No. 15-1160(L) & 15-1199

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DENNIS WALTER BOND, SR.; MICHAEL P. STEIGMAN,
Plaintiffs-Appellants,
and

ROBERT J. ENGLAND; LEWIS F. FOSTER; DOUGLAS W. CRAIG,
Individually, and on behalf of all others similarly situated,
Plaintiffs,
v.

MARRIOTT INTERNATIONAL, INC.; MARRIOTT INTERNATIONAL, INC. STOCK AND CASH INCENTIVE PLAN,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Maryland (Greenbelt), Case No. 8:10-cv-01256-RWT

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLANTS

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(Caption for No. 15-1199)

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QUESTION PRESENTED

This appeal stems from a suit brought by participants in the Marriott "Deferred Stock Incentive Plan" (the "Plan"), a pension plan governed by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq., alleging, among other things, that the Plan violated ERISA's minimum vesting requirements. The district court granted summary judgment in favor of the plan sponsor, based on its conclusion that the Plan was exempt from ERISA's vesting requirements as a "top hat" plan that was "maintained by an employer primarily for the purpose of providing deferred compensation to a select group of management or highly compensated employees." 29 U.S.C. § 1051(2).

The Secretary of Labor addresses the following issue in this brief:

Whether a pension plan is exempt from ERISA's vesting requirements under 29 U.S.C. § 1051(2) if the plan extends coverage to participants who are neither management nor highly compensated.

THE SECRETARY'S INTEREST

This appeal presents an important issue concerning the legal test for determining whether a deferred compensation plan is exempt from most of ERISA's protections because it is a top hat plan, an issue the Secretary of Labor has addressed in several advisory letters. As the head of the federal agency with primary responsibility for Title I of ERISA, Secretary of Labor v. Fitzsimmons,

805 F.2d 682, 692-93 (7th Cir. 1986) (en banc), the Secretary has a strong interest in ensuring that plan participants are afforded ERISA's full protections where they are entitled to those protections, including ERISA's minimum standards for vesting under employer-sponsored pension plans. The Secretary also has a significant interest in ensuring that the courts apply the proper legal test for determining what plans are exempt from certain key ERISA protections because they meet the narrow exemption for top hat plans.

STATEMENT OF FACTS

A. Legal Background

Congress passed ERISA to ensure "that if a worker has been promised a defined pension benefit upon retirement – and if he has fulfilled whatever conditions are required to obtain a vested benefit – he actually will receive it." Nachman Corp. v. Pension Ben. Guar. Corp., 446 U.S. 359, 375 (1980). To this end, ERISA's vesting and non-forfeiture provisions applicable to pension plans were designed to serve as integral protections for the rights of United States workers. See 29 U.S.C. § 1001(a) ("despite the enormous growth in [employee benefit] plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans"); Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 510 (1981) ("the

concepts of vested rights and nonforfeitable rights are critical to the ERISA scheme").

Congress provided an exception to these protections, and other critical provisions, for any pension "plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." 29 U.S.C. § 1051(2) (participation and vesting); 29 U.S.C. §§ 1081(a)(3), 1101(a)(1) (identically worded provisions exempting such plans from ERISA's funding and fiduciary responsibility provisions). See also 29 C.F.R. §2520.104-24 (exempting certain welfare plans from most of ERISA's disclosure and reposting requirements). Such plans are commonly referred to as "top hat" plans. "The dominant characteristic of the special top hat regime is the near-complete exemption of top hat plans from ERISA's substantive requirements." In re New Valley Corp., 89 F.3d 143, 148 (3d Cir. 1996). Congress excluded top hat plans from these requirements because "Congress deemed top-level management, unlike most employees, to be capable of protecting their own pension expectations." Gallione v. Flaherty, 70 F.3d 724, 727 (2d Cir. 1995).

The Department of Labor has issued several key pieces of guidance relating to whether top hat plans may include participants who are neither management nor highly compensated.

