IN THE

United States Court of Appeals
For the Thirteenth Circuit

JEAN LUC PICARD

Plaintiff-Appellant,

v.

ENTERPRISE PERMANENTE, ENTERPRISE LIFE INSURANCE PLAN,

and BORG LIFE ASSURANCE CO.,

Defendants-Appellees,

On Appeal from the United States District Court

for the District of Columbia

BRIEF FOR APPELLANTS

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JURISDICTIONAL STATEMENT

This action originated in the United States District Court for the District of Columbia. Plaintiff timely appealed to the United State Court of Appeals for the Thirteenth Circuit. The District Court had jurisdiction under 28 U.S.C. § 1331 to consider an alleged violation of the Employee Retirement Income Security Act. The District Court granted the Defendants' Motion for Summary Judgment because the Plan administrator's interpretation of the "commission of a crime" exemption was reasonable. The Thirteenth Circuit has appellate jurisdiction over the District Court's final decision pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

I. Whether the District Court erred in refusing to dismiss the complaint for failure to arbitrate the dispute in accordance with Section 8.2 of the Policy.

II. Whether the District Court erred in finding that the Plan administrator reasonably concluded that Crusher was engaged in the commission of a crime for purposes of the Plan.

STATEMENT OF THE CASE

This is an Employee Retirement Income Security Act ("ERISA") case arising out of the benefits dispute between Captain Jean Luc Picard and Enterprise Permanente, Enterprise Life Insurance Plan, and Borg Life Assurance Co. (R. at 1). As the administrator of Dr. Beverly Crusher's estate and beneficiary of her life insurance policy, Picard brought an action under 29 U.S.C § 1132, seeking accidental death benefits based on Crusher's employment with Enterprise Permanente. *Id*. Co-Defendants moved for summary judgment arguing that Picard failed to initiate arbitration, and even if arbitration was not required, the decision to deny accidental death benefits was reasonable. (Appx. 5). Upon consideration, the trial judge granted summary judgement for Co-Defendants, stating that, while arbitration was not compelled in this case, the decision to deny accidental death benefits was not unreasonable. (Appx. 6). The parties have filed timely cross-appeals in the United States Court of Appeals for the Thirteenth Circuit. *Id*.

STATEMENT OF THE FACTS

Headquartered in Maryland, Enterprise Permanente ("Enterprise") is an integrated care consortium that operates medical clinics, practices, and hospitals throughout the east coast. (Appx. 1). Enterprise is the administrator and named fiduciary of a life insurance plan ("the Plan"); an employee welfare benefit plan as defined by ERISA. *Id*. All full-time employees of Enterprise are eligible for the Plan, and automatically enrolled after 90 days of consecutive service. (Appx. 2). The Plan provides two benefits: (1) life insurance coverage of 1x salary, and (2) an additional death benefit of $1,000,000 upon the employee's accidental death in the line of duty. (Appx. 1). Although not consistently applied to traffic violations, Section 2.2 of the Plan exempts from accidental-death coverage any "'losses caused by, contributed to by, or resulting from' the actual or attempted 'commission of a crime.'" (Appx. 1, 3).

All benefits under the Plan are funded by, and paid in accordance to, a group term life insurance policy ("Policy") that Enterprise purchased from Borg Life Assurance Co. of Baltimore ("Borg"). (Appx. 1-2). According to the Section 10.1 and 10.2 of the Plan and Section 3.2 of the Policy, "Borg has discretionary authority to interpret and administer the Plan and to make all factual determinations," including the ability to "determine eligibility for claims and to construe the terms of the Plan." (Appx. 2). Additionally, Borg set forth the following conditions in the Policy:

1) Borg will act as Enterprise's agent for purposes of processing all claims and benefits under the Plan;
2) Borg will "provide expertise and make all initial decisions regarding claims that are filed" under the Plan;
3) Borg is not a fiduciary for purposes of ERISA; and
4) Borg is a fiduciary for purposes of making decisions regarding claims that are filed under the Plan.

Id. Section 8.2 of the Policy provides that all controversies and claims arising out of the Policy shall be settled by arbitration. *Id*. This provision is currently strictly enforced. (Appx. 3). In order to provide transparency, Borg provides claims guidelines to participants and beneficiaries to inform them of how claims arising under the Plan are determined. *Id.* Included in these guidelines, is the consistent enforcement of a similar "commission of a crime" exemption that is provided in the Plan. *Id.*

Dr. Beverly Crusher ("Crusher"), a full-time employee of Enterprise for more than ten years, was a participant in the Plan. (R. at 1, 2). On December 31, 2017, despite acting as the "on-call" physician in the Cardiology Department, Crusher celebrated New Year's at a party in Washington D.C. (R. at 3). This responsibility mandated that Crusher be available by call or text, should she be needed at the hospital. (Appx. 3). At 11:38 p.m., after receiving a text that she was urgently needed at the hospital to attend to a patient, Crusher left the party immediately. (R. at 3). While on her way to the hospital at 12:09 a.m., Crusher received two more texts, stating that the patient was in full arrest, and the medical team was awaiting physician instruction. (Appx. 4). Despite the fact that Crusher was not using hands-free phone accessory but instead texting on her 2007 "flip" phone, she responded one minute later instructing the medical team to perform CPR on the patient. Seconds later, at 12:11 a.m., Crusher's vehicle veered off the road and crashed into a utility pole, killing her instantly. *Id*. There were no other cars involved in the accident. *Id*.

Upon investigation, the Washington D.C. Metropolitan Police Department ("MPD") determined that Crusher was driving at an excessive speed while texting on a cell phone that was not equipped with a hands-free accessory. (R. at 4). Despite evidence of two violations, the MPD found Crusher's violation of D.C. Code § 50-1731.04 so egregious that they made no final determination regarding Crusher's excessive speed. (R. at 10). § 50-1731.04 restricts the use of

mobile telephones while operating a motor vehicle in the District of Columbia unless the phone is equipped with a hands-free accessory. (Appx. 4). Captain Jean Luc Picard ("Picard"), husband of the recently deceased Crusher, argued that Crusher was excused from § 50-1731.04 under an exception that allowed the use of a mobile telephone in an emergency situation. *Id*. The MPD rejected Picard's argument and assessed a $100 fine. (Appx. 5).

Following Crusher's death, Picard timely filed two claims for benefits under the Plan: (1) a $350,000 life insurance benefit for Crusher's yearly salary; and (2) a claim for $1,000,000 for Crusher's accidental death in the line of duty. *Id*. While Borg ruled that Picard was entitled to the life insurance benefit, it denied his claim for accidental death benefits under Section 2.2 of the Policy, finding that the loss was "caused by, contributed to by, or resulting from an insured's attempt to commit or commission of a crime." *Id*. Despite Picard's appeal, Borg upheld its initial determination for both claims on September 1, 2018, and invited Picard to initiate arbitration if he sought to appeal through an external process. *Id*.

Picard failed to initiate arbitration. *Id*. Instead, Picard filed suit in the United States District Court for the District of Columbia on October 1, 2018, alleging that he was wrongfully denied accidental death benefits. (R. at 4). Defendant Borg filed a Motion for Summary Judgment, in which Defendant Enterprise Permanente and Defendant Enterprise Life Insurance Plan were joined. (Appx. 5). Defendants argued that the Complaint should be dismissed because the Plaintiff failed to initiate arbitration in accordance with Section 8.2 of the Policy, but should this Court find otherwise, the decision to deny the claim for accidental death benefits was a reasonable application of the "commission of a crime" exemption in Section 2.2 of the Policy. *Id*. Although arbitration was not required, the District Court granted the Motion for Summary Judgment on November 9, 2019, because the Plan administrator's interpretation of the

"commission of a crime" exemption was reasonable. (Appx. 6). The parties filed cross appeals in the United States Court of Appeals for the Thirteenth Circuit. *Id*.

SUMMARY OF THE ARGUMENT

Enterprise willingly offered its employees a welfare benefit plan subject to only one condition — that claims "arising from" or "related to" the Policy must be arbitrated. This Court must review the issue of whether the District Court erred in refusing to dismiss the complaint for failure to arbitrate through the lens of the Federal Arbitration Act ("FAA"). The FAA leaves no place for the District Court to exercise its discretion, mandating that it must compel arbitration when a valid arbitration agreement encompasses the dispute. *United Computer Sys., Inc. v. AT&T Corp.*, 298 F.3d 756, 766 (9th Cir. 2002). Accordingly, the scope of the District Court's review should have been limited to (1) whether a valid arbitration agreement existed; (2) whether that agreement encompassed Plaintiff's claims; and (3) whether Congress intended for the claims to be omitted from the FAA.

