DOCKET NOS. 15-1160(L) & 15-1199

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DENNIS WALTER BOND, SR. AND MICHAEL P. STEIGMAN,
Plaintiffs-Appellants-Cross-Appellees

and

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

v.

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

On Appeal from the United States District Court for the
District of Maryland, No. 8:10-cv-01256 (Honorable Roger W. Titus)

OPENING/RESPONSE BRIEF OF APPELLEES/CROSS-APPELLANTS MARRIOTT INTERNATIONAL, INC. AND MARRIOTT INTERNATIONAL STOCK AND CASH INCENTIVE PLAN

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CORPORATE DISCLOSURE STATEMENT
(Fed. R. App. P. 26.1 and Loc. R. 26.1)

Appellee/Cross-Appellant Marriott International, Inc. makes the following disclosures:

Question	Answer
1. Is Appellee a publicly-held corporation or other publicly-held entity?	☒Yes ☐No
2. Does Appellee have any parent corporations?	☐Yes ☒No
3. Is 10% or more of the stock of Appellee owned by a publicly-held corporation or entity?	☐Yes ☒No
4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation?	☐Yes ☒No
5. Is Appellee a trade association?	☐Yes ☒No
6. Does this case arise out of a bankruptcy proceeding?	☐Yes ☒No

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JURISDICTIONAL STATEMENT

The district court has jurisdiction pursuant to 28 U.S.C. § 1331 because Appellants assert claims under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq*. ("ERISA"). This Court has jurisdiction pursuant to 28 U.S.C. § 1291 following the January 20, 2015 final order granting summary judgment to Appellees/Cross-Appellants Marriott International, Inc. and Marriott International Inc. Stock and Cash Incentive Plan (collectively, "Marriott" or the "Company").

Appellants Dennis Walter Bond, Sr. and Michael P. Steigman (collectively, "Appellants") filed their notice of appeal on February 13, 2015. Marriott filed its notice of cross-appeal on February 24, 2015.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the district court correctly rule that the deferred stock bonus awards ("Retirement Awards"), which Marriott granted to a select group of managers or highly-compensated employees comprising less than two percent of Marriott's overall workforce, constituted "top hat" plans exempt from ERISA's vesting requirements pursuant to 29 U.S.C. § 1051(2)?

2. Did the district court err in holding that Appellants' claims are not barred by the statute of limitations where Appellants were aware of the ERISA-exempt status of their Retirement Awards and the facts underlying their claims, and received their final payments, more than three years before initiating this action?

STATEMENT OF THE CASE

Appellants are two former Marriott employees who received Retirement Awards from Marriott between 1976 and 1989. Marriott provided the Retirement Awards as stock bonuses to individually selected management employees in addition to the broad-based benefits they received. Marriott informed Appellants no later than 1978 that, unlike the broad-based benefits Marriott provided them, ERISA exempted Retirement Awards from its vesting requirements because they qualified as "top hat" plans.

During their time at Marriott, Appellants gladly accepted these extra benefits and never challenged their selection to receive these awards, the awards' vesting terms, or Marriott's compliance with the award terms and applicable law. It is undisputed that Marriott administered the awards in compliance with the plans' stated terms, and paid every Retirement Award recipient, including Appellants, everything they were promised under the plans.

Decades after they left Marriott and decades after Marriott stopped granting Retirement Awards, Appellants sued Marriott, challenging the top-hat status of the plans under ERISA. Appellants ask the Court to rewrite the plans retroactively and force Marriott to pay them substantially more shares than ever vested, more than they ever earned or expected, and more than the law entitled them to receive.

On January 19, 2010, Bond, along with former plaintiffs Robert England, Lewis Foster and Douglas Craig, initiated this lawsuit in the United States District Court for the District of Columbia. The case was subsequently transferred to the United States District Court for the District of Maryland where the plaintiffs, joined by Steigman, filed two amended complaints.[1] The second amended complaint, filed on October 17, 2011, remains the operative pleading and alleges two causes of action under ERISA. Both counts assert that the Retirement Awards violated ERISA's minimum vesting requirements because they do not qualify for the "top hat" exemption from those requirements. JA-30, 48-49. Appellants seek declaratory and injunctive relief requiring Marriott to reform the Retirement Awards to pay Appellants and other recipients additional benefits they allegedly would have received if their awards were subject to ERISA's vesting requirements. JA-53.