First, in 1985, the Department of Labor sent a letter to the Internal Revenue Service concerning "rabbi trusts," which it defined as a "trust maintained by an employer for the benefit of an employee in connection with a deferred compensation agreement." Letter From Department of Labor to Internal Revenue Service, dated Dec. 13, 1985, reprinted in 13 BNA Pension Reporter 702. While the letter primarily discussed the distinction between "funded" and "unfunded" for purposes of the statutory exemption, the letter also stated:

> With particular regard to the development of a regulation concerning "top hat" plans, the Department recognizes, and must ensure, that employers design and maintain these plans only for a select group of management or highly compensated employees, that is, employees who may not need the substantive protections of Title I of ERISA.

Id. (emphasis added).

Second, in 1990, the Department of Labor wrote a letter in response to a request for an advisory opinion from CSX Corporation concerning whether CSX's proposed deferred compensation plan would qualify for top hat status. DOL Advisory Opinion 90-14A, 1990 WL 123933 (May 8, 1990).

In response, the Department's letter stated that one threshold requirement for a top hat plan was that it had to "limit[] participation to a 'select group of management or highly compensated employees.'" 1990 WL 123933, at *2. In describing the background for top hat plans, the Department stated: "It is the view of the Department that in providing relief for 'top-hat' plans from the broad

remedial provisions of ERISA, Congress recognized that certain individuals, by virtue of their position or compensation level, have the ability to affect or substantially influence, through negotiation or otherwise, the design and operation of their deferred compensation plan, taking into consideration any risks attendant thereto, and, therefore, would not need the substantive rights and protections of Title I." Id.

In a footnote, this letter also stated that the term "primarily" in the top hat provisions of ERISA modified the purpose of the plan, rather than the composition of the plan. 1990 WL 123933, at *2, n.1. More specifically, this footnote stated:

> It is the Department's position that the term "primarily," as used in the phrase "primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees" in sections 201(2), 301(a)(3) and 401(a)(1) [of ERISA], refers to the purpose of the plan (i.e., the benefits provided) and not the participant composition of the plan. Therefore, a plan which extends coverage beyond "a select group of management or highly compensated employees" would not constitute a "top hat" plan for purposes of Parts 2, 3 and 4 of Title I of ERISA.

Id.

Finally, in 1992, the Department of Labor wrote a letter in response to a request for an advisory opinion concerning whether a "rabbi trust" would be considered to be unfunded for the purpose of the top hat exemption. In a footnote, the Department's letter reiterated that top hat plans must be designed and

maintained only for a select group of management of highly compensated employees:

> We note that employers must design and maintain "top hat" plans only for a select group of management or highly compensated employees. The Department has expressed the view that, in providing relief for "top hat" plans from the broad remedial provisions of ERISA, Congress recognized that certain individuals, by virtue of their position or compensation level, have the ability to affect or substantially influence, through negotiation or otherwise, the design and operation of their deferred compensation plan, taking into consideration any risks attendant thereto, and, therefore, would not need the substantive rights and protections of Title I.

DOL Advisory Opinion 92-13A, n.1 (May 19, 1992) (emphasis added) (citing DOL Advisory Opinion 90-14A, 1990 WL 123933 (May 8, 1990)).

B. Factual Background

Marriott International is a multi-billion dollar global hospitality company headquartered in Bethesda, Maryland. See Marriott News Center, http://news.marriott.com/company-information.html. The Plan grew out of an informal practice first employed by one of Marriott's predecessor entities, Hot Shoppes, Inc.,[1] in the 1960s, prior to ERISA's effective date of January 1, 1976. Joint Appendix ("JA") 29, 86, 1027. A written document for the Plan from 1970 stated that its purpose was to "attract, hold and reward key employees," and it remained largely unchanged until 1990. Id. at 93-95. Benefits under the Plan

[1] In addition to Hot Shoppes, Inc., Marriott's other predecessor entities that also sponsored the Plan were Marriott-Hot Shoppes, Inc. and Marriott Corporation. This brief will refer to these collectively as "Marriott."

consisted of deferred stock bonus awards, which were periodically given in the form of award certificates from Marriott. Id. at 1027. The awards vested on a pro rata basis between the date of the granting and age 65 and were to be paid in ten annual installments beginning either at retirement, disability, or age 65. Id. The awards vested on a fractional basis based on the number of years that the participant had until age 65. For example, a 25-year-old participant vested at 2.5% a year over 40 years, while a 60 year-old vested 20% a year for five years, and the vesting period began anew with each new award certificate. Id. at 29-30, 2227. This vesting regime fails to comply with ERISA's minimum vesting standards, which generally require that an employee who has completed five years of service will receive 100% of his accrued benefit. See 29 U.S.C. § 1053(a)(2).