Arbitration clauses are generally valid and enforceable. Contract and agency principles govern whether a party is bound to a written arbitration provision, absent a signature. *See Letizia v. Prudential Bache Securities, Inc.*, 802 F.2d 1185, 1187 (9th Cir. 1986). A participant of a welfare benefit plan agrees to be bound by the plan's provisions and is made aware of their obligation through the summary plan description. The same applies to beneficiaries. Additionally, a beneficiary may agree to an arbitration provision through the traditional contract theory of equitable estoppel. When a beneficiary enforces the terms of an agreement for his benefit but refuses to abide by an arbitration clause contained within the agreement, he is bound by the provision. The Plaintiff is required to arbitrate his claims through this principle, as he readily enforced the terms of the Plan when they benefitted him

The arbitration clause in Section 8.2 encompasses the Plaintiff's claims. The language used in the Policy's arbitration provision should be construed as broadly requiring only minimal causal connectivity to the Plan. *See Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir. 1987). In determining whether a claim falls within the scope of an arbitration agreement, legal labels attached to the plan are immaterial. Plaintiff's claims are asserted under ERISA — a statute governing benefit plans — and allege that the Defendant's wrongfully denied him benefits and breached their fiduciary duty. Moreover, relief the Plaintiff seeks is wholly based on receiving benefits from the Plan, in accordance with the fiduciary's interpretation of Section 2.2 of the Policy. Thus, Plaintiff's claims are directly tied to the Plan and Policy and fall within the broad scope of Section 8.2.

Absent an indication that Congress intended for Plaintiff's claims to be excluded from the scope of the FAA, this Court must compel arbitration. *See Am. Express Co. v. Italian Colors, Rest.,* 670 U.S. 228, 233 (2013). Plaintiff's claim for wrongful denial of benefits ("benefit claim") is strictly contractual in nature, requiring only that an arbitrator review the fiduciary's interpretation of "crime" and the factual circumstances concerning Crusher's accident. Congress's command that plan administrators establish an internal claims procedure exhibits its clear intent for parties to abide by agreed upon procedures, such as arbitration, to avoid a high volume of costly suits.

Similarly, Plaintiff's breach of fiduciary duty claim ("statutory claim") is arbitrable. As a general matter, claims alleging violations of federal statutory rights are arbitrable "contrary to congressional command." As six circuits have previously held, neither ERISA's text nor its legislative history lend support for concluding that Congress intended for ERISA to be excluded from the scope of the FAA. Additionally, there is no inherent underlying conflict between

arbitration and ERISA's statutory purpose of protecting employees and contractual rights. Therefore, Plaintiff's statutory rights may be effectively vindicated in an arbitral forum. Accordingly, this Court should compel arbitration in this case.

The language and legislative history of ERISA establishes that an entity that acts as a fiduciary when evaluating claims does not act under a conflict of interest that creates a *per se* abuse of discretion merely because it funds the benefits paid by the plan. An interpretation in the alternative would be substituting judicial opinion for Congress's judgment in determining the regulations under ERISA. ERISA explicitly authorizes an employer or any agent of the employer that is responsible for funding a benefit plan to serve as claim administrator. *See* 29 U.S.C. § 1108(c)(3); § 1002(14)(C). It is therefore clear that Congress, at the time of enacting ERISA, was aware of the potential for a conflict of interest. Consequently, absent any evidence the fiduciary acted improperly, holding a *per se* abuse of discretion solely due to a conflict of interest is improper. *See Pegram v. Herdrich*, 530 U.S. 211, 225 (2000).

Further, it is in the best interest of companies to pay out benefits claims. Individual claims are minute in comparison to the profitability of a company as a whole. *Mers v. Marriott Int'l Grp. Accidental Death & Dismemberment Plan*, 144 F.3d 1014, 1017, 1020 (7th Cir. 1998). Should the company develop a reputation for unreasonably denying benefit claims, its business as a whole will suffer. *See Wright v. R.R. Donnelley & Sons Co. Grp. Benefits Plan,* 402 F.3d 67, 76 (1st Cir. 2005). Lastly, employers offer fringe benefits to attract skilled workers, which they will be unable to do if promised benefits are not paid. *Perlman v. Swiss Bank Corp. Comprehensive Disability Prot. Plan*, 195 F.3d 975, 976, 981 (7th Cir. 1999). Therefore, it is ultimately in Borg's best interest to pay out benefit claims. Here however, because Crusher was violating a condition in the policy, Borg is not required to pay out the claim.

This Court must give deference to Borg's interpretation of the "commission of a crime" exemption and cannot overturn the death benefit denial unless the determination is found to be an abuse of discretion. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 (1989). The standard of review for determining abuse of discretion, as set forth in *Firestone*, is arbitrary and capricious. *Id.* Therefore, the interpretation must simply be supported by facts and "not grounded on any unreasonable basis." *Hancock v. Metro. Life Ins. Co*., 590 F.3d 1141, 1155 (10th Cir 2009) (quoting *Finley v. Hewlett-Packard Co. Employee Benefits Org. Income Prot. Plan*, 379 F.3d 1168, 1176 (10th Cir. 2004)).

Borg's determination that Crusher was exempt from the death benefit is supported by the Washington D.C. Code ("D.C. Code"), the dictionary definition of "crime," and the exemption's purpose to avoid shifting the cost of illegal, self-destructive behavior that could have been avoided with reasonable care. Therefore, Borg's interpretation is well grounded in reason and fact. Additionally, the Plaintiff's contention that society is only beginning to recognize the dangers of distracted driving, that is simply not true. According to the National Safety Council, "at least nine Americans die and 100 are injured in distracted driving crashes" every day. National Safety Council, *April is Distracted Driving Awareness Month*, https://www.nsc.org/road-safety/get-involved/distracted-driving-awareness-month (lasted visited Jan. 10, 2020). It is in the interest of the American people to hold distracted drivers accountable, whether that means a suspended license, a hefty fine, or the denial of an insurance claim.

For the above reasons, the Court should affirm the decision of the District Court, and grant Defendants' Motion for Summary Judgement.

ARGUMENT

I) AS A THRESHOLD MATTER, THE DISTRICT COURT ERRED IN FAILING TO DISMISS THE COMPLAINT BECAUSE SECTION 8.2 OF THE POLICY MANDATES ARBITRATION.

The District Court erred in granting summary judgment for the motion to compel arbitration because it failed to properly analyze Picard's complaints under the FAA. Ensuring that private arbitration agreements are enforced according to their terms; Congress designed the FAA "to make arbitration agreements as enforceable as other contracts." *See Prima Paint Corp. v. Flood & Conklin Mtg. Co.* 388 U.S. 279, 294 (2002). To do so, Section 2 of the FAA demands that arbitration agreements "be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This broad liberal policy in favor of arbitration has been substantiated by the Supreme Court, holding that matters concerning the scope of arbitrable issues must be resolved in favor of arbitration. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24 (1983); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 512 (1974).

To correctly find that Picard's claims are arbitrable pursuant to the FAA, this Court must first determine that a valid arbitration agreement encompassed the dispute at issue. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). This court should find that Crusher and Picard agreed to Section 8.2 of the Policy, which unambiguously encompasses the alleged wrongful denial of benefits. Accordingly, the District Court's authority is severely restricted by the FAA and it must compel arbitration. *See Byrd*, 470 U.S. at 218; *United Computer Sys., Inc.,* 298 F.3d at 766.

A) **Section 8.2 of the Policy is a Valid Arbitration Agreement That Encompasses Plaintiff's Claims.**

This Court should reverse the District Court's finding that compelling arbitration in this case would be "at odds with the values of arbitration," merely because neither Crusher nor Picard negotiated or physically signed the document. Instead, this Court should rely on ordinary principles of contract law and the all-encompassing plain language of Section 8.2 to properly find that Picard's claims are arbitrable under the FAA.

i) **Neither the Plan nor the Policy is an Employment Contract**

Although the text of the FAA excludes employment contracts from its scope, this exception has been construed extremely narrowly. *See Am. Postal Workers Union v. United States Postal Serv*., 823 F.2d 466, 473 (11th Cir. 1987); (limiting the scope of the § 1 which exempts from the FAA "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" to employment agreements of postal workers); *Pietro Scalzitti Co. v. International Union of Operating Eng'rs, Local No. 105*, 351 F.2d 576, 580 (7th Cir. 1965) (applying the § 1 exclusion to employment agreements of truck drivers in interstate commerce). In *Gilmer v. Interstate/Johnson Lane Corp.,* the Supreme Court mandated an arbitration clause for a claim arising under the Age Discrimination in Employment Act ("ADEA"), as it found it did not amount to an "employment contract." 500 U.S. 20, 35 (1991). Similarly, in *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith*, the court enforced an arbitration clause finding that the contract was not an employment contract because it did not implicate workplace conditions or other topics ordinarily covered by employment contracts. 7 F.3d 1110, 1120 (3rd Cir. 1993) (finding that welfare plans were not employment contracts merely because they protect employees).