After an initial phase of discovery, the parties filed cross-motions for summary judgment addressing whether the statute of limitations and the doctrine

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[1] The district court dismissed England's ERISA claims because his employment with Marriott terminated before ERISA's effective date. *See England v. Marriott Int'l, Inc.*, 764 F. Supp. 2d 761 (D. Md. 2011). Foster and Craig voluntarily dismissed their claims because they admittedly received more shares under the vesting schedule provided in the Retirement Awards than they would have received if those Awards were subject to ERISA's minimum vesting requirements. (*See* Stipulation of Voluntary Dismissal, Oct. 13, 2011 (ECF No. 67)).

of laches barred Appellants' claims. The district court denied Marriott's motion and granted Appellants' cross-motion. JA-1046. The court also denied Appellants' motion for class certification.

Following further discovery, the parties filed cross-motions for summary judgment on Marriott's affirmative defense that the Retirement Awards qualify as top hat plans. At the conclusion of a hearing held on January 12, 2015, the district court ruled for Marriott, concluding that "[t]he employees who received… or who were invited to receive these benefits… were clearly highly-compensated employees by any standard in relation to the rest of the company and they primarily were management." JA-3545. The court also concluded that "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.* On January 20, 2015, the district court entered an order granting Marriott's motion for summary judgment, denying Appellant's cross-motion, and entering final judgment in favor of Marriott. JA-3422.

STATEMENT OF FACTS

I. Between 1976 And 1989, Marriott Operated A Large, Rapidly Expanding Hospitality Business.

Between 1976 and 1989,[2] Marriott operated a large, rapidly growing, highly diversified and decentralized hospitality corporation, engaged in three primary lines of business: hotels, restaurants, and contract food services.[3] Each had a number of distinct operating divisions with individual units dispersed around the country or around the world.[4]

Marriott's business grew and evolved rapidly during this period, far outpacing the record growth in the industry as a whole. Marriott owned 35 individual hotels in 1976.[5] By 1989, Marriott owned and operated 539 separate hotels.[6] Over this period, Marriott's hotel room supply increased 726.2%, compared with an overall growth in U.S. hotel room supply of 64.4%.[7] Growth in the restaurant sector similarly soared during this time, with Marriott restaurants

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[2] The Retirement Awards at issue in this case were granted between 1976 and 1989. JA-40.

[3] JA-1724-25; 1892-1902; 2205-06.

[4] JA-1724-25; 2206.

[5] JA-1601.

[6] JA-1609.

[7] JA-1893.

increasing from just over 420 units in 1976 to over 1,200 units in 1988, when Marriott began to divest portions of its restaurant holdings.[8]

Marriott also experienced rapid employment growth throughout this period. From 1976 to 1989, Marriott's workforce increased 675.1%.[9] In 1976, Marriott employed at least 60,600 people.[10] Based on a one day "snapshot" taken in 1989, Marriott employed at least 229,000 people.[11] The actual number of aggregate employees in each year far exceeded the snapshot figures due to employee turnover throughout the year.[12] For example, Appellants determined that Marriott employed 411,164 people throughout 1989. While this growth applied to the management and non-management ranks alike, the proportion of management employees to the total workforce remained fairly steady, ranging from 6% to 8%.[13]

II. Marriott Relied Upon On-Site Managers To Operate Its Hotels And Restaurants.

Because Marriott's operations were so diverse and diffuse, the Company's management was (and still is) necessarily decentralized, with management

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[8] JA-1602; 1902.

[9] JA-1896.

[10] JA-1605.

[11] JA-1612.

[12] JA-1139-40; 1413.

[13] JA-1256; 1413.

employees spread across corporate, divisional, and hotel and restaurant unit levels. It is undisputed that the individual hotels and restaurants were Marriott's primary assets, and the drivers of its financial success.[14] Appellants concede that hotels and restaurants were not and could not be run from corporate headquarters.[15] Rather, they required on-the-ground managers operating them as individual profit centers.[16]

Marriott operated and evaluated each individual hotel and restaurant as a standalone business. Each property had its own management team and maintained its own finances. Marriott charged these managers with the day-to-day operations and the financial and competitive success of their business units.[17] Appellants concede it is the unit-level managers that "managed the large number of unit staff

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[14] JA-1898; 1959.