By the mid-1970s, Marriott distributed awards under the plan to nearly 1000 employees with varying job titles and salaries, and the numbers continued to grow over the next decade. JA 1028.[2] Two years after ERISA's effective date, Marriott stated in its 1978 Prospectus that:

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[2] The parties dispute whether all of the employees in the plan were either managers or highly compensated. According to the plaintiffs' summary judgment brief to the district court, two of the most-frequent recipients of deferred stock between 1978 and 1990 were managers at Marriott's fast-food restaurants/diners, and managers at Marriott's hotel/airport gift shops (over 3,000 recipients collectively). Plaintiffs' Memorandum in Opposition to Marriott's Motion for Summary Judgment at 2; see also Opening Brief For Plaintiffs-Appellants at 18. In addition, employees with low compensation were participants in the plan. For every year between 1982 and 1989, between 82% and 99% of Marriott employees

> The Incentive Plan is an "employee pension benefit plan" within the meaning of [ERISA]. However, inasmuch as the Plan is unfunded and is maintained by the Company primarily for the purpose of providing deferred compensation for a selected group of management or highly compensated employees, it is deemed a "select plan" and thus is exempt from the participation and vesting, funding and fiduciary responsibility provisions of Parts 2, 3, and 4 respectively of Subtitle B of Title 1 of the Act. The reporting and disclosure provisions of Part 1 of Subtitle B of the Act continue to apply and under Section 2520.104–23 of the regulations, the Company has filed a statement with the Department of Labor providing certain information with respect to the Incentive Plan. The Company will not extend to participants any of the protective provision of the Act for which an exemption may properly be claimed.

JA 298. By the middle of the 1980s, several thousand Marriott employees were participants in the Plan. Id. at 1029. After the Department of Labor issued the 1990 advisory opinion (discussed above) addressing the requirements for top hat status, Marriott substantially amended the Plan to restrict membership in the new plan to high pay-grades.[3] Id. at 1030. The number of Marriott employees

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earned more salary than the lowest-paid participant in the Plan. Plaintiffs' Memorandum in Opposition to Marriott's Motion for Summary Judgment at 37. By contrast, according to Marriott's summary judgment brief to the district court, to participate in the plan, an "employee had to occupy a position designated by Marriott as a management position." Memorandum in Support of Marriott's Motion for Summary Judgment at 43. Marriott also asserts that Plan participants were usually highly compensated when compared to the rest of the company. Id. at 45-49.

[3] Between 1978 and 1989, the participants had the option of taking a pre-retirement award payable in 10 annual installments commencing the year after the award. This option, which is not at issue in this case, was removed by the amendment in 1990, restoring the original terms, which deferred payment until either retirement, disability, or age 65. JA 98, 308.

receiving awards in the amended plan dropped from 2500 (in the pre-amended Plan) in 1989 to less than 100 (in the amended plan) in 1990. Id. Marriott informed participants of the changes in a November 1990 memorandum, and a 1991 Marriott proxy statement, which was sent to Marriott shareholders, also disclosed the changes. Id.

C. Procedural History

The first complaint in this case, which was subsequently withdrawn, was filed in the Circuit Court for Montgomery County, Maryland, by plaintiff Robert England against Marriott and alleged state-law claims for breach of contract, promissory estoppel and unjust enrichment. England subsequently dismissed this complaint and filed the Complaint in the United States District Court for the District of Columbia on January 19, 2010, which was brought as a putative class action by England and three other named plaintiffs – Dennis Walter Bond, Sr., Lewis Foster, and Douglas Craig. JA 1026. In addition to a breach of contract claim under state law, this suit asserted claims under ERISA requesting that the Plan be reformed to comply with ERISA's vesting rules, and sought the benefits to which they would be entitled under ERISA if the plan was not exempt as a top hat plan.