The Plan is not an employment contract and should accordingly be interpreted under the FAA. *Pritzker,* 7 F.3d at 1120. Courts have narrowly construed the § 1 exclusion to include only the employment contracts of those engaged in interstate commerce such as the shipping and delivery of goods. *See Am. Postal Workers*, 823 F.2d at 473; *Pietro Scalzitti Co.*, 351 F.2d at 580. Although Enterprise is present in multiple states, Dr. Crusher worked as a doctor in the same hospital for ten years and is not included in this narrow exemption. (Appx. 1).

Moreover, the Plan is not an employment contract merely because it arises in an employment context. *See Gilmer,* 500 U.S. at 35. Similar to *Pritzker,* the Plan does not implicate any workplace conditions or terms of employment and covers no topics ordinarily included in employment contracts — the Plan solely concerns benefits. *Pritzker,* 7 F.3d at 1120. Accordingly, rather than being a mandatory employment contract, the Plan is an optional benefit that protects employees. *Id.* Additionally, employees are enrolled in the Plan after ninety days of full-time work, not their initial start date. (Appx. 1).

ii) **Both Crusher and Picard Agreed to be Bound by Section 8.2 of the Policy.**

The mere fact that a party did not sign an arbitration agreement does not prohibit that party from being bound by its terms. *Fisser v. International Bank*, 282 F.2d 231, 233 (2d Cir. 1960). As a result of the strong federal policy favoring arbitration, a party's actions may bind him to a written arbitration provision, absent his signature, through contract and agency principles. *See e.g., Letizia*, 802 F.2d at 1187; *Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923, 938 (3d Cir. 1985); *Interocean Shipping Co. v. National Shipping & Trading Corp.*, 523 F.2d 527, 539 (2d Cir. 1975).

An individual's voluntary participation in a plan constitutes an agreement to be bound by the plan's provisions in effect at that time. *Dorman v. Charles Schwab Corp.,* 780 Fed. App'x.

510, 512 (9th Cir. 2019); *Chappel v. Lab. Corp.,* 232 F.3d 719, 723-24 (9th Cir. 2000) (finding that an employee was bound by an arbitration clause that he was previously unaware of, solely because he participated in the plan); *Hoefel v. Atlas Tack Corp.,* 581 F.2d 1, 5 (1st Cir. 1978) (*quoting Rochester Corp. v. Rochester*, 450 F.2d 118, 120-21 (4th Cir. 1971) (explaining that an employer offering a pension plan is a unilateral contract, fulfilled by an employee's performance for a requisite amount of time, and thus benefits are not a gratuity)); *Smith v. Aegon Companies Pension Plan*, 769 F.3d 922, 931 (6th Cir. 2014) (applying a venue selection clause to plaintiff's claim because he continually participated in the plan).

Pursuant to the theory of equitable estoppel, a nonsignatory is estopped from refusing to comply with an arbitration clause when he has maintained that other provisions of the contract should be enforced to benefit him. *See Letizia*, 802 F.2d at 1187. Such an obligation arises specifically when a nonsignatory embraces a contract and subsequently attempts to repudiate the arbitration clause. *See E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 200 (3d Cir. 2001); *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999) (binding a nonsignatory to a contract when it received the benefit of lower insurance rates); *Legacy Wireless Services, Inc. v. Human Capital, L.L.C.*, 314 F. Supp. 2d 1045, 1056-57 (D. Or. 2004) (finding that a nonsignatory directly benefited from an agreement by receiving fees); *but see Comer v. Micor, Inc*., 436 F.3d 1098, 1102 (9th Cir. 2006) (finding that the plaintiff was "simply a participant in trusts managed by others for his benefit" because he did not seek to enforce the terms of the management agreement nor otherwise take advantage of them prior to the lawsuit).

Although a "summary plan description" is not itself the terms of a plan, it is a statutorily established means of communicating the plan's terms to participants and beneficiaries. *CIGNA*

Corp. v. Amara, 563 U.S. 421, 438 (2011). The summary plan description must be accurate and sufficiently comprehensive to reasonably inform plan participants and beneficiaries of their rights, obligations, and benefits that arise under the plan itself. *See* ERISA § 102(b), 29 U.S.C. § 1022(b); *Araujo v. Kraft Foods Global, Inc.*, 387 Fed. App'x. 212, 218 (3d Cir. 2010).

Section 8.2 of the Policy is a valid arbitration agreement that binds both Crusher and Picard. The District Court's rejection of the Policy's arbitration clause merely because Crusher and Picard did not negotiate or sign it grossly disregards the strong federal policy favoring arbitration. (Appx. 7). It has been repeatedly noted that contract principles govern whether an arbitration clause is enforceable. *See Letizia*, 802 F.2d at 1187; *Comer,* 436 F.3d at 1102. Thus, in determining whether Crusher and Picard are bound by the clause, it is immaterial that the District Court sees the Policy as only "funding mechanism" for claims arising under ERISA. *Id.* (Appx. 7).

Crusher consented to the arbitration clause in Section 8.2 by voluntarily participating in the Plan. (Appx. 1); *see Chappel,* 232 F.3d at 723-24. Although automatically enrolled after working full-time for ninety consecutive days, Crusher worked at Enterprise and participated in the Plan for ten years, declining to ever opt out. (Appx.1). Moreover, the arbitration clause was explicitly stated in the summary plan description, which Enterprise was statutorily required to distribute, to ensure that Crusher was aware of her obligations and rights. (Appx. 3); *see* 29 C.F.R. § 2520.104-1; *Araujo,* 387 Fed. App'x. at 218. Accordingly, this Court must find that Crusher's voluntary participation in the Plan after being informed of Section 8.2's arbitration clause created a valid agreement.

As Crusher's beneficiary, Picard is similarly bound to Section 8.2 of the Policy, as Enterprise is statutorily required to furnish a copy of the summary plan description to

beneficiaries as well. (Appx. 6); *see* ERISA § 102(b); 29 U.S.C. §1022(b). Should this Court decline to find a valid agreement, even though Section 8.2 was expressly stated within the summary plan description informing participants and beneficiaries of their rights and obligations, the promise of inescapable and impending litigation for each individual benefit claim will deter employers from providing such plans.

Picard seeks to reap the benefits of the Plan, while refusing to honor standard provisions that fail to satisfy his liking. Should this Court find that Picard's knowledge of Section 8.2 and his role as Crusher's beneficiary are not sufficient to form an agreement, it should find that equitable estoppel binds Picard to Section 8.2 of the Policy. *See Letizia*, 802 F.2d at 1187. Unlike the plaintiff in *Com*er, who did not enforce or take advantage of the terms of the agreement, Picard enforced the terms of the Plan and Policy when convenient, filing for both life insurance and death benefits. (Appx. 5); *Comer*, 436 F.3d at 1102. Picard filing for and profiting $350,000 from Crusher's life insurance benefit is analogous to the plaintiff in *Tencara,* who received lower insurance rates. (Appx. 5). *Tencara*, 170 F.3d at 353. Accordingly, similar to the plaintiff in *Tencara,* who was bound by the contract after receiving a benefit, this Court must find that through equitable estoppel, Picard agreed to Section 8.2 of the Policy. *Tencara*, 170 F.3d at 353. Should this Court find otherwise, its precedent will allow beneficiaries to exploit the terms and procedures of welfare benefit plans.

iii) **Plaintiff's Complaints are Squarely Within the Scope of Section 8.2's Arbitration Clause.**

Section 8.2 entirely encompasses Picard's claims for wrongful denial of benefits. In light of the FAA's strong federal policy favoring arbitration, The Supreme Court has found that any issues concerning the scope of arbitrable claims must be resolved in favor of arbitration. *See*

Moses, 460 U.S. at 24-25. In the present case, this Court must focus on the particular language of Section 8.2, which establishes the scope of the arbitration agreement.