[15] *Compare* JA-1898 ("[H]otel operations are decentralized with significant management and decision making at the individual hotel level."); *with* JA-1868 at 31:1-8 (Appellants' expert Tomaras admitting that Marriott's hotels "were not managed by corporate executives at Bethesda").

[16] *See* JA-1728-29; 1898-99; 2207-08.

[17] *See* JA-2034-35 (describing Marriott's practice of managing "from the field," and not from an "ivory tower"); JA-2041 (describing Marriott's "emphasis on control" and the "profit center" of each business unit down to "[e]very dime or penny" accountability so that "managers play a significant role by monitoring their specific department").

who were directly providing service to Marriott's millions of daily customers."[18] As a hospitality company, customer service is the touchstone of Marriott's operations. Unit management, not corporate employees, tended to these guests and ultimately bore responsibility for their satisfaction.[19]

Each hotel had its own management team. In addition to the Executive Committee (typically consisting of a General Manager, Director of Sales and Marketing, Director of Human Resources, Director of Food and Beverage, Director of Engineering, Director of Catering, Executive Housekeeper, and Director of Finance), full-service hotels often had other managers, including but not limited to, gift shop managers, restaurant maître d's, and golf and tennis pros. A gift shop could generate significant profits for the hotel by offering resort logo products and necessities required by guests, contributing directly to a hotel's bottom line and customer satisfaction.[20] Appellants concede that gift shop managers were part of a standalone hotel's management team, and that these managers were highly compensated compared to the rest of the hotel's workforce.[21]

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[18] JA-1956; *see also* JA-1959 ("[I]t is essential to have trained management teams who can effectively manage the massive numbers of unit staff who directly service customers.").

[19] JA-1866-67.

[20] JA-1899.

[21] JA-734; 774; 1873-75.

Between 1976 and 1989, hotels became much more than places for tourists and business people to sleep. Hotels increasingly focused on attracting special events, such as weddings, bar mitzvahs, and business-related conferences. The task of attracting and staging these events fell to the Director of Sales and Marketing, Director of Catering and other managers directly and indirectly involved in sales, marketing, and event-planning. Appellants admit that the Director of Catering "is an important position for a hotel that holds… events like weddings or bar mitzvahs or corporate meetings."[22] These managers were critical to local and national marketing efforts to attract events and groups that could generate substantial business for the hotel and raise its competitive profile.

Marriott's restaurants did not require the same degree of management as its full-service hotels, and as a result, Marriott granted far fewer Retirement Awards to restaurant managers than hotel managers.[23] But like hotels, these restaurants required hands-on management. Marriott expected restaurant managers to recruit and supervise employees and operate the restaurant in a profitable manner.[24] Marriott also owned upscale restaurants connected to certain hotels. For example, Appellant Steigman served as the General Manager for the Capriccio restaurants in

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[22] JA-1875.

[23] JA-1270; 1467.

[24] JA-1902.

the Denver and Los Angeles Marriott hotels and was responsible for their operations and financial performance.

At Marriott's corporate headquarters in Bethesda, Maryland, the senior leadership team, led by the President and CEO, charted the strategic direction of the company.[25] Corporate departments such as legal, human resources, accounting, tax, and finance also operated from Bethesda.[26] The division leaders responsible for managing certain aspects of each broad business group (*e.g.*, restaurants, hotels, etc.), and within those groups, executive teams responsible for each brand (*e.g.*, Marriott, Courtyard, Roy Rogers, Big Boy, etc.), also resided in Bethesda.[27]

Depending on the size and complexity of the operating division, Marriott also established regional management teams.[28] For example, the West Coast Lodging Division had administrative and managerial responsibilities for hotels in that region. The corporate and divisional management generally focused on supporting and coordinating the activities and growth of the rapidly expanding

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[25] JA-1724-25; 1832-33; 2206.

[26] JA-1630-31.

[27] JA-1725-28; 2206.