After the district court in the District of Columbia granted Marriott's unopposed motion to transfer the case to the United States District Court for the

District of Maryland, id. at 1026, and the plaintiffs filed a subsequent Amended Complaint in that court, Marriott moved to dismiss on statute of limitations grounds (along with several other grounds), arguing that the vesting terms were included in the award certificates, which meant that plaintiffs had actual knowledge of the alleged ERISA violation more than six years before this suit was brought. England v. Marriott Int'l, Inc., 764 F. Supp. 2d 761, 769 (D. Md. 2011). Marriott also argued that Plaintiff England, along with similarly situated putative class members, lacked standing to sue. Id. at 780. In 2011, the district court in Maryland denied this motion, except that the court dismissed named plaintiff England because he left Marriott prior to ERISA's effective date; the district court also restricted the putative class to participants who stayed at Marriott after ERISA's effective date. Id. at 771, 780. The district court rejected Marriott's limitations argument because it concluded that there was no indication or "red flag" to indicate to a reasonably diligent plaintiff that their benefits under the Plan were governed by ERISA, particularly given Marriott's insistence that ERISA did not govern the awards. Id. at 770-72. The claims of plaintiffs Foster and Craig were voluntarily dismissed. JA 13.

Subsequently, England (despite his earlier dismissal), Bond, and one additional named plaintiff, Michael Steigman, filed a Second Amended Complaint on October 7, 2011. Id. at 29. Both Bond and Steigman worked for Marriott for

many years after ERISA was enacted, and both received some benefits under the Plan, but also forfeited a portion of their benefits because they left Marriott prior to turning 65. Id. at 43-46.

The Second Amended Complaint, which is the operative complaint for purposes of this appeal, is styled as a class action and makes three claims. First, plaintiffs requested injunctive and other equitable relief pursuant to 29 U.S.C. § 1132(a)(3), requiring, among other things, that the plan be reformed to require Marriott to comply with ERISA's vesting provisions with regard to the Plan. Second, plaintiffs requested additional benefits under 29 U.S.C. § 1132(a)(1)(B) that they claim are owed them, again, because of ERISA's mandatory vesting. Third, plaintiffs sued for breach of contract under state law. JA 48-53.

In September 2012, plaintiffs filed a motion for class certification. The proposed classes encompassed participants in the Plan from 1976 until 1990 who did not fully vest. Bond v. Marriott Int'l, Inc., 296 F.R.D. 403, 406 (D. Md. 2014). In January 2013, the district court denied this motion on the basis that the commonality, typicality, and adequacy of representation elements of Federal Rule of Civil Procedure 23(a) had not been met, because many members of the proposed class had divergent interests. Id. at 408-09. The district court also found that Federal Rule of Civil Procedure 23(b)(1) was not met because some putative class

members had been helped by Marriott's vesting schedule, and that this fact also presented standing issues for these class members. Id. at 409-11.

Marriott again moved to dismiss on limitations grounds, and the district court again denied this motion. To determine the limitations period, the court looked to the limitations period for the most analogous state law claim, which was three years for breach of contract in Maryland. JA 1037-38. The court determined that the limitations period never began running, however, because Marriott did not adopt a claims procedure until after plaintiffs brought suit, and plaintiffs were never expressly denied benefits and thus were not sufficiently informed that they had been harmed by the Plan's alleged non-compliance with ERISA. Id. at 1038-41. The court also rejected Marriott's argument that the doctrine of laches barred the claims, and its argument that one of the named plaintiffs had released his ERISA claims via his separation agreement. Id. at 1041-45.

D. Most Recent District Court Decision

After extensive discovery, Marriott again moved for summary judgment on the basis that ERISA's vesting requirements were inapplicable to the Plan because the Plan qualified for top hat status under ERISA. In a decision issued from the bench at the conclusion of the summary judgment hearing, the district court agreed and granted this motion.

In analyzing whether the Plan qualified for top hat status, the district court asked three questions: whether the Plan was "unfunded, [and whether] its purpose [was] to provide deferred compensation and [whether] that purpose [was] to provide deferred compensation to a group that's primarily limited to a select group of management or highly-compensated employees." JA 3540. In answering the first two of these questions, the district court concluded that it was undisputed that the Plan was unfunded and that its purpose was to provide deferred compensation. Id.

