No. 17-16984

In the U.S. Court of Appeals For the Ninth Circuit

CHARLES GUENTHER,
Plaintiff-Appellant,

v.

LOCKHEED MARTIN CORPORATION, ET AL.
Defendant-Appellees.

On Appeal from the U.S. District Court
for the Northern District of California, San Jose
Case No. 5:11-cv-00380-EJD

Brief for the U.S. Secretary of Labor as Amicus Curiae Supporting Plaintiff-Appellant

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STATEMENT OF THE ISSUE

Section 413 of the Employee Retirement Income Security Act, 29 U.S.C. § 1001, et seq. ("ERISA"), contains two time limits by which participants in employee benefit plans must file suit alleging fiduciary misconduct. The one relevant here is contained in section 413(2), which requires participants to sue within three years of acquiring "actual knowledge of the breach or violation." 29 U.S.C. § 1113(2). The breach alleged in this case is a misrepresentation by a fiduciary to an ERISA-plan participant about how the participant's benefits would be calculated under the plan. The district court concluded that the plaintiff had actual knowledge of the misrepresentation when the fiduciary made a subsequent, seemingly contradictory statement to the participant. Because the fiduciary made that second statement more than three years before the plaintiff filed suit, the district court dismissed the claim as time barred under section 413(2).

The Secretary addresses the following question presented: Whether an ERISA plan participant has "actual knowledge" of a fiduciary breach within the meaning of section 413(2) the very moment the fiduciary makes a statement that appears to contradict a prior statement.

STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

Congress enacted ERISA "to protect . . . the interests of participants in employee benefit plans . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b) (Congressional findings and declaration of policy). The Secretary of Labor has primary enforcement and regulatory authority for the fiduciary responsibility provisions in Title I of ERISA. See 29 U.S.C. §§ 1132(a)(2) & (5), 1134, 1135; Sec'y of Labor v. Fitzsimmons, 805 F.2d 682, 688-91 (7th Cir. 1986) (en banc). Congress also authorized plan fiduciaries, participants, and beneficiaries to bring actions to remedy fiduciary breaches in order to more fully protect the rights conferred by ERISA. 29 U.S.C. §§ 1132(a)(2) & (3).

Civil actions brought by either the Secretary or private parties to redress fiduciary breaches must be filed within the time limits prescribed in ERISA. 29 U.S.C. § 1113. The Secretary has an interest in the proper interpretation of those time limits in order to effectuate Congressional intent to provide "ready access to the Federal courts." 29 U.S.C. § 1001(b).

The Secretary files this brief as amicus curiae under the Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE CASE

Plaintiff Charles Guenther ("Guenther") brought this action against Defendants Lockheed Martin Corporation ("Lockheed") and the Lockheed Martin Corporation Retirement Plan for Certain Salaried Employees (the "Plan"), a defined-benefit plan, for breach of fiduciary duty under ERISA. Guenther alleges Lockheed told him that, upon rejoining the company, his retirement benefits under the Plan would be calculated by "bridging" (or combining) the employment service credit he earned in his prior employment at Lockheed with any future service credit he would earn if he resumed employment at the company. After Guenther rejoined Lockheed, he learned his service credits would not in fact be bridged. This suit followed.

I. Factual Background

Guenther worked for Lockheed during three different periods over the last 35 years. The first time he was re-hired by Lockheed, Guenther successfully "bridged" his service credits from his prior employment and became an active participant in the Plan again. Guenther v. Lockheed Martin Corp., 646 F. App'x 567, 569 (9th Cir. Mar. 29, 2016) (unpublished). The Plan was amended in 2005, after Guenther's second period of employment had ended and while Guenther was *not* employed by Lockheed. The amendment stated that "no person who is re-employed by [Lockheed] on or after January 1, 2006, shall become an active Participant or earn Credited Service under the Plan with respect

to any period commencing with such reemployment" ("2005 Plan Amendment"). Id. Thus, any employee who is re-employed and resumes employment after January 1, 2006, could not become an active participant in the Plan or earn any additional service credit under the Plan. Id. at *6. Because Guenther was not a Lockheed employee when the amendment was adopted, he never received notice of the amendment. Id.