[28] JA-1728; 1729-30; 2206.

business units.[29] Corporate and divisional management, however, did not and could not manage the individual hotels and restaurants.[30]

III. Marriott Granted Retirement Awards Pursuant To Its Annual Management Incentive Bonus Programs.

Marriott offered a full complement of benefits across its entire workforce, such as salaried or hourly pay, health insurance, retirement plans, and profit sharing.[31] Beginning in 1963, Marriott offered a select group of management employees the opportunity to earn tax-deferred Retirement Awards through Marriott's Management Incentive Bonus Programs"[i]n addition to regular Salary, Cash Bonus and Profit Sharing."[32]

In 1970, Marriott's stockholders approved the Deferred Stock Incentive Plan (the "1970 Plan"). The 1970 Plan remained in effect until 1978 and overlapped ERISA's January 1, 1976 effective date. The 1970 Plan authorized Retirement Awards " as a part of a management incentive program whereby a portion of the annual bonus awarded to managers and other employees for outstanding performances is made in the form of deferred stock."[33]

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[29] JA-542-43; 1724-27; 1729-30.

[30] JA-2034-35.

[31] JA-459-60; 760; 2049; 2062-66.

[32] JA-87; 90.

[33] JA-93.

Retirement Awards "contingently vest[ed] in equal annual installments until age 65" or fully upon approved early retirement, permanent disability or death.[34] The 1970 Plan expressly provided that "[v]esting accruals stop when employment terminates for any other reason."[35] Marriott distributed vested shares in "ten annual installments after retirement, permanent disability or upon reaching age 65" as long as the employee refrained from "competing, directly or indirectly, with the Company for a period of ten years after retirement or after age 65 if employment is terminated while in good standing prior to retirement."[36] Each Retirement Award recipient, including Appellants, received an Award Certificate explaining the vesting schedule and the other principal terms of the awards.[37]

IV. Following ERISA's Enactment, Marriott Determined That Retirement Awards Were Top Hat Plans, Exempt From ERISA's Vesting Rules.

Congress enacted ERISA in 1974 "after careful study of private retirement pension plans." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981). Concerned that rank-and-file employees were losing promised retirement benefits, Congress imposed a variety of requirements, including vesting requirements, on broad-based retirement and pension plans. *See* 29 U.S.C. § 1001(a). Congress did

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[34] JA-94.

[35] *Id.*

[36] *Id.*

[37] *See* JA-109-135.

not extend those requirements to all plans. After surveying the landscape, Congress exempted so called "top hat" plans from these requirements, including the vesting requirements.[38]

A top hat plan is an unfunded plan "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). Congress did not define the key terms of the exemption – "primarily," "select group," and "management or highly compensated employees." The Department of Labor ("DOL") has never issued regulations governing top hat plans.

Following ERISA's enactment, Marriott assessed its existing benefit plans and determined that the ERISA vesting requirements did not apply to the Retirement Awards because they were "unfunded and… maintained by the Company primarily for the purpose of providing deferred compensation for a selected group of management or highly compensated employees."[39]

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[38] *See* ERISA §§ 201, 301, 401, 29 U.S.C. §§1051, 1081, 1101. The term "top hat plan" is not found in ERISA, but is a commonly used and accepted reference to plans that fall within ERISA Section 1051(2). As the Supreme Court has recognized, ERISA was the "product of a decade of congressional study of the nation's private employee benefit system." *Mertens v. Hewitt Assocs.* 506 U.S. 248, 251 (1993).

[39] JA-298.

V. Marriott Continued To Grant Retirement Awards To Select Management Employees From 1978 Through 1989.

In 1978, Marriott modified its Retirement Awards in response to demands of management. At a July 14, 1977 Executive Committee meeting, J.W. Marriott, Jr., Marriott's then President and CEO and current Chairman, reported that "young managers, especially, were dissatisfied with the long vesting period" of the Retirement Awards and desired an option with a shorter vesting period and faster payout.[40] In response, Marriott changed the 1970 Plan in 1978 by adding a "Pre-Retirement Award" option to the program.[41] This option gave eligible employees the choice to select an award that vested and was paid over a period of ten years during employment (a "Pre-Retirement Award") or a Retirement Award. Appellants concede the Pre-Retirement Awards were not subject to ERISA.[42]

Marriott subjected the 1978 Plan to an extensive review process. On July 14, 1977, Marriott's Executive Committee reviewed and adopted the 1978 Plan.[43] Marriott's shareholders then approved the plan on November 15, 1977.[44] Marriott's law department drafted a Prospectus describing the plan and disclosing

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[40] JA-142.