Courts consistently opine that arbitration clauses that include the language "arising out of" and "relating to," is all-encompassing. *See Chiron Corp. v. Ortho Diagnostic Sys. Inc.*, 207 F.3d 1126, 1131 (9th Cir. 2000); *Collins & Aikman Prods. Co. v. Building Sys., Inc.*, 58 F.3d 16, 20 (2d Cir. 1995) (classifying "any claim or controversy arising out of or relating to" as the paradigm of a broad clause). Although not defined within ERISA, courts interpreting arbitration clauses have broadly construed the phrase "arising out of," to mean "originating from," "growing out of," or "flowing from." *Williams v. Imhoff*, 203 F.3d 758, 765-66 (10th Cir. 2000). Claims "arising out of" need only minimal causal connectivity, regardless of the legal label attached. *See id.; Genesco*, 815 F.2d at 846. Even more so, the term "relating to" requires only that the claim have a significant relationship to the plan. *DW Indus., Inc. v. Dentsply Int'l, Inc.*, 171 F. App'x 92, 92-93 (9th Cir. 2006).

This Court must find that Picard's ERISA claims fall within Section 8.2's broadly constructed arbitration clause. Section 8.2 of the Policy unambiguously provides that: "Any controversy or claim arising out of or relating to this policy, or breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Employment Arbitration Rules." (Appx. 2). Picard's claims undoubtedly "arise out of" and "relate to" the Plan because the relief Picard seeks relies upon and is payable in accordance with the terms of the Policy. (Id.) Thus, Picard's dispute, while seeking action under the Plan, ultimately demands that the Court interpret the Policy.

Picard's benefit claim asserts that he was wrongly denied benefits owed to him by the Plan pursuant to the crime exclusion contained in Section 2.2 of the Policy. (Appx. 1, 2). The

sole basis for Picard's claim is the plan itself. Accordingly, Picard's claim has not only a minimal causal relationship to the Plan and Policy but is wholly dependent on their interpretation. *See Imhoff*, 203 F.3d at 765-66.

Additionally, Picard's statutory claim asserts that there was an alleged breach of duty owed to him, resulting from the interpretation of Section 2.2 of the Policy. (R. 1, 2). Any resolution of Picard's claim would require direct examination of Section 2.2 and undoubtedly has a significant and direct relationship to the Policy. *See Dentsply Int'l, Inc.*, 171 F. App'x at 92-93.

Both of Picard's claims arise directly out of and relate to the terms of Section 2.2 of the Policy. (R. 2, 7). Additionally, resolution of either of these claims requires analysis of the terms of Section 2.2 itself. Resultantly, both of Picard's claims fall within the scope of Section 8.2's arbitration agreement.

B) **Plaintiff's Claims are Otherwise Arbitrable Pursuant to the FAA.**

Both of Picard's claims are governed by, and arbitrable pursuant to, the FAA's broad liberal policy in favor of arbitration. Picard's claim under ERISA § 502(a)(1)(B) is a "classic" case for arbitration because it focuses strictly on interpreting the terms of the Policy and factual determinations. *Adams v. Gould, Inc.,* 687 F.2d 27, 32 (3d Cir. 1982). Similarly, Picard's statutory claim under ERISA § 502(a)(3) is arbitrable because Congress failed to explicitly exclude ERISA from the scope of the FAA. *See Shearson/American Express v. McMahon,* 482 U.S. 220, 227 (1987).

i) **Plaintiff's Benefit Claim Must Be Arbitrated.**

Claims for wrongfully denied benefits are contractual in nature, rendering them appropriate for arbitration. *See Chappel v. Laboratory Corp. of America*, 232 F.3d 719, 724-25 (9th Cir. 2000); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 744 (1981)

(agreeing that contractual claims arising from a collective bargaining agreement may be arbitrated). A plan participant or beneficiary may bring a civil action to recover benefits, enforce rights, or clarify rights to future benefits under the terms of the benefit plan. ERISA § 502(a)(1)(B). Claims alleging a wrongful denial of benefits frequently concentrate on the plan administrator's interpretation of the terms of the plan or factual issues concerning eligibility for the denied benefits, making them a "classic case for arbitration." *See Adams,* 687 F.2d at 32; *see, e.g., Viggiano v. Shenango China Div. of Anchor Hocking Corp.,* 750 F.2d 276, 277 (3d Cir. 1984).

Section 503 of ERISA explicitly requires that employee benefit plans include an established claims procedure, evidencing Congress' unmistakable intent that parties abide by contractually agreed upon administrative remedies. *Amato v. Bernard*, 618 F.2d 559, 567 (9th Cir. 1980). The institution of such administrative claim-resolution furthers Congress's goal of minimizing the volume of lawsuits challenging denials of plan benefits, eliminating frivolous lawsuits, and lowering the cost of claims settlements. *Id.* Attempting to "strike a balance between providing meaningful reform and keeping costs within reasonable limits," these procedures demonstrate a congressional awareness of costly litigation and the need for an efficiently operating private insurance system. (1974) U.S. Code Cong. & Admin. News, pp. 4670, 4682; *Taylor v. Bakery & Confectionary Union & Industry International Welfare Fund*, 455 F. Supp 816, 820 (E.D.N.C. 1978).

Here, Picard's benefit claim is dependent upon two contractual functions: 1) the interpretation of the term "crime;" and (2) the factual determination of whether Crusher was engaged in a crime at the time of her death. (R. 7, 8); *Chappel*, 232 F.3d at 722-24. Moreover, Picard must abide by the agreed upon claims procedure which entrusts Enterprise and Borg with

the right and responsibility to manage the Plan and interpret its terms. (Appx. 2, 3). When challenging this determination, the Policy merely instructs that Picard must submit his claim to arbitration, a forum that regularly handles similar claims. (Appx. 2); *Amato,* 618 F.2d at 567. The "realistic limits" that the District Court wishes to place on arbitration would effectively render Congress's concerns a reality and result in an influx of costly and frivolous lawsuits at the expense of employers. (R. 6); *see Taylor*, 455 F. Supp. at 820.

ii) **An Arbitral Forum Allows for Proper Vindication of Plaintiff's Statutory Claim.**

Congress enacted the FAA requiring that courts "rigorously enforce agreements to arbitrate," to reverse centuries of judicial hostility towards arbitration, rooted in the misconception that arbitration weakened substantive legal protections afforded to complainants. *See Moses,* 460 U.S. at 24-25; *McMahon,* 482 U.S. at 227; *AT&T Mobility LLC v. Concepcion,* 563 U.S. 1740, 1745 (2011). The presumption of arbitrability created by the FAA warrants no exception when a claim is founded on statutory rights. *Rodriguez de Ouijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 481 (1989); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,* 473 U.S. 614, 627 (1985).

The Supreme Court has continually stressed that courts must enforce agreements to arbitrate federal statutory claims absent a "contrary congressional command." *Am. Express Co*, 670 U.S. at 233. The party opposing arbitration bears the burden of showing that Congress unmistakably intended to preclude a waiver of judicial remedies for the statutory right at issue. *McMahon,* 482 U.S. at 227. This intent must be deduced from (1) the statute's text; (2) the statute's legislative history; or (3) an "inherent conflict between arbitration and the statute's underlying purposes." *Id.*

Of the six circuits to consider the issue, none found that Congress intended to prevent a waiver of judicial remedies for statutory violations of ERISA. *See Imhoff*, 203 F.3d at 767 (agreeing that Congress did not prohibit ERISA claims from arbitration); *Kramer v. Smith Barney,* 80 F.3d 1090, 1084 (5th Cir. 1996) (concluding that Congress did not intend to preclude statutory ERISA claims from the breadth of the FAA); *Pritzker*, 7 F.3d at 1118; *Bird v. Shearson Lehman/Am. Express, Inc.,* 926 F.2d 116, 122 (2d Cir. 1991); *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.,* 847 F.2d 475, 477 (8th Cir. 1988); *see also* G. Richard Shell, *ERISA and Other Federal Employment Statutes: When is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 TEX. L. REV. 509, 572-73 (Feb. 1990) ("A careful review of ERISA discloses that if Congress intended anything with respect to enforcement of the FAA, it intended to preserve the full application of the FAA in ERISA cases"). This Court should follow suit.

Here, the District Court failed to rigorously enforce the Policy's arbitration clause despite Picard's failure to demonstrate that Congress unmistakably intended to exclude ERISA from the breadth of the FAA.

(1) **The Text of ERISA Offers No Support for Precluding the Enforcement Arbitration Agreements.**

When Congress seeks to override the presumption of arbitrability instilled by the FAA, it must do so unambiguously. *See McMahon,* 482 U.S. at 227; *Gilmer,* 590 U.S. at 29. However, the text of ERISA remains entirely silent on the subject of arbitration, speaking only to Congress's desire that plaintiffs be provided ready access to federal courts. *Bird,* 926 F.2d at 119; *Pritzker,* 7 F.3d at 1119; *Kramer,* 80 F.3d at 1084.