Guenther was re-hired by Lockheed a second time on September 11, 2006. Guenther v. Lockheed Martin Corp., No. 5:11-cv-00380-EJD, 2017 WL 3838437, at *1 (N.D. Cal. Sept. 1, 2017). Before his re-hiring in September 2006, Guenther "heard a 'rumor' that 'Lockheed was going to be changing around their plan.'" Guenther, 2017 WL 3838437, at *1. He sent an e-mail to management on February 22, 2006, discussing potential changes in the Plan for re-hired employees, but management did not provide the confirmation he requested about those changes and the manager he e-mailed was not involved in human resources or authorized to speak on behalf of the Plan. Id. at *1-2. During his interview for re-employment with Lockheed, Guenther met with a human resources representative who gave him a "bridging form" in response to his inquiries about whether Lockheed was "bridging service" related to the Plan. Id. at *2. On July 17, 2006, he completed and submitted the bridging application, which stated that those with

prior service "may be eligible to have [their] prior service bridged with [their] current period of employment." Id.

On July 25, 2006, Guenther accepted an employment offer with Lockheed. He also received a letter (the "July 25 letter") in response to his bridging application stating that his "prior periods of Lockheed/Lockheed Martin service will be bridged with [his] proposed Lockheed Martin service" and "if [he is] rehired by Lockheed Martin, [he] will need to submit a new Application for Bridging of Prior Service to ensure that any necessary adjustments to [his] employment service date and pension records are made." Guenther, 2017 WL 3838437, at *2. The July 25 letter did not state whether bridging applied to the defined-benefit pension plan or to a defined-contribution plan called the Capital Accumulation Plan. Id.

After resuming employment with Lockheed, Guenther followed the July 25 letter's instructions and submitted a new bridging application, dated September 14, 2006. Guenther, 2017 WL 3838437, at *2. Relying on the representations in the July 25 letter, he concluded he would again participate in the defined-benefit pension plan and that his prior credited service would be counted in calculating his benefits. Id. When he checked his online pension account, however, he did not see any additional accumulation of credited service. Id.

On November 7, 2006, Guenther received a letter (the "November 7 letter") in response to his September 14 bridging application that, in

one paragraph, appeared to confirm his past benefits would be bridged with his future benefits:

> Since you were vested in a pension benefit provided by the Lockheed Martin Corporation Retirement Plan for Certain Salaried Employees, your prior periods of Lockheed/Lockheed Martin service will be bridged with your current Lockheed Martin service. Consequently, your accrued benefit under the Capital Accumulation Plan has immediately become vested because the combined total of your Lockheed Martin controlled group service exceeds five years.

Guenther, 2017 WL 3838437, at *3. However, in a separate paragraph, the letter stated that "because you are not currently participating in a Lockheed Martin defined benefit pension plan, you are not entitled to a pension benefit from Lockheed Martin for your current period of service." Id.

At this point, Guenther contacted human resources regarding the seemingly conflicting information in the letters. Guenther, 2017 WL 3838437, at *3. The human resources representative thanked Guenther for bringing the letters to her attention and stated that Lockheed would try to be clearer in the future, but did not resolve the confusion and did not tell Guenther he would be able to participate in the Plan for his new period of employment. Id. Guenther also discussed the letters with a manager and a co-worker, neither of whom provided any additional information or explanation. Id.

II. Procedural History

Guenther filed this case on November 8, 2010, asserting two causes of action, one under ERISA to recover Plan benefits and one for breach of contract. Guenther, 2017 WL 3838437, at *3. The district court dismissed the breach of contract claim with prejudice, but stayed the remainder of the case for Guenther to exhaust his administrative remedies by first making a claim for benefits to the Plan. Id. The Plan denied his claim, and the court lifted the stay on November 30, 2012. Id.