[41] JA-308-10.

[42] JA-39 at ¶ 40.

[43] JA-142.

[44] JA-2087.

that Retirement Awards were exempt from ERISA's vesting requirements.[45] Marriott filed the Prospectus with the Security and Exchange Commission ("S.E.C.").[46] Marriott distributed the Prospectus to all management employees eligible to earn a bonus that could include a Retirement Award, including Appellants.[47] The Prospectus described the Retirement Awards program, the tax deferral provided by the Awards and, in a section conspicuously titled "ERISA," the top hat status of the Retirement Awards:

> The Incentive Plan is an 'employee pension benefit plan' within the meaning of the Employee Retirement Income Security Act of 1974 (the 'Act'). 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.[48]

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[45] JA-298; 2111. The Prospectus alone refutes Appellants' claims that Marriott took no steps to bring the Plan into compliance with ERISA and that Marriott "does not deny that the Plan violated ERISA." *See* Appellants' Opening Br. at 3.

[46] JA-293.

[47] *See* JA-293-304; 314-15.

[48] JA-298 (emphasis added).

VI. Marriott Established A Process To Select Retirement Award Recipients.

Marriott granted Retirement Awards only to a select group of management or highly compensated employees. Marriott did not employ an *ad hoc* process, as Appellants contend. Rather, Marriott acknowledged its multiple layers of management and its unique decentralized business model and developed a selection process keyed to job function, managerial responsibilities, and financial performance.[49]

The process involved four steps, each of which is well-documented in the record. *First,* for a position to be designated as a management position, a supervisor had to complete a "Request for New or Revised Management Occupation," including a detailed job description and a recommendation on bonus eligibility. Additional levels of management then had to review and approve the request.[50]

Second, multiple levels of supervisors had to approve the bonus potential of the specific management position based on job function, managerial responsibility, or financial importance of the position.[51] As Clifford Ehrlich, former senior vice

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[49] JA-1653 ("Bonus eligibility was not directly related to pay grades; it was based on the job functions."); *see also* JA-1706; 1824-25.

[50] JA-1638-41; 1730; 2113-16.

[51] *See* JA-1639.

president for human resources, explained, "the standard basically was somebody who had material and identifiable impact on the company's performance…. If you're in a business unit and you contributed to the success of the business unit, you were contributing to the success of the company."[52] Marriott documented this approval process, showing the various levels of review and ultimately the approval of the request.[53]

Third, if Marriott approved the position as a bonus-eligible management position, at the beginning of each year, the employee and his supervisor would negotiate and agree to an individualized bonus plan involving individual performance goals as well as relevant corporate or financial performance goals.[54] The record contains examples of these bonus calculation forms.[55] The forms set forth specific bonus criteria (including individual goals, unit sales, profitability, etc.), the manager's salary, and the manager's bonus range. At the bottom of the form, the manager's supervisor would assess the manager's annual performance.

Fourth, only when a manager in a bonus-eligible position satisfied his or her individual performance criteria and the corporate/financial performance goals and

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[52] JA-2758-59.

[53] JA-2123-24.

[54] JA-1645-47; 1664.

[55] JA-2117-2122; 2261-63.

received a bonus was the manager eligible for a Retirement Award, calculated as a percentage of the manager's cash bonus.[56]

Marriott's ERISA expert, Pamela Baker, explained that Marriott's eligibility process "was at a level of best practices since it was more rigorous than most during that period and was designed to avoid allowing a non-top-hat group member [to] receive an award."[57] Appellants agree that Marriott limited participation in the Retirement Award program. Bond testified that Marriott restricted eligibility for Retirement Awards to "folks that [Marriott] wanted to have stay with the company for the long term."[58] Steigman agreed that, "I don't know of anyone" outside of management positions that received a Retirement Award.[59] Kevin Kimball, a 38-year Marriott employee viewed the Retirement Awards as "gravy" on top of all the other benefits managers received and testified that Retirement Awards recipients "felt like [they] had an ownership interest in the company" and were "now part of the club."[60]

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[56] JA-1704-05; 1709-10.

[57] JA-1561; 2394.

[58] JA-468.

[59] JA-793.

[60] JA-1797.