Statutory provisions that vest exclusive jurisdiction in federal courts do not establish a congressional command to prohibit arbitration. *See Mitsubishi,* 473 U.S. at 627 (finding that claims under the antitrust act were arbitrable, despite federal courts retaining exclusive

jurisdiction); *Sulit,* 847 F.2d at 477 (refusing to accept that Congress intended to override the FAA by granting ERISA plaintiffs ready access to federal courts). Merely permitting access to a judicial forum is insufficient to demonstrate Congress' intent that ERISA be exempt from the FAA — such provisions state only what judicial forum is available rather than deeming an arbitral forum unavailable. *See Bird,* 926 F.2d at 119; *Rodriguez,* 490 U.S. at 482-83 (compelling arbitration despite the Securities Exchange Act including similar jurisdictional language). However, in the existence of a valid binding arbitration clause, a claimant waives the right to pursue claims exclusively in federal courts. *McMahon,* 482 U.S. at 227-29.

Here, the District Court inappropriately disregarded ERISA's statutory terms. ERISA's plain language is wholly silent on the matter of arbitration, providing no support for concluding that Congress felt Picard's statutory claim must be resolved in a judicial forum. *See Bird,* 926 F.2d at 119. While the plain language of ERISA does bestow federal courts with exclusive jurisdiction, this provision merely identifies a judicial forum provided to Picard, had he not voluntarily waived his right to a judicial remedy per Section 8.2 of the Policy. (R. at 7); *See Rodriguez,* 490 U.S. at 482-83; *McMahon,* 482 U.S. at 227-29.

(2) **ERISA's Legislative History Evinces No Congressional Intent to Prohibit Binding Arbitration.**

ERISA's legislative history presents no justifiable basis for concluding that Congress intended to exempt statutory claims from an arbitral forum. *Pritzker,* 7 F.3d at 1119; *Bird,* 926 F.2d at 119 (finding no evidence in ERISA's legislative history to imply that Congress intended to preclude a waiver of judicial forum). In *Gilmer,* the Supreme Court reasoned that if the substantive protections of the Age Discrimination in ADEA were protected against waiver of judicial forum, Congress would have explicitly amended the statute to reflect its intent. 500 U.S. at 29. Similarly, in *Pritzker,* the Third Circuit found that nothing in ERISA's legislative history

exempts it from the FAA — correcting its previous reliance on legislative statements that Congress intended for ERISA to provide a consistent source of law to assist those involved in benefits plans. *See* 7 F.3d at 1119; S. Rep. No. 127, 93d Con., 1st Sess. 29, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4838, 4865. The court instead respected the Supreme Court's conclusion that general statements of legislative purpose do not indicate congressional intent to preclude arbitration and accordingly enforced a binding arbitration agreement. *See Pritzker* 7 F.3d at 1119 (citing *Gilmer,* 500 U.S. at 38).

Similar to its text, ERISA's legislative history falls short of establishing that Congress unmistakably intended that Picard's claim be heard in a judicial forum. *Pritzker,* 7 F.3d at 1119. Absent a contrary indication, such as Congress explicitly amending ERISA, the only plausible conclusion is that the statute's silence about arbitration signifies an approval of arbitral forums for Picard's statutory claim. *See Gilmer,* 500 U.S. at 29. This Court must consequently find that ERISA's legislative history supports enforcing Section 8.2 of the Policy rather than placing "limits" on arbitration. (R. 6)*; see Pritzker,* 7 F.3d at 1119.

(3) **ERISA's Underlying Purpose Does Not Conflict with Binding Arbitration Agreements.**

Courts agree that ERISA was enacted "to promote the interests of employees and their beneficiaries in employee benefit plans," and "to protect contractually defined benefits." *Firestone*, 489 U.S. at 113 (allowing parties to arbitrate their dispute is not inconsistent with ERISA's purposes). A statute's underlying purpose conflicts with arbitration when an arbitral forum is "inadequate to protect the substantive rights at issue." *See McMahon,* 482 U.S. at 229; *Rodriguez,* 490 U.S. at 486 (mandating binding arbitration for substantive rights arising under the Securities Act because investors' rights were still protected in an arbitral forum). Notably, ERISA's remedial nature alone is not sufficient to demonstrate that Congress intended to

preclude arbitration. *See Firestone,* 489 U.S. at 108; *Bird,* 926 F.2d at 121 (quoting *Mitsubishi,* 473 U.S. at 636-37 (subjecting antirust claims to arbitration because the legislation's remedial role was not compromised)). Accordingly, a binding arbitration agreement will be enforced "so long as the prospective litigant effectively may vindicate his statutory cause of action in the arbitral forum." *See Mitsubishi,* 473 U.S. at 637; *Gilmer,* 500 U.S. at 28.

Arbitrators are fully competent and capable of enforcing federal statutes. *Mitsubishi,* 473 U.S. at 626-27; *Rodriguez,* 490 U.S. at 482-83; *McMahon,* 482 U.S. at 227 (declaring that arbitrators can interpret and apply federal statutes); *but see Amaro v. Cont'l Can Co*., 724 F.2d 747, 752 (9th Cir. 1984) (citing *Alexander v. Gardner-Denver Co*., 415 U.S. 36, 57 (1974); *Barrentine*, 450 U.S. at 752) (incorrectly stating that arbitration clauses are frequently not enforced because arbitrators know only "the law of the shop," and are "powerless to grant a broad range of relief"). As noted by the Supreme Court, "we are well past the time when judicial suspicion of the desirability of arbitration and the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *See Mitsubishi,* 473 U.S. at 626-27. Most recently, the Ninth Circuit was forced to reconsider its long history of skepticism towards arbitration. *See Dorman v. Charles Schwab*, 934 F.3d 1107, 1111 (9th Cir. 2018) (compelling arbitration of a breach of fiduciary duty under ERISA). As arbitration becomes more prevalent, commercial arbitration institutions have fortified their procedures to better safeguard the substantive rights of parties. *See* G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration,* 35 UCLA L. REV. 623, 628 (1998) (observing that the American Arbitration Association has strengthened its procedural and evidentiary rules).

Arbitration allows for the satisfactory vindication of statutory rights. *See Gilmer*, 500 U.S. at 28; *Bird,* 926 F.2d at 122; *but see Barrentine*, 450 U.S. at 752 (declining to enforce the arbitration clause of a collective bargaining agreement in plaintiff's wage and hour dispute, brought under the Fair Labor Standards Act ("FLSA"), because waiving FLSA rights would "nullify the purposes of the statute"). Pursuant to a mandatory arbitration agreement, the Supreme Court in *Gilmer* compelled arbitration of an employee's age discrimination claim brought under the ADEA because the statute's social policies were protected by knowledgeable arbitrators. *See Gilmer,* 500 U.S. at 23; 28.

Despite strong Supreme Court precedent*,* the Second Circuit initially refused to compel arbitration of a beneficiary's ERISA breach of fiduciary duty claim when a trustee entered into an arbitration agreement with a fiduciary service provider. *Bird v. Shearson Lehman/Am. Express* 871 F.2d 292, 296-97 (2d Cir. 1989). Granting certiorari, the Supreme Court vacated and remanded the case "for further consideration in light of its most recent commercial arbitration case, *Rodriguez*." *See Shearson Lehman/Am. Express, Inc. v. Bird,* 493 U.S. 884, 885 (1989). Following the Supreme Court's specific instructions, the Second Circuit subsequently concluded that the FAA requires courts to enforce agreements to arbitrate breach of fiduciary duty claims under ERISA. *Bird,* 926 F.2d at 118-19.