Guenther then asserted two claims in the district court: (1) a claim for benefits due under the terms of the Plan, brought under ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B); and (2) a claim that Lockheed breached its fiduciary duties to Guenther for which he sought appropriate equitable relief (in the form of equitable estoppel) under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3). Guenther, 646 F. App'x at 568. The district court granted summary judgment for Lockheed on both claims. With respect to the benefits claim, the court held Lockheed did not abuse its discretion in denying Guenther's claim for benefits. As to the fiduciary breach claim, it held Guenther did not clearly allege equitable estoppel and, alternatively, that the equitable estoppel claim failed because no misrepresentation occurred and the Plan terms were not ambiguous, as required for equitable estoppel in

the Ninth Circuit. Guenther, 2017 WL 3838437, at *3; Guenther, 646 F. App'x at 568-69.

On appeal, this Court affirmed summary judgment for Lockheed on the benefits claim but reversed on the fiduciary breach claim, holding Guenther alleged sufficient facts to plead a plausible claim for breach of fiduciary duty under ERISA. Guenther, 646 F. App'x at 568-69. This Court rejected as premature the district court's conclusion Lockheed did not make a misrepresentation as a fiduciary for two reasons. First, the unchallenged evidence showed Guenther had received "bridging" the last time he was re-hired by Lockheed, and Lockheed did not inform Guenther that he was placed into a new defined-contribution plan or that the 2005 Plan Amendment barred the type of bridging Guenther had previously received and expected. Second, Guenther had not been given the opportunity to conduct discovery into Lockheed's frame of mind when it made the promise to bridge. Id. at 569. This Court thus remanded the action to "consider whether [Lockheed] breached a fiduciary duty and, if so, whether Guenther is entitled to surcharge as a remedy."[1] Id. at 570.

Upon returning to the district court, Guenther filed a Second Amended Complaint on December 12, 2016, asserting breach of

[1] The remedy of surcharge would require Lockheed, not the Plan, to compensate Guenther for monetary losses caused by Lockheed's fiduciary breach. CIGNA Corp. v. Amara, 563 U.S. 421, 441-42 (2011).

fiduciary duty and seeking the equitable remedy of surcharge, relying on the same factual allegations that Lockheed made misrepresentations to him about his ability to continue to earn service credits under the defined-benefit pension plan. Guenther, 2017 WL 3838437, at *4.

The district court again granted Lockheed's motion for summary judgment, this time stating that Lockheed "has successfully shown that Plaintiff's sole claim is barred by ERISA's three year [time limit], and Plaintiff has not satisfied his responsive burden to produce evidence on which a reasonable factfinder could conclude otherwise." Guenther, 2017 WL 3838437, at *1. The district court held Guenther had actual knowledge of the fiduciary breach triggering the three-year time limit when he received the November 7 letter from Lockheed. The court concluded Guenther "unequivocally stated he understood the November 7 letter to mean he was not entitled to a pension benefit on re-employment with Lockheed, and he knew from his online account he was not accruing credit." Id. at *7. The court rejected Guenther's argument that he had no reason to believe the November 7 letter was accurate over the July 25 letter, stating that "as Plaintiff understands the letters, one [letter] must have contained an inaccuracy since the information about Plaintiff's right to 'bridge' service cannot be reconciled between them." Id. at *8. Accordingly, the district court found Guenther gained "actual knowledge" of any alleged breach arising from the discrepancy when he received the November 7, 2006 letter. Id.

Because Guenther filed his complaint on November 10, 2010, more than three years after his receipt of the November 7, 2006 letter, the district court concluded his complaint was time-barred by ERISA section 413(2). Id.

SUMMARY OF THE ARGUMENT

The district court dismissed Guenther's misrepresentation claim because it was filed more than three years after Lockheed made a statement to Guenther that apparently conflicted with an earlier statement it made to him. The district court concluded as a matter of law that the mere utterance of the second statement gave Guenther "actual knowledge" of a fiduciary breach of misrepresentation under ERISA section 413(2) because it appeared to deviate from the prior statement. The district court's conclusion that a discrepancy between two statements, by itself, suffices for "actual knowledge" of a misrepresentation is based on the unwarranted assumption that Guenther knew which representation was true and which was false or misleading. Without that knowledge, a participant like Guenther is merely confused by the conflicting information but has no actual knowledge of facts establishing that any specific communication was a misrepresentation. The district court therefore erred in concluding that Guenther's knowledge of a potential discrepancy between the November 7 letter and the July 25 letter constitutes actual knowledge of a fiduciary breach.