VII. Between 1976 And 1989, Marriott Granted Retirement Awards To Less Than 1.63% Of Marriott Employees.

Between 1976 and 1989, in any given year no more than 1.63% of all Marriott employees received a Retirement Award, and no more than 2.12% received a Retirement Award or a Pre-Retirement Award.[61] Set forth below is a chart showing the number of the Marriott employees that received either a Retirement Award or a Pre-Retirement Award in each year compared with the Annual Report workforce counts (snapshot) and with Appellants' and Marriott's respective total workforce counts (includes annual turnover) as derived from Marrpay, Marriott's payroll database.[62] Though Appellants agree that Pre-Retirement Awards are not subject to ERISA, they maintain that Pre-Retirement Award recipients were eligible to receive Retirement Awards. Accordingly, Marriott includes Pre-Retirement Award recipients in the numerator. The parties also agree on the annual workforce numbers set forth in Marriott's Annual Reports and that these numbers reflect one day "snapshots" of Marriott's workforce. The parties also agree that the actual number of employees for the entire year far exceeded the "snapshot" number. Appellants' expert typically found higher total

[61] JA-101-108.

[62] Appellants repeatedly contend that the district court erroneously adopted the calculations of Marriott's experts. This is not accurate. The district court agreed with Marriott's calculations, but those calculations were based, as they are here, on the numbers identified by Appellants' experts. JA-3544.

workforce numbers than Marriott's expert. The end result is that the peak percentage under the calculation most favorable to Appellants (using the highest numerator, including Pre-Retirement Award recipients, and the smallest denominator, based on the Annual Report workforce numbers) is 2.12% in 1980. Every other permutation in every year is below 2%.[63]

YEAR	STOCK BONUS AWARDS	EMPLOYEES PER ANNUAL REPORT	AWARD RECIPIENT PERCENT	TOTAL WORKFORCE PER MARRIOTT	AWARD RECIPIENT PERCENT	TOTAL WORKFORCE PER APPELLANTS	AWARD RECIPIENT PERCENT
1976	907	60,600	1.50%	60,600	1.50%	N/A	-
1977	1,004	61,700	1.63%	61,700	1.63%	N/A	-
1978	1,256	68,500	1.83%	68,500	1.83%	101,544	1.23%
1979s	984	63,600	1.55%	98,435	1.00%	N/A	-
1979	1,177	65,700	1.79%	105,692	1.11%	109,406	1.08%
1980	1,424	67,300	2.12%	106,200	1.34%	109,944	1.30%
1981	1,580	81,800	1.93%	116,504	1.36%	120,513	1.31%
1982	1,689	109,200	1.55%	129,543	1.30%	126,846	1.33%
1983	2,173	109,400	1.99%	143,487	1.51%	141,742	1.53%
1984	2,176	120,100	1.81%	168,075	1.29%	166,825	1.30%
1985	2,430	154,600	1.57%	188,293	1.29%	200,335	1.21%
1986	3,493	194,600	1.79%	252,906	1.38%	258,554	1.35%
1987	4,140	210,900	1.96%	350,191	1.18%	360,940	1.15%
1988	4,285	229,600	1.87%	392,886	1.09%	392,406	1.09%
1989	4,524	229,900	1.97%	403,344	1.12%	411,164	1.10%

Not only did Retirement Award recipients constitute a tiny sliver of the total workforce, they were also only a small percentage of management employees.[64] Between 1978 and 1989, less than 8% of Marriott employees held positions assigned to salary grades 39 or above, which Marriott has identified as salary

[63] *See* JA-1330-31; 1480.

[64] *See* JA-1066; 1444.

grades associated with management positions for salary administration purposes.[65] And less than 17% of total employees with salary grades of 39 or above received Retirement Awards between 1978 and 1989.[66] During that period, less than 22% of such employees received either a Retirement Award or Pre-Retirement Award.[67] Indeed, many Retirement Award recipients, including both Appellants, held management positions at various points that were ineligible to receive bonuses and Retirement Awards.[68]

VIII. Retirement Award Recipients Were Highly Compensated Employees.

Retirement Award recipients were highly compensated in relation to the general Marriott workforce and the workforce at each manager's division or specific unit. For example, in 1989, the average annual compensation paid to Retirement and Pre-Retirement Award recipients was $60,619 – nearly ten times greater than the average annual compensation of $6,129 for the general workforce.[69] For all years from 1978 through 1989, this average compensation ratio was never lower than 8.68 to one.[70] Indeed, for each year where data is

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[65] JA-1066; 2663; 1256; 1448.