Although the Supreme Court has consistently compelled arbitration for 25 years, it has been hesitant to require arbitration for all nonwaivable statutory rights. *See Alexander*, 415 U.S. at 39 (finding that labor arbitrators were not authorized to resolve plaintiff's Title VII claims). The plaintiff in *Alexander* previously complied with an arbitration clause for contractual claims arising out of a collective bargaining agreement negotiated by the union. *Id.* However, the Court found that prior arbitration did not bar the plaintiff from subsequently filing a Title VII claim and

asserting his non-waivable statutory rights because, although dependent on the same facts, the rights asserted by the plaintiff were independent from his rights under the collective bargaining agreement. *Id.*

Here, the basis for the District Court's judgement — that arbitration is a sub-optimal resolution for statutory rights — is not only contradictory to current Supreme Court precedent but is entirely undermined by the existence of the FAA. (R. 6-7); *See Mitsubishi,* 473 U.S. at 626-27; *Rodriguez,* 490 U.S. at 482-83; *McMahon,* 482 U.S. at 227. The District Court's opposition towards arbitration is the exact type of judicial hostility that the FAA was enacted to eradicate. (R. 6); *Mitsubishi,* 473 U.S. at 626-27. Arbitrators no longer know "only the law of the shop," but are fully competent and capable of interpreting and applying complex federal statutes. (Id.)*; see Amaro*, 724 F.2d at 752 (citing *Alexander*, 415 U.S. at 57; *McMahon,* 482 U.S. at 227. Similar to the Ninth Circuit in *Dorman*, this Court must overcome its skepticism of arbitration and compel arbitration of Picard's statutory claim. *Dorman,* 934 F.3d at 1111. Although the falsehood that arbitrators are "powerless to grant a broad range of relief" has been largely dissipated, the District Court's reliance on it is nevertheless misplaced, as the relief Picard seeks is limited by the nature of his claim itself. *Id.*; *see Amaro*, 724 F.2d at 752 (citing *Alexander,* 415 U.S. at, 57).

As six circuits previously have, this Court should accept that an arbitral forum properly protects ERISA's underlying purpose of "promoting the interests of employees and their beneficiaries in employee benefit plans" and "protecting contractually defined benefits." (R. 7); *see Firestone,* 489 U.S. at 108; *Pritzker,* 7 F.3d at 1118; *Bird,* 926 F.2d at 122; *Sulit,* 847 F.2d at 477; *Kramer,* 80 F.3d at 1084; *Imhoff,* 203 F.3d at 767. In *Rodriguez,* the Supreme Court enforced a binding arbitration agreement under the Securities Act because it did not affect the

statue's underlying purpose of protecting investors from possible abuses in the securities industry. *See* 490 U.S. at 486. Recognizing the substantial parallels between the underlying purposes of the Securities Act and ERISA, this Court should find that if arbitration adequately protects individual's interests under the Securities Act, it will likewise protect analogous interests under ERISA. *See id.*

The District Court's concern that arbitration will not protect Picard's rights is misplaced. Unlike *Barrentine,* where the Court found that allowing an individual to waive or contract away the right to a minimum wage would effectively nullify the statute's congressional purpose to achieve "a uniform national policy guaranteeing compensation for all employees," ERISA does not impose an affirmative duty on employers to offer welfare benefit plans. 450 U.S. at 752. Instead, the purpose of ERISA is to protect an employee's contractual rights — a purpose that is not undermined by arbitration. *See Firestone,* 489 U.S. at 108. Furthermore, although employers that offer plans must comply with ERISA's standards, the substance of plans and policies are unique to each employer. Thus, the non-waivable nature of the wage and hour dispute in *Barrentine* is wholly distinguishable from Picard's statutory claim, which arises out of a plan voluntarily offered by Enterprise and voluntarily entered into by participants and beneficiaries. *See id.* Should this Court refuse to honor arbitration agreements, employers may be largely dissuaded from offering employees benefit plans in the future due to an inability to rely on a plan and policy's contractual nature. Moreover, the American Arbitration Association's strengthened procedural and evidentiary rules will ensure that Picard's rights are effectively vindicated in a fair proceeding. *See* Shell, *Res Judicata*, *supra*, at 20.

Although the Supreme Court has not expressly ruled on whether statutory ERISA claims are arbitrable, its decision to remand *Bird,* specifically directing the Second Circuit to reconsider

in light of *Rodriguez,* implicitly signals that statutory ERISA claims like Picard's should be arbitrated pursuant to the FAA. *Bird,* 926 F.2d at 118-19. This view is bolstered by *Gilmer,* where the plaintiff was required to pursue his age discrimination claim in an arbitral forum, pursuant to an arbitration clause. *See* 500 U.S. at 23, 28. If an employee can contract away his rights to litigate an age discrimination claim, it should follow that Picard's statutory claim, which arose from a contract itself, may be properly defended through arbitration. *See id.*

Although the Court declined to compel the plaintiff in *Alexander* to arbitrate his Title VII claim, important factual distinctions differentiate *Alexander* from the present case. *See* 450 U.S. at 39. Unlike *Alexander*, which examined the issue of whether an individual is barred from asserting a statutory right after previously engaging in arbitration, this Court must determine the enforceability of a binding arbitration agreement. *Id.*; (Appx. 6). Moreover, the arbitration clause in *Alexander* arose out of a union negotiated collective bargaining agreement, whereas Picard's claim arises from an employee sponsored welfare benefit plan. (R. 1); *id.* Based on this distinction, the Court in *Alexander* emphasized its concern about the union's views and interests conflicting with the individuals, resulting in the individual's rights not being properly protected. *Id.* Here, although Crusher and Picard did not negotiate the terms of the agreement themselves, they knowingly and voluntarily participated in the Plan after the summary plan description informed them of the arbitration clause. (Appx. 3); (R. 6). Moreover, no conflict of interest arises in regard to Picard's rights being properly represented, as neither the Plan, Enterprise, nor Borg would represent him in the arbitral proceedings.

II) IN THE ALTERNATIVE, IF ARBITRATION IS NOT MANDATORY, THE DISTRICT COURT SHOULD BE AFFIRMED ON THE MERITS BECAUSE CRUSHER WAS COMMITTING A CRIME AT THE TIME OF HER DEATH, FOREFEITING THE DEATH BENEFITS.

ERISA governs employee welfare benefit plans that are created or maintained by an employer for the benefit of its employees. 29 U.S.C. § 1002(1). ERISA does not regulate the substance of the benefit plans; rather, employers are free to provide as many or as few benefits as they wish. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985) (ERISA does not "regulate the substantive content of the benefit plans."). Therefore, employers may exclude benefits for certain conduct, such as the "commission of a crime," in order to avoid passing the costs of illegal, self-destructive conduct to other participants.

ERISA additionally provides a cause of action for a plan participant to seek judicial review of an administrator's benefits determination. 29 U.S.C. § 1132(a)(1)(B). ERISA's enforcement scheme represents a "'careful balancing' between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 215 (2004) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987)). Included in this "careful balancing," is the presence of a conflict of interest. *Dedeaux*, 481 U.S. at 54. However, Plaintiff bears the burden of proving "the existence of the conflict" and proving "that any such conflict jeopardized the administrator's impartiality." *Wolberg v. AT&T Broadband Pension Plan*, 123 F. App'x 840, 845 (10th Cir. 2005). Here, as a result of the Plaintiff failing to carry this burden, a possible conflict of interest carries no weight in the equation.

There being no conflict, this Court's determination rests upon statutory interpretation. Because the Plan provides discretionary authority, this Court cannot ignore the plan language but must instead defer to the administrator's decision, and overturn only for abuse of discretion.

Firestone, 489 U.S. at 115. For these reasons, this Court should affirm the decision of the District Court, and grant Defendants' Motion for Summary Judgement.

A) **Under the *Firestone* analysis, conflict of interest is weighed as a factor in determining abuse of discretion.**

Under ERISA, a fiduciary has the authority to control and manage the operation and administration of a plan and must provide a full and fair review of claim denials. 29 U.S.C. § 1002(21)(A)(i). However, ERISA is silent concerning the appropriate standard of review for actions that challenge benefit eligibility determinations. Consequently, in *Firestone*, the Supreme Court determined the appropriate standard of judicial review for benefit determinations made by fiduciaries and plan administrators. *Firestone*, 489 U.S. at 108-09, 111-13, 115; *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105, 109 (2008). The Court determined that (1) courts should be guided by principles of trust law; (2) principles of trust law require courts to review a denial of plan benefits under a *de novo* standard unless the plan provides to the contrary; (3) where the plan provides to the contrary by granting the administrator or fiduciary discretionary authority to determine eligibility for benefits, trust principles make a deferential standard of review appropriate; and (4) if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a factor in determining whether there is an abuse of discretion. *Id*.

Here, the terms of the Plan clearly stipulate that Borg has discretionary authority to interpret the plan, including the authority to determine whether a claimant is entitled to benefits. (Appx. 2). Therefore, according to *Firestone*, trust principles make a deferential standard of review appropriate. 489 U.S. at 102. Although Borg may be operating under a conflict of interest by both funding and administering the Plan, it had no effect on Borg's determination to deny Crusher's benefits claim. (Appx. 2).

i) **Conflict of Interests Should Not be Given Undue Weight.**

Congress and the courts have made clear that a fiduciary's responsibility for paying the claims that it reviews, standing alone, does not create a *per se* abuse of discretion. *Pegram,* 530 U.S. at 225. Therefore, because the Plaintiff presented no evidence that Borg was biased, the conflict of interests holds no weight on review.