In addressing the pivotal last question, the district court looked for guidance to a 1983 district court case, Belka v. Rowe Furniture Corp., 571 F. Supp. 1249 (D. Md. 1983). The court described Belka as affirming top hat status for a plan where between 1.6% and 4.6% of the workforce was covered, and where the mean annual compensation of the plan ($40,000 in 1983) was significantly higher than the company average of $9,195. JA 3542. The court then noted that Belka was favorably cited by the Fourth Circuit in Darden v. Nationwide Mut. Ins. Co., 796 F.2d 701 (4th Cir. 1986). JA 3543.

The court went on to conclude that the Plan met both "qualitative" and "quantitative" tests for top hat status. JA 3544-46. Quantitatively, the court found that the percentage of employee participation in the Plan compared to the overall workforce (2%), and the percentage of Marriott managers (20% of all managers)

was sufficiently low that the plan could be considered to meet the "select group" requirement of 29 U.S.C. § 1051(2). JA 3544. The court also concluded that the qualitative portion of the test was met because:

> The employees who received or who were invited to receive these benefits on the company were clearly highly-compensated employees by any standard in relation to the rest of the company and they primarily were management. Here Marriott has pointed out that it used a multi-part or four-part process to determine who would be invited to participate in the program and therefore become eligible for benefits under the plan which focused on a number of very selective criteria which produced the quantitative result that I've already mentioned. And it's clear from viewing this plan as a whole that it was primarily intended for the purpose of retention of management and other highly-compensated employees.

Id. at 3545. The court also concluded that Marriott had sufficiently disclosed the fact that the plan was a top hat plan even though there was no direct evidence that Marriott had filed the requisite documentation with the Department of Labor. Id. at 3546. The court then noted that the Department of Labor's 1990 advisory letter "was a fairly significant expansion upon the perceived scope of the top hat exemption." Id. at 3546-47. Moreover, while the court recognized that Congress's overall intent with the top hat exemption was that there was no need to give all ERISA protections to employees with sufficient bargaining power to protect themselves, it refused to consider whether the employees at issue had sufficient bargaining power such that ERISA protections were not necessary for them. Id. at 3547-48.

Furthermore, although this was a motion for summary judgment, the district court also relied entirely on Marriott's expert statistical analysis and rejected the analysis of the expert for plaintiffs. JA 3547-50. The court also concluded that the proper denominator for determining the relevant percentages was the "entire workforce," rather than full-time or salaried employees. Id. at 3548-49.

Finally, the court relied on Demery v. Extebank Deferred Comp. Plan (B), 216 F.3d 283 (2d Cir. 2000), for the proposition that top hat status would not be eliminated if a "few positions managed to get in there that did not meet one of those criterion" if a plan was "principally intended for management and highly-compensated employees." JA 3549-50.

SUMMARY OF ARGUMENT

This case concerns the circumstances under which rank-and-file workers will be denied ERISA's robust substantive protections for participation, funding, vesting, and fiduciary requirements because their plan qualifies for top hat status. ERISA's text, legislative history, structure, and remedial purposes make clear that pension plan participants may only be deprived of these key ERISA protections if their plan is composed exclusively of management or highly compensated employees.

The Department of Labor has long and consistently read the statutory exemption for top hat plans in precisely this manner. This narrow construction of

the exemption is consistent not only with the language of the relevant provision and general principles of statutory construction, but also with this court's recognition that the primary animus behind ERISA was to protect the pension rights of employees who lacked the economic bargaining power to protect their own rights. It is therefore entitled to considerable deference. The district court's contrary view – that so long as an unfunded deferred compensation plan is primarily composed of management or highly compensated individuals it is exempt from ERISA's core protections as a top hat plan – does not honor the remedial legislation that Congress passed.