ARGUMENT

I. Guenther Did Not Have "Actual Knowledge" Of A Fiduciary Breach When Lockheed Made A Statement To Him That Appeared To Contradict An Earlier One

A. Only Actual Knowledge Of The Facts That Constitute The Fiduciary Breach Triggers The Three-Year Period In ERISA Section 413(2)

Congress enacted ERISA "to protect . . . the interests of participants in employee benefit plans. . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b) (Congressional findings and declaration of policy) (emphasis added). ERISA imposes stringent duties of loyalty and prudence on plan fiduciaries to ensure plans are properly managed and that participants receive promised benefits. 29 U.S.C. § 1104(a). To enforce these statutory responsibilities and to remedy violations, ERISA contains several "carefully integrated" enforcement provisions, which authorize plan participants and beneficiaries, plan fiduciaries, and the Secretary of Labor to bring suit when fiduciaries fail to adhere to ERISA's important standards. Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146 (1985); see, e.g., 29 U.S.C. § 1132(a) (conferring rights to sue and specifying eligible plaintiffs).

A plan participant must bring a lawsuit alleging fiduciary misconduct before the *earlier* of two dates: (1) six years after the date of the fiduciary breach or violation; or (2) three years after the date the participant has "actual knowledge of the breach or violation." ERISA sections 413(1)-(2), 29 U.S.C. §§ 1113(1)-(2). There is an exception to this rule where the defendant engaged in "fraud or concealment," in which case a participant must bring the action within six years of his or her "discovery" of the breach. 29 U.S.C. § 1113.[2]

The three-year time limit only "begins to run on the date that the person bringing suit learns of the breach or violation." Landwehr v. DuPree, 72 F.3d 726, 732 (9th Cir. 1995). The participant must have "actual" knowledge of the specific facts that made the defendant's

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[2] The full text of ERISA section 413 provides as follows:

> "No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of--
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation."

29 U.S.C. § 1113.

conduct illegal. Gluck v. Unisys Corp., 960 F.2d 1168, 1176-77 (3d Cir. 1992). "[C]onstructive knowledge," or knowledge the participant could have obtained in the exercise of reasonable diligence, on the other hand, does not suffice as "actual knowledge." Id. at 1176.

In defining "actual knowledge," this Court has stated "the [time limit] is triggered by [a claimant's] knowledge of the transaction that constituted the alleged violation, not by [his] knowledge of the law." Meagher v. Int'l Ass'n of Machinists & Aerospace Workers Pension Plan, 856 F.2d 1418, 1423 (9th Cir. 1988) (quoting Blanton v. Anzalone, 760 F.2d 989, 992 (9th Cir. 1985)); see, e.g., Waller v. Blue Cross of Cal., 32 F.3d 1337, 1341 (9th Cir. 1994) (declining to equate knowledge of the purchase of annuities with actual knowledge of the alleged breach of fiduciary duty). Because "it is not enough [to have] notice that something was awry; [one] must have had specific knowledge of the actual breach of duty." Brock v. Nellis, 809 F.2d 753, 755 (11th Cir. 1987). The "stringent requirement imposed" by ERISA section 413(2)'s "actual knowledge" standard, and the statutory structure itself, "sets a high standard for barring claims against fiduciaries prior to the expiration of the section's six-year [time limit]." Gluck, 960 F.2d at 1176.

B. The Discrepancies In Lockheed's Communications To Guenther Did Not Give Him Actual Knowledge Of Facts That Constituted A Fiduciary Breach