ERISA authorizes an employer, or any agent of the employer that is responsible for funding a benefit plan, to serve as a claim administrator. *See* 29 U.S.C. § 1108(c)(3); § 1002(14)(C). Congress expressly authorized employers to fund and administer plans, demonstrating its awareness and approval of such arrangements when enacting ERISA. *See* Staff of Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., *Statistical Analysis of Major Characteristics of Private Pension Plans* at *27* (Comm. Print 1972) (finding that sixty percent of participants in private pension plans belonged to employer-administered plans). Consequently, this reflects Congress's judgment that a fiduciary's interest in a benefit determination does not alone result in an abuse of discretion. *Id.*; *see Hays v. Provident Life & Acc. Ins. Co.*, 623 F. Supp. 2d 840, 843 (E.D. Ky. 2008) (while a plan administrator's dual role in both evaluating and paying benefit claims creates a *per se* conflict of interest, that conflict of interest does not constitute a *per se* abuse of discretion).

The potential conflict that arises when administrators retain the dual role of both paying and reviewing claims is just one factor for courts to consider when determining whether an abuse of discretion exists. *Firestone*, 489 U.S. at 115; *Glenn*, 554 U.S. at 108; RESTATEMENT (SECOND) OF TRUSTS § 187, cmt. d (1959). The term "factor" implies that when a judge reviews the lawfulness of benefit denials, several different factors should be considered, of which a conflict of interest is merely one. *Id*.

A plan administrator is presumed to have acted neutrally unless there is specific evidence of actual bias. In *Mers*, a fiduciary's decision to deny benefits to the plaintiff was upheld after the plaintiff claimed that the defendant abused its by both funding the plan and acting as plan administrator. *Mers*, 144 F.3d at 1017, 1020. The Court reasoned that the impact of granting or denying benefits in one case is miniscule compared to the defendant's yearly revenue, and that paying claims was in the best interest of the defendant to bring in more clients. *Id* at 1021; *see Wright*, 402 F.3d at 76 (individual claims are often quite minute when compared with the profitability of the supposedly conflicted decision-makers who are unlikely to risk their goodwill and endanger their prospects of securing repeat business by not treating claimants fairly).

The justifications for the neutrality of a plan administrator that pays benefits out of its own assets was further explained in *Perlman* when the court upheld the defendant's decision to deny benefits to the plaintiff. *Perlman*, 195 F.3d at 976, 981. The court held that when evaluating the decision of a plan administrator under *Firestone,* a conflict of interest cannot be given great weight without exceeding the judicial capacity to tailor standards of review. *Id* at 981. The court concluded by reasoning that employers offer fringe benefits to attract good workers, which they will be unable to do if promised benefits are not paid. *Id*. Therefore, not only is it in the best interest of companies to pay out claims, but a plan administrator acts neutrally unless there is specific evidence of actual bias. *Id.*

Here, there is no evidence that Borg had any bias when denying Crusher's benefit claim and Borg's conflict of interests did not contribute to an abuse of discretion. A fiduciary's conflict of interest supports finding that there was an abuse of discretion when other factors contribute to the Court's reasoning. In *Bedrick*, the defendant abused its discretion because the denial of the plaintiff's claims was not referred to a doctor until six months after the plaintiff's physical

therapy was drastically limited, the doctor's review was conducted without updating the plaintiff's file, and the doctor erroneously concluded that the ability to walk by age five would not be significant progress for a child with cerebral palsy. *Bedrick By & Through Humrickhouse v. Travelers Ins. Co*., 93 F.3d 149, 153 (4th Cir. 1996). The court ruled in favor of the plaintiff concluding that a fiduciary with a conflict of interest must act as no such conflict exists. *Id.* at 154. The defendant failed to act in such a manner because it did not evaluate the plaintiff's physical and occupational therapy claims in a manner consistent with its duty under ERISA. *Id.* at 154. Here, outside of Borg's dual role of administering and funding Crusher's plan, no evidence exists to support the notion that Borg's conflict of interest influenced its decision to deny benefits to Crusher.

ERISA allows a fiduciary to act as a plan administer and as a plan's funding source without a *per se* abuse of discretion. *See Pegram*, 530 U.S. at 225. Consequently, because ERISA permits a company to retain this dual role within the same entity, the fact that a company has some employees who sell insurance policies and others who determine eligibility cannot be weighed on judicial review unless the plaintiff shows that the fiduciary acted on the basis of its own financial interests when carrying out its fiduciary responsibilities. *Id* at 225; *see Rush Prudential HMO, Inc. v. Moran,* 536 U.S. 355, 384 (2002) (a claim that a company was conflicted should fail in the absence of a showing that the company's decision was actually infected by that potential conflict and any conflict of interest on the fiduciary's part is relevant on judicial review only where the conflict was plausibly raised).

Consequently, Borg's conflict of interest should not receive weight from this Court because Borg acted reasonably in interpreting the plan. Borg's decision to deny the death benefit

was not influenced by its conflict of interest, therefore this Court's determination rests on whether Borg's denial was arbitrary and capricious.

B) **Borg's Interpretation of the Policy's "Commission of a Crime" Was Not Arbitrary and Capricious.**

Because Borg has discretion to determine eligibility for death benefits, as explained above, this Court must defer to Borg's interpretation, and may overturn only for abuse of discretion. *Firestone*, 489 U.S. at 109; see *Fleisher v. Standard Ins. Co.*, 679 F.3d 116, 125 (3d Cir. 2012) (granting discretionary authority in a plan "makes the plan administrator the competent authority to interpret ambiguous plan provisions in the first instance"). To determine whether an abuse of discretion occurred, courts should consider the "common and ordinary meaning as a reasonable person in the position of the plan participant would have understood the words to mean." *Cardoza v. United of Omaha Life Ins. Co.*, 708 F.3d 1196, 1203 (10th Cir 2013) (quoting *Scruggs v. ExxonMobil Pension Plan*, 585 F.3d 1356, 1362 (10th Cir. 2009)); *Caldwell v. Unum Life Ins. Co. of Am.*, 271 F. Supp. 3d 1252, 1261 (D. Wyo. 2017).

Here, Crusher was a participant in a plan which conferred Borg "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." (R. at 2.) Thus, this Court reviews Borg's determination "asking only whether the denial of benefits was arbitrary and capricious." *Eugene S. v. Horizon Blue Cross Blue Shield of N.J.*, 663 F.3d 1124, 1130 (10th Cir. 2011). The administrator's interpretation will be upheld as long as it is sufficiently supported by facts and not "grounded on any unreasonable basis." *Hancock*, 590 F.3d at 1155 (quoting *Hewlett-Packard*, 379 F.3d at 1176). In other words, when a plan's language is subject to more than one rational interpretation, the plan administrator may choose "any rational alternative." *Kimber v. Thiokol Cop.*, 196 F.3d 1092, 1100 (10th Cir. 1999).

Several circuits have developed sub-rules to assist in determining whether an administrator's interpretation was arbitrary and capricious, however, none these rules are dispositive. *See De Nobel v. Vitro Corp.*, 885 F.2d 1180, 1188 (4th Cir. 1989); *Finley v. Special Agents Mut. Benefit Ass'n*, 957 F.2d 617, 621 (8th Cir. 1992). The determinative principle remains that courts may not replace a plan fiduciary's "reasonable interpretation" of a disputed provision with its own — to disturb as an "abuse of discretion" the challenged benefits determination would exceed judicial authority. *King v. Hartford Life & Accident Ins. Co.*, 414 F.3d 994, 999 (8th Cir. 2005) (quoting *De Nobel*, 885 F.2d at 1188).

The District Court correctly found that Borg's interpretation of the "commission of a crime" exemption withstands the arbitrary and capricious standard of review. The term "crime," as interpreted by Borg, was not ambiguously applied to Crusher's conduct. Additionally, the plan administrator is given deference when interpreting terms of a policy, so long as the interpretation is reasonable. Borg's interpretation of Section 2.2 is unquestionably reasonable in this case. Therefore, this Court should affirm the District Court's grant of summary judgment to the Defendant.

i) **The "Commission of a Crime" Exemption Unambiguously Applies to Plaintiff's Claim.**

Plaintiff argues here, as he did in the District Court, that a reasonable insured individual would not understand text and driving to constitute a "crime." (R. at 7, 11). Plaintiffs seek to re-write the "commission of a crime" exemption and propose a subjective and unworkable construction, where only major offenses are considered "crimes." (R. at 11). Demonstrating just how unworkable this standard is, Plaintiff suggests a definition of "crime" that would only include offenses that were "an act with the intent to violate the rights of another," virtually excluding all statutory offenses. (R. at 7). This is directly inconsistent with the contention in

Plaintiff's brief which contends that the purpose of the Policy should be to "protect the insurance company from insuring knowingly or intentionally criminal enterprises or activities." (R. at 11). The District Court properly rejected this argument, stating that, while the purpose of the Policy was not merely to punish, it was also not merely "to avoid insuring intentionally criminal activities." *Id.*

Plaintiff contends that because the Policy does not supply a definition for the term "crime," and because no reasonable person would call Crusher a criminal, that the word "crime" is ambiguous. That is not so. Although the degree of criminal activity may vary greatly—some very serious and some minor in nature—a reasonable person understands the word "crime" to mean a violation of the law.