ARGUMENT

TOP HAT PLANS MAY ONLY COVER MANAGERS OR HIGHLY COMPENSATED EMPLOYEES

Top hat plans are a "rare sub-species of ERISA plans" and their definition is "narrow." New Valley Corp., 89 F.3d at 148. See also Kross v. Western Elec. Co., Inc., 701 F.2d 1238, 1242 (7th Cir. 1983) (exemptions from ERISA coverage should be confined to their "narrow purpose"); Guiragoss v. Khoury, 444 F. Supp. 2d 649, 659 (E.D. Va. 2006). The defendant bears the burden of demonstrating that a plan is a top hat plan. Deal v. Kegler Brown Hill & Ritter Co. L.P.A., 551 F. Supp. 2d 694, 700 (S.D. Ohio 2008) (citing Barrowclough v. Kidder, Peabody, Inc., 752 F.2d 923, 932 (3d Cir. 1985); Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989)).

As noted above, the district court applied the following test to determine if a plan qualifies as top hat: "it must be unfunded, its purpose must be to provide deferred compensation and that purpose must be to provide deferred compensation to a group that's primarily limited to a select group of management or highly-compensated employees." JA 3540. For the reasons discussed below, this test is incorrect and improperly eliminates ERISA's protections for rank-and-file employees who are not highly compensated or management.

A. Application of the traditional tools of statutory construction indicates that top hat plans may only include management and highly compensated employees

The "traditional tools of statutory construction, . . . the statute's text, legislative history and structure, as well as its purpose," Bell Atl. Tel. Cos. v. FCC, 131 F.3d 1044, 1047 (D.C. Cir. 1997) (citations and internal quotations omitted), all support that top hat plans may not include participants who are neither management nor highly compensated. The "top hat" provision on vesting, like the other statutory top hat exemptions, applies to "a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." 29 U.S.C. § 1051(2). A straightforward reading of this provision suggests that the term "primarily" is an adverb that modifies the prepositional phrase "for the purpose of providing deferred compensation" that immediately

follows it, see William Shakespeare, Hamlet, III, ii, 17 ("Very like a whale" is an example of an adverb modifying a prepositional phrase), and does not modify the more remote prepositional phrase "for a select group of management or highly compensated employees," just as it is not naturally read to qualify the prepositional phrase "by an employer," which precedes it. See United States v. Jones, 471 F.3d 535, 539 (4th Cir. 2006) ("adverbs" do not "modify the infinite hereafters of statutory sentences"). This means that while the most important purpose of the plan must be to provide deferred compensation to a select group of management or highly compensated employees, a top hat plan may have other, secondary purposes (e.g., retaining top talent, allowing highly compensated individuals to realize earnings in later tax years with presumably lower marginal tax rates, or avoiding limitations in the Internal Revenue Code that apply to tax-qualified plans). See, e.g., Garratt v. Knowles, 245 F.3d 941, 946-948 (7th Cir. 2001) (distinguishing an excess benefit plan, which must be maintained solely for the purpose of providing benefits in excess of contribution limitations in 26 U.S.C. § 415, from a top-hat plan, which can have multiple purposes). It does not mean that the "select group" may be primarily composed of management or highly compensated individuals. Nor does it mean that a top hat plan can have a secondary purpose that is inconsistent with the primary purpose, such as a secondary purpose of covering individuals who are outside the "select group" set by statute.

This reading of the relevant provision is further supported by its use of the term "select group," which indicates a limit to who is eligible for the "top hat" provision. See Merriam-Webster, http://www.merriam-webster.com/dictionary/select (defining "select" to mean, among other things, "exclusively or fastidiously chosen often with regard to social, economic, or cultural characteristics"). It seems unlikely that Congress would use the limiting term "select group" if a secondary purpose of the provision is to expand its coverage to employees who are not in this select group.

Similarly, the legislative history, although sparse, describes the top hat provision as intended for top executives and gives an example of stock plans established solely for officers of a corporation. See, e.g., H.R. Rep. No. 93-1280, at 296 (1974) (Conf. Rep.) ("the labor fiduciary rules do not apply to an unfunded plan primarily devoted to providing deferred compensation for a select group of management or highly compensated employees. For example, if a 'phantom stock' or 'shadow stock' plan were to be established solely for the officers of a corporation, it would not be covered by the labor fiduciary rules"); H.R. Rep. No. 93-533, at 4656 (1974) (Conf. Rep.) ("Title I would cover all private employee benefit plans under Commerce Clause jurisdiction except . . . Unfunded deferred compensation schemes of top executives."). This supports what the most natural reading of the statutory language suggests: that Congress understood the provision

as applying only to the select group of management or highly compensated employees.