ERISA fiduciaries have a duty to provide clear and accurate information. Specifically, a "fiduciary has an obligation to convey complete and accurate information material to the beneficiary's circumstance, even when a beneficiary has not specifically asked for the information." Barker v. Am. Mobil Power Corp., 64 F.3d 1397, 1403 (9th Cir. 1995); see also King v. Blue Cross & Blue Shield of Ill., 871 F.3d 730, 744-45 (9th Cir. 2017); Washington v. Bert Bell/Pete Rozelle NFL Player Ret. Plan, 504 F.3d 818, 823-24 (9th Cir. 2007); Farr v. U.S. W. Commc'ns, Inc., 151 F.3d 908, 914-15 (9th Cir. 1998). This case presents a common situation where fiduciaries provide participants with confusing and conflicting communications about their benefits. E.g., Frommert v. Conkright, 433 F.3d 254, 272-73 (2d Cir. 2006); Caputo v. Pfizer, Inc., 267 F.3d 181, 193 (2d Cir. 2001) ("Although the announcement should have (and did) give plaintiffs reason to suspect that Pfizer had lied to them, 'it is not enough that [plaintiffs] had notice that something was awry; [plaintiffs] must have had specific knowledge of the actual breach of duty upon which [they sued].'") (alteration in original) (citation omitted).

Here, Lockheed provided confusing and possibly contradictory information in letters sent to Guenther. In the July 25 letter, Lockheed told Guenther his past employment at Lockheed would be bridged with

his current employment. The November 7 letter was unclear. While stating—in apparent conformance with the July 25 letter—"your prior periods of Lockheed/Lockheed Martin service will be bridged with your current Lockheed Martin service," Lockheed linked that statement to a defined-contribution plan and then "noted" that Guenther was not currently participating in a defined-benefit plan. Of course, if Guenther was no longer a participant in the defined-benefit plan (and could not accrue additional benefits), then the promised "bridge" led nowhere with respect to that plan. It was thus not apparent from the face of the letters (a) whether they were inconsistent with one another, or (b) assuming they were inconsistent, which letter was right and which was wrong. A participant cannot have "actual knowledge" of a fiduciary misrepresentation without knowledge as to whether a misrepresentation occurred, or, assuming he or she knows of contradictory communications, which communication constituted the misrepresentation.

To satisfy the "actual knowledge" requirement, the plaintiff must know facts that are at least sufficient to give a potential plaintiff knowledge that a duty has been breached or ERISA violated. See, e.g., Gluck, 960 F.2d at 1177. Knowing which of two potentially conflicting representations was the misrepresentation is necessary for a participant to understand which communication underlies the ERISA violation. Meagher, 856 F.2d at 1423. For example, if the November 7

letter was false, then Guenther would have a different misrepresentation claim, because he did not take any action based on the November 7 representation that assumed he was not part of the Plan except to further investigate its content. On the other hand, if the July 25 letter was false, then Guenther would have an argument that he took this job with Lockheed based on the letter's misrepresentation about bridging. Guenther, 646 F. App'x at 569. These claims and injuries are completely different. Without knowledge as to which representation was in error, Guenther could not have actual knowledge as to the facts underlying any specific ERISA violation. Accordingly, if it is unclear which letter contained the breach, Guenther could not have actual knowledge of the breach to trigger the three-year time limit.

In finding Guenther's "actual knowledge" of an alleged fiduciary misrepresentation, the district court relied heavily on the November 7 letter, stating it provided Guenther with the actual knowledge necessary to trigger the three-year time limit under section 413(2) of ERISA. Guenther, 2017 WL 3838437, at *7-8. The court concluded any "discrepancy" between the November and July letters sufficed to confer upon Guenther "actual knowledge" of a violation. Id. at *8. But, as far as Guenther was aware, either letter could have been a misrepresentation. Indeed, after receiving the November letter, Guenther embarked on a years-long search for an answer from Lockheed as to his eligibility status, belying the notion that the

November letter resolved the matter. Id. at *4-5. Based on these letters and Guenther's past experience of having his benefits bridged, he could reasonably have concluded that competent professionals had provided him with accurate information initially and the second letter was in error. Under this scenario, the document received on November 7 told Guenther only that there was confusion regarding bridging and his participation in the Plan.