Borg was duty-bound to apply the terms of Crusher's plan, even if those terms did not favor the Plaintiff. *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604 (2013); *Varity Corp. v. Howe*, 516 U.S. 489 (1996). That is precisely what Borg did.

To determine the plain and ordinary meaning of the "commission of a crime" exemption, Borg followed basic rules of contract interpretation. First, the Court can look to the D.C. Code, which states that "[n]o person shall use a mobile telephone or other electronic device while operating a motor vehicle . . . unless the telephone or device is equipped with a hands-free accessory." (Appx. 4) (citing D.C. Code § 50-1731.04). Enterprise contends that "the only objective definition for 'crime' . . . is one that adheres to the law and code of the legal jurisdiction in effect where the loss occurred." (R. at 8). Concluding that the claims administrators do not have the expertise to define "crime," Enterprise relied on the Washington, D.C. Metropolitan Police Department's ("MPD") interpretation of the code, which concluded that Crusher was in violation because she was driving while using her telephone without a hands-

free accessory. (Appx. 4). The District Court also ceded to the expertise of local law enforcement, finding it particularly compelling that the MPD explicitly rejected Picard's attempt to excuse Crusher from any liability under the D.C. Code. *Id*. Undermining the authority of the MPD could lead to the inconsistent and unpredictable enforcement of the D.C. Code. (R. at 10).

The Plaintiff contends that it would be unreasonable to consider Crusher's actions a crime, and correctly notes that the Plan "has not applied the crime exemption in all cases of death that occur while violating traffic laws." (R. at 10). The Plaintiff fails to mention, however, the strict impaired driving laws in D.C., the overwhelming data describing the dangers of distracted driving, and the fact that MPD overlooked Crusher's speeding violation because it "determined that her violation of the distracted driving law was so egregious that she should be cited for the offense." (R. at 9-10). The Plaintiff also failed to show any cases where the plan administrator declined to apply the crime exemption in instances of a loss "caused or partially caused" by impaired driving. (R. at 10).

Second, this Court can look to the dictionary to construe plain meaning of the terms. *See Team Sys. Int'l, LLC v. Haozous*, 656 F. App'x 907, 911 (10th Cir. 2016) (relying on Black's Law Dictionary definition as common meaning). The dictionary confirms that Crusher's actions constituted a "crime." *See Crime*, Black's Law Dictionary (11th ed. 2019) (a crime is "an act that the law makes punishable"). The act, under this interpretation, is operating a moving motor vehicle" while using a mobile telephone that is not equipped with a hands-free accessory. (Appx. 4) (citing D.C. Code § 50-1731.04). According to D.C. Code § 50-1731.06, titled "Enforcement, fines and penalties," these actions previously stated is punishable by a fine of $100, which is ultimately the punishment that Crusher was administered. (Appx. 4) (citing D.C. Code § 50-1731.06).

Finally, the Court should consider the "commission of a crime" exemption as a whole, in proper context consistent with its purpose to avoid shifting the cost of illegal, self-destructive behavior that could have "been easily avoided if the policy-holder had exercised reasonable care," to other plan participants. (R. at 11); see *Sister of the Third Order v. Group Health Benefit*, 901 F.2d 1369, 1372 (7th Cir. 1990) (discussing purpose of a crime exemption: "a plan . . . need not draw down the assets contributed by the provident many to shift the cost of self-destructive behavior"); *Harrison v. Unum Life Ins. Co. of Am.*, 2005 WL 827090, at *4 (D.N.H. Apr. 11, 2005) (holding that crime exemption "exists to prevent claimants from passing the costs of illegal behavior on to other policy holders"). By awarding the accidental death benefit in this case, the Defendants would be sending the message that the poor decision-making by a participant will be funded by the reasonable care of others.

Borg applied an objective standard of "crime," (i.e., looking to D.C. Code and the dictionary) plus a strong causal requirement just as the Tenth Circuit instructed in *Fought*, fulfilling the "commission of a crime" exemption's purpose and providing a workable standard for administrators and courts. *Fought v. Unum Life Ins. Co. of Am.*, 379 F.3d 997, 1009 (10th Cir. 2004) (causation element in exemption must not be attenuated). Indeed, there is no dispute here that Crusher's death was "caused by, contributed to by, or result[ed] from" the use of her cell phone while driving. (Appx. 6). There were with no intervening causes. *Id*. According to the record and the MPD report, Crusher, absent a hands-free accessory, sent a text message just before the collision, distracting her while traveling at "an excessive rate of speed." (Appx. 4).

Here, Crusher's conduct was a crime under D.C. Code and as the term "crime" is defined by the dictionary, which was serious enough to directly cause Crusher's death. There is simply no ambiguity. After reviewing Section 2.2 of the Policy, a reasonable participant would

understand that is a crime to use a cellphone without a hands-free accessory while driving at excessive speeds in the middle of the night; so fast that that the car veers off the road and into a utility pole without the involvement of a single other car. The District Court correctly concluded that the "commission of a crime" exemption was unambiguously applied by Borg.

ii) **Borg Also Prevails Under Deferential Review.**

Applying *Firestone* deference, Borg's interpretation was reasonable, so long as it avoided adopting a construction that was "uncommon" or "extraordinary." *See Kimber*, 196 F.3d at 1100; *see also Adamson v. Unum Life Ins. Co. of Am.*, 455 F.3d 1209, 1215 (10th Cir. 2006) ("our review inquires whether the administrator's decision resides somewhere on a continuum of reasonableness—even if on the low end"); *Lefler v. United Healthcare of Utah, Inc.*, 72 F. App'x 818, 826 (10th Cir. 2003); *Fought*, 379 F.3d at 1003 (under deferential review, courts evaluates insurer's plan interpretation for reasonableness). Plaintiff believes that "no reasonable person would call Crusher a criminal," because the majority of the population has only begun to appreciate the potential dangers of using a phone while driving. (R. at 8). The notion that the dangers of distracted driving are only just now beginning to be appreciated is the most "uncommon" or "extraordinary" claim in this case. As the District Court noted, in 2012, "more than 33,000 people were killed and approximately 2,400,000 were injured in accidents involving distracted drivers, in the United States. (R. at 9) (citing NAT'L CTR. FOR STATISTICS & ANALYSIS, NHTSA REP. NO. DOT HS 811, 856, 2012 MOTOR VEHICLE CRASHES: OVERVIEW (2013)). Many of those 33,000 fatalities were likely victims of the distracted driving of others. Would the Plaintiff like to tell their loved ones that distracted driving is not a crime? Probably not.

There is simply no basis for which this Court could conclude that Borg's determination does not meet the *Kimber* standard. As the District Court stated, "Plaintiff does not offer any

persuasive argument as to why it was unreasonable for the plan administrator to adhere to the reasoned judgment of the D.C. Council and MPD in making its decision regarding the criminal nature of distracted driving." (R. at 10). Plaintiff provides zero caselaw supplementing their fragile position, and instead, tries to ascertain the purpose of the Policy to justify a decision in their favor. The District Court correctly brushed that argument aside. Plaintiff's arguments fail to support the notion that Borg's determination was somehow unreasonable, however a contrary conclusion is supported by D.C. Code, the dictionary, and a clear purpose of avoiding cost-shifting by encouraging participants to avoid anti-social behavior. Accordingly this Court should Borg's determination was reasonable.

CONCLUSION

For the reasons stated above and in the District Court's thorough opinion, this Court should affirm the District Court's decision granting Defendants' motion for summary judgment and denying Plaintiff's motion for summary judgment.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that both copies of Team 8's brief are solely the work product of the members of the team. The team has complied fully with the honor code [redacted]. Further, we certify that the team has complied with all rules and regulations of the 2020 Hennessy Moot Court Competition.

Date: January 17, 2020

[redacted]