So too, the structure of the top hat provisions, as exemptions from ERISA's core protections, supports the narrow reading that the text indicates. See 29 U.S.C. § 1051 (vesting provisions apply to "any employee benefit plan" other than listed exemptions, including top hat plans). Thus, limiting the top hat exception to plans that extend coverage only to management or highly compensated employees is consistent with the general statutory principle that coverage of a remedial statute such as ERISA is read broadly and exceptions to coverage are read narrowly. Kross v. Western Elec. Co., Inc., 701 F.2d 1238, 1242 (7th Cir. 1983); Guiragoss v. Khoury, 444 F. Supp. 2d 649, 659 (E.D. Va. 2006).

Finally, ERISA's primary purpose, set forth in its first section – to "protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing appropriate remedies, sanctions and ready access to the Federal courts," 29 U.S.C. § 1001(b) – is best served by this reading of the statute. See also id. § 1001(a) (congressional finding that "many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans"). Conversely, allowing an employer to intentionally draft or operate a top hat plan to include

ordinary employees who are neither management nor highly compensated directly undermines these objectives by taking away core ERISA protections from employees who are not in a position to negotiate for a separate pension plan and who are thus the primary targets of the entire statutory scheme. See Darden v. Nationwide Mut. Ins. Co., 796 F.2d 701, 706 (4th Cir. 1986) (ERISA case noting that in "interpreting statutory language so as to define the class of persons protected by the statute, a court must take as its 'primary consideration' whether the inclusion of the disputed category of persons would effectuate the 'declared policy and purposes' of the statute") (quoting United States v. Silk, 331 U.S. 704, 713 (1947)).

B. The Department of Labor has long and consistently read the statute to exempt plans that contain only management and highly compensated employees and this interpretation is entitled to deference

The Department of Labor consistently has taken precisely this view of the statutory language. First, the 1985 "Rabbi Trust" letter states that top hat plans should be designed and maintained "only for a select group of management or highly compensated employees." Letter From Department of Labor to Internal Revenue Service, dated Dec. 13, 1985, reprinted in 13 BNA Pension Reporter 702. Likewise, the 1990 CSX Letter explains that "primarily" modifies the purpose rather than the composition of the plan, and reiterates that a top hat plan cannot extend coverage beyond the "select group of management or highly compensated

employees." 1990 WL 123933, at *2. While the district court found that the 1990 CSX Letter created new law, in fact it was reiterating guidance that the Department had previously given, and it is entirely consistent with the statutory language. So too the 1992 Kilberg Letter reiterated this same point, stating that employers must design and maintain top hat plans "only" for management or highly compensated individuals. See also 40 Fed. Reg. 34530 (Aug. 15, 1975) (in declining to adopt a formal rule after conducting notice-and-comment, the Department noted that the "class of employees with respect to whom [top hat compliance exemptions] appl[y] – highly compensated or management employees – generally have ready access to information concerning their rights and obligations and do not need the protections afforded them by Part 1 of Title I of the Act").

The Department's long-standing and consistent reading of the statutory top hat exemption is entitled to deference. See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). As this Court has noted, although Department of Labor "opinion letters" are "not binding on the courts," they are given "considerable and in some cases decisive weight." Monahan v. County of Chesterfield, Va., 95 F.3d 1263, 1283 (4th Cir. 1996) (internal quotations and citations omitted). This deference is particularly appropriate here given that the Secretary's interpretation is supported by the best interpretation of the statutory provisions using the traditional tools of statutory interpretation.

