48] and fifth[49] factors require examination of whether Borg considered an adequate amount of materials in reasonably determining Appellant's claim. First, Borg considered all of the relevant information related to the car crash. Some of the information includes the text messages between the Deceased and Enterprise. R. at 4. These text messages are time stamped and the last message was sent while the Deceased was driving at 12:10 AM. *Id*. Moments later, the Deceased crashed her car into a utility pole and died instantly. *Id*. Such timing between the final text message

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[45] BLACK'S LAW DICTIONARY (9th ed. 2009).
[46] OXFORD LEARNER'S DICTIONARIES (8th ed. 2015).
[47] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2016).
[48] Since the Record lacks the requisite information necessary to review the second factor, Appellees proceed to the third factor.
[49] The third and fifth Factors are essentially related to the "substantial evidence" and are considered together before the fourth factor.

and the car crash implies that her texting and driving resulted in her own demise. The MPD supports that inference by indicating that the Deceased was driving at an excessive speed while using her phone. *Id*. In addition, the MPD essentially considered Appellant's argument that the Deceased was not using her phone and driving against D.C. law, but it ultimately determined that the Deceased violated the law. R. at 4; Opinion at 9. Based on such information, Borg considered facts, circumstances, and inferences to come to a reasonable conclusion that the Deceased had violated the law and applied that conclusion against its policy to ultimately deny Appellant's claim. Opinion at 9-10. During Borg's internal administrative reviews and the district court proceedings, Appellant did not introduce any evidence that Borg could have considered prior to making any determination. Judge Cooper from the district court said it best that:

> [p]laintiff does not offer any persuasive argument as to why it was unreasonable for the plan administrator to adhere judgment of the D.C. Council and MPD in making its decision regarding criminal nature of distracted driving …. Plaintiff has not shown any cases where the plan administrator did not apply the crime exclusion to instances of a los caused or partially caused by impaired driving.

Id. at 10. Appellee was given multiple opportunities to present his evidence against MPD's findings and in favor of his claim under Borg's review. He, however, did not present any evidence and Borg proceeded to make a reasoned and principled decision based on the available information.

The fourth factor requires examination of whether a plan administrator applied plan provisions consistently "with respect to similarly situated claimants."[50] Borg has complied with this regulation in that it "consistently enforced" its crime exclusion provision. R. at 3. The only recent development in Borg's enforcement is its treatment of traffic law violations as triggering the crime exclusion provision. *Id*. While Appellant may argue that there is inconsistency between his claim and similar claims in the past, Borg is entitled to adopt a new view on enforcement especially when a dangerous activity such as texting and driving arises as a serious and fatal problem. Based on the district court's review of the D.C. Council's zero-tolerance policy, the national statics, and texting and driving being equally dangerous as drunk driving, it is absolutely reasonable for any plan administrators such as Borg to take a safety-promoting stance. *See* Opinion at 9. When a new policy is in place to promote safety, there inevitably will be some inconsistency during the transition.

This argument would be vulnerable to a conflict of interest assertion only if Appellant could show there was bias in deciding his claim.[51] There is however no indication or complaint that Borg has "a history of biased claim administration" or has Appellee ever raised that point in district court.[52] Therefore, Borg's adoption of a new stance on a traffic law violation cannot be held as unreasonable.

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[50] 29 C.F.R. § 2560.503-1(b)(5).
[51] *See Glenn* at 116-17.
[52] *See id*.

The sixth factor requires examination of the procedural and substantive requirements imposed by ERISA. Here, we examine regulation § 2560.503-1(b), (h), which sets forth the claims procedures for an ERISA plan. Borg satisfied its procedural requirements when it gave Appellee a full and fair review. Borg also satisfied its substantive requirements when it met every factor listed here.[53]

All 5 of the relevant factors discussed so far weigh in favor of Borg having made a reasonable determination. The Court in *Glenn* held that any factor can act as a tiebreaker when the other factors are evenly weighed.[54] Here, such a tiebreaker is unnecessary but out of an abundance of caution, Appellant will examine the eighth factor, which involves whether there was a conflict of interest in determining Appellant's claim.

The eighth factor requires examination of a conflict of interest. Specifically, "[i]t is thus not the existence of a conflict of interest – which is a given in almost all ERISA plans – but the *gravity* of the conflict, as inferred from the circumstances, that is critical."[55] One element of a possible conflict of interest that Appellant will argue is that Borg is both the Plan Administrator in deciding claims and the insurance company paying out policy proceeds. R. at 1-2. Although there is an aspect of a potential abuse for financial gain, such "incentive may be outweighed by other

[53] The Seventh factor is not discussed as it is not applicable here.
[54] *Glenn* at 117.
[55] *Marrs v. Motorola, Inc.*, 577 F.3d 783, 789 (7th Cir. 2009).

incentives, such as … interest in maintaining a reputation" as a fair plan administrator and insurance company.[56] As discussed above, Borg has consistently applied its crime exclusion provision and it has never displayed a history of bias. If Borg had a reputation as a plan administrator that is often conflicted in applying its policies, such conduct would attract litigation from participants and beneficiaries and no fiduciary would hire Borg as a plan administrator. Hence, this Court should find that there was no conflict of interest that clouded the reasonable determination Borg made in this matter.

The other factors considered above also weigh heavily in favor of Borg's determination being reasonable. Therefore, regardless of any hypothetical conflict of interest, Borg's determination would be reasonable, as the District Court correctly found. Opinion at 11.

2. Borg's Determination Was Based on Substantial Evidence

Borg has taken all appropriate steps to satisfy the procedural requirements ERISA sets forth, including: (1) providing an administrative process in compliance of plan documents; and (2) performing a full and fair review by giving Appellant the opportunity to submit comments, documents, and records to support his claim for benefits.[57] As established above, Borg provided and followed a reasonable policy to

[56] *Williams v. Interpublic Severance Pay Plan*, 523 F.3d 819, 821 (7th Cir. 2008).
[57] 29 C.F.R. § 2560.503-1(b)(5), (h)(2).

administer all claims submitted to the Plan. In performing its full and fair review, Borg on multiple occasions, *i.e.*, during initial determination, final determination, and with the trial court, gave Appellant every opportunity to submit any evidence in support of his claim. Other than the arguments he submitted in opposition to the MPD, Appellee failed to provide any information for Borg's consideration. *See generally*, R.; Opinion at 10. At each level of administrative review, Borg considered all evidence related to Appellant's claim. Based on a complete review of all available documents, Borg made a reasonable determination that Appellant would not be eligible for benefits under the crime exclusion provision. Borg cannot compel Appellant to produce evidence in favor of his position; all it can do is provide an opportunity for him to do so. Since Borg repeatedly satisfied its procedural and administrative requirements set forth under ERISA and the relevant caselaw, this Court should find that Borg's determination to deny Appellant's claim was reasonable and based on substantial evidence; and ultimately, affirm the District Court's holding.

CONCLUSION

Appellees Enterprise and Borg respectfully request this Court to reverse and vacate the district court's holding that it had subject matter jurisdiction. In the alternative, should this Court hold that it has subject matter jurisdiction, Appellees Enterprise and Borg respectfully request that this Court affirm the district court's

holding that Borg's administrative determination of Appellant's claim was reasonable and based on substantial evidence.

CERTIFICATE OF SERVICE

We hereby certify that: (i) the work product contained in all copies of our brief is in fact our work product; (ii) we have complied fully with [redacted] [redacted] the honor code of [redacted] and (iii) we have complied with all Rules of the Competition.

Dated: January 17, 2020

[redacted]