The district court therefore erred in stating that Guenther's knowledge of a discrepancy between the November 7 letter and the July 25 letter constitutes actual knowledge of a fiduciary breach. Knowledge of a discrepancy is knowledge only that "something was awry," a standard no court has adopted to suffice as "actual knowledge." E.g., Fish v. Greatbanc Tr. Co., 749 F.3d 671, 683 (7th Cir. 2014); Frommert, 433 F.3d at 272-73; Brock, 809 F.2d at 755; Maher v. Strachan Shipping Co., 68 F.3d 951, 955-56 (5th Cir. 1995). It does not in itself equate to actual knowledge that a breach of fiduciary duty occurred. Wright v. Heyne, 349 F.3d 321, 329-30 (6th Cir. 2003) ("somewhere between 'every last detail' and 'something was awry' lies the requisite knowledge of an ERISA violation") (citation omitted). Consistent with this view, this Court previously considered and described the November 7 letter only as evidence of potential misrepresentation, not as dispositive evidence of a fiduciary breach. Guenther, 646 F. App'x at 569. The district court thus made an unsupported logical leap to conclude that

knowledge of conflicting representations is "actual knowledge" that the July 25 letter contained a misrepresentation.

In reaching this conclusion, the district court failed to draw all inferences in the plaintiff's favor. See, e.g., Chuck v. Hewlett Packard Co., 455 F.3d 1026, 1031 (9th Cir. 2006); Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986) (a court draws all reasonable inferences in favor of the party against whom summary judgment is sought). By assuming the November 7 letter was true and the July 25 letter was false, the district court effectively presumed that Guenther must have known one letter was a misrepresentation, placing the burden on Guenther to establish the negative and show that he did not actually know the July 25 letter contained the misrepresentation. Guenther, 2017 WL 3838437, at *7-8. The district court did not even consider whether Guenther was simply confused by the presence of conflicting information without any actual knowledge that a specific letter contained a fiduciary misrepresentation.

Furthermore, the clarity the district court ascribed to the November 7 letter conflicts with the discussion of the same document in this Court's previous opinion. This Court considered these same documents and determined Guenther was suffering from a "lack of opportunity . . . to conduct discovery into Defendants' frame of mind when they made [the bridging] promise." Guenther, 646 F. App'x at 569. Accordingly, this Court found the document less than clear. Id.

Such divergent readings of the same letter indicate that, at the very least, this case was not appropriately decided on summary judgment.

The district court's view that knowledge of a discrepancy between two letters is actual knowledge of a misrepresentation also creates perverse incentives for fiduciaries. The purpose of ERISA section 413 is to prevent a plaintiff who has actual knowledge of a breach, "from sitting on her rights and allowing the series of related breaches to continue." Tibble v. Edison Int'l, 843 F.3d 1187, 1196 (9th Cir. 2016) (en banc); see also Wright, 349 F.3d at 330-31; Fink v. Nat'l Savs. & Tr. Co., 772 F.2d 951, 956-958 (D.C. Cir. 1985). If discrepancies in communications alone confer "actual knowledge," fiduciaries are encouraged to create confusion in order to escape liability after three years, and discouraged from speaking definitively. Imputing knowledge of specific fiduciary misrepresentations to participants who receive confusing communications from plan fiduciaries "would allow the unfaithful fiduciary . . . to control the starting date of the statute of limitations" by sowing confusion. CB Richard Ellis Investors, L.L.C. v. Sonnenblick, 45 F. App'x 680, 682 (9th Cir. Aug. 26, 2002) (unpublished).

CONCLUSION

The Secretary respectfully requests that this Court reverse the district court's decision dismissing the fiduciary breach claim as barred by ERISA's three-year time limit.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE OF BRIEFS AND VIRUS CHECK

Pursuant to Rules 32(a)(7)(B) and (C), Fed. R. App. P., I certify that this amicus brief uses a mono-spaced typeface of 14 characters per inch and contains 4,312 words.

I certify that the digital version and hard copies of the Secretary's Brief are identical. I further certify that a virus scan was performed on the Brief using McAfee, and that no viruses were detected.

Dated: August 22, 2018

s/ Stephanie B. Bitto
STEPHANIE B. BITTO
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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of August, 2018, true and correct copies of the foregoing **Brief for the U.S. Secretary of Labor as Amicus Curiae Supporting Plaintiff-Appellant** were filed electronically with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system and served electronically via email to the Participants in the case who are registered CM/ECF users of the appellate CM/ECF system.

Dated: August 22, 2018

s/ Stephanie B. Bitto
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