This Court has never addressed whether a top hat plan may cover participants who are neither management nor highly compensated.[4] However, in addressing the "select group" part of the top hat test in Darden, the Fourth Circuit quite rightly pointed out that "implicit in the congressional statement of purpose is the recognition that the persons to be aided by the statute lacked sufficient economic bargaining power to obtain contractual rights to nonforfeitable benefits." 796 F.2d at 706-07 ("Had they possessed such bargaining power, statutory reform would have been unnecessary."). Yet the reading of the statutory top hat exemption advocated by Marriott and adopted by the district court threatens to leave just such employees utterly without most of the core protections of ERISA, so long as they are participants in plans which are primarily composed of "high-

[4] Only two other Circuits have addressed the precise issue in this case even in passing and, at least as a matter of dicta, they came to opposite conclusions. Compare In Re New Valley Corp., 89 F.3d 143, 148 (3d Cir. 1996) (although parties agreed that plan was a top hat plan, the court noted that "[i]n character, the plan must cover only high level employees" (emphasis added)), with Demery v. Extebank Deferred Comp. Plan (B), 216 F.3d 283, 289 (2d Cir. 2000) (stating that the statutory language "suggests that if a plan were principally intended for management and highly compensated employees, it would not be disqualified from top hat status simply because a very small number of the participants did not meet that criteria, or met one of the criteria but not the other" but then concluding that all participants in the plan were highly compensated). See also Kemmerer v. ICI Americas Inc., 70 F.3d 281, 286 (3d Cir. 1995) ("Top hat plans, however, which benefit only highly compensated executives, and largely exist as devices to defer taxes, do not require such scrutiny and are exempted from much of ERISA's regulatory scheme."); Carrabba v. Randalls Food Markets, Inc., 38 F. Supp. 2d 468, 477 (N.D. Tex. 1999) ("[a] legitimate top hat plan must cover a 'select group' of employees who are 'only high-level employees'") (citing In Re New Valley Corp., 89 F.3d at 148), aff'd, 252 F.3d 721, 722 (5th Cir. 2001).

echelon employees [who], unlike their rank-and-file counterparts, are capable of protecting their own pension interests." Alexander v. Brigham and Women's Physician's Org., Inc., 513 F.3d 37, 43 (1st Cir. 2008). This Court should decline to do so.[5]

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[5] This brief takes no position on the form of equitable relief that would be appropriate, under 29 U.S.C. § 1132(a)(3), to redress an employer's violation of ERISA's vesting requirements in circumstances where the employer erroneously included non-management, non-highly-compensated employees in a pension plan that would otherwise qualify as a top-hat plan under Section 1051(2). In circumstances where (1) the plan included very few such employees, (2) the employer included such employees inadvertently, or (3) the employer had an objectively reasonable basis for believing that such employees qualified as management or highly-compensated for purposes of Section 1051(2), it may be that the appropriate remedy would be to provide relief only to those non-management, non-highly-compensated employees who were improperly included in the plan – e.g., to reform the plan to exclude the non-qualifying employees and award them the full vesting and other protections and benefits while maintaining the plan in its exempt status for the management and highly-compensated employees who do qualify. That approach would avoid providing a windfall gain to the management and highly-compensated employees who could properly have been included in a plan covered by Section 1051(2), who possess sufficient economic bargaining power to protect their own rights and are not the intended beneficiaries of the substantive ERISA provisions at issue. See *Darden*, 796 F.2d at 706-07 ("[I]mplicit in the congressional statement of purpose is the recognition that the persons to be aided by the statute lacked sufficient economic bargaining power to obtain contractual rights to nonforfeitable benefits."); DOL Advisory Opinion 90-14A, 1990 WL 123933, at *2 ("It is the view of the Department that in providing relief for 'top-hat' plans from the broad remedial provisions of ERISA, Congress recognized that certain individuals, by virtue of their position or compensation level, have the ability to affect or substantially influence, through negotiation or otherwise, the design and operation of their deferred compensation plan, taking into consideration any risks attendant thereto, and, therefore, would not need the substantive rights and protections of Title I.").

CONCLUSION

For the foregoing reasons, the Court should hold that the district court erred in finding that a top hat plan may include participants who are neither management nor highly compensated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32A

I hereby certify that this brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B). It has a total of 6172 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman font size 14.

Dated: May 28, 2015

s/ David Ellis
David Ellis
Attorney

CERTIFICATE OF SERVICE

I hereby certify on this 28th day of May, 2015, I electronically filed the foregoing amicus curiae brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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