[66] JA-1418; 1446.

[67] JA-1518.

[68] *See, e.g.*, JA-2129-38.

[69] JA-1515.

[70] *Id.*

available, at least 93% of Retirement and Pre-Retirement Award recipients were among the top 10% earners in the overall Marriott workforce.[71]

Average and Median Compensation for Award Recipients and Workforce 1978-1989

Year	Comparison of Average Compensation			Comparison of Median Compensation		
	Average Compensation Award Recipients	Average Compensation Total Workforce	Ratio of Averages	Median Compensation Award Recipients	Median Compensation Total Workforce	Ratio of Medians
1978	$28,936	$3,056	9.47	$24,271	$967	25.09
1979	$30,927	$3,564	8.68	$25,801	$1,087	23.73
1980	$38,074	$3,894	9.78	$29,928	$1,280	23.38
1981	$40,728	$4,322	9.42	$34,599	$1,540	22.47
1982	$44,962	$4,815	9.34	$38,422	$1,699	22.61
1983	$47,451	$5,141	9.23	$39,868	$1,827	21.82
1984	$52,399	$5,080	10.32	$42,817	$1,676	25.54
1985	$56,905	$5,356	10.62	$48,103	$1,727	27.85
1986	$55,977	$5,474	10.23	$45,437	$1,808	25.13
1987	$58,589	$5,402	10.84	$48,108	$1,700	28.30
1988	$59,875	$5,516	10.85	$49,850	$1,749	28.51
1989	$60,619	$6,129	9.89	$50,097	$2,125	23.57

Context is important in determining who is "highly compensated" within a corporation as diversified and decentralized as Marriott. A hotel general manager in Omaha may not have earned more than a corporate vice president in Bethesda. But within that standalone hotel, he or she was likely the highest paid employee. Appellants concede that the executive committee managers at an individual hotel were highly compensated compared with the general workforce of the hotel.[72] Appellant Bond's compensation illustrates this point. In 1989, Bond served as the

[71] JA-1515-16.

[72] JA-1872-75.

General Manager of the St. Louis Marriott Pavilion hotel and received the highest compensation of any employee at that property, earning $176,322.[73]

IX. Appellants Concede They Held Management Positions At Marriott.

A. Appellant Bond

Bond joined Marriott in 1973 as an Assistant Sales Manager at the Lambert Airport Marriott in St. Louis, and was soon promoted to Director of Sales and Marketing, with several people reporting directly to him.[74] Bond admits that both positions were management positions.[75] Bond concedes, however, that neither position had bonus potential and that he was not eligible for and did not receive Retirement Awards in those positions.[76]

In 1976, Marriott promoted Bond to Director of Sales and Marketing of the City Line Avenue Marriott in Philadelphia, with approximately ten people reporting to him.[77] In 1978, Marriott promoted Bond to Regional Director of Marketing for Marriott's East Coast region, and he relocated to Marriott's corporate headquarters in Bethesda, Maryland.[78] In 1979, he relocated to Los

[73] JA-383; 2139.

[74] JA-382-83; 452-56.

[75] JA-469.

[76] JA-451-52.

[77] JA-383; 452-56.

[78] JA-383; 471-74.

Angeles as Regional Director of Marketing for Marriott's West Coast region.[79] From 1982 until he resigned from Marriott in 1992, Bond served as the General Manager of the Marriott Pavilion hotel in St. Louis.[80] From 1976 until he left Marriott, Bond occupied bonus-eligible management positions.[81]

Bond testified that he "was very happy with working for [Marriott] at that time and felt like they were taking care of [him]," and he "didn't feel like anyone was trying to short change [him]."[82] In addition to his annual salary, which increased from approximately $20,000 in 1973 to $176,322 in 1989, Bond received cash bonuses and medical benefits, and participated in Marriott's generous profit-sharing plan and stock option plan for salaried employees.[83]

On top of those benefits, Bond received Retirement Awards from Marriott in 1976 and 1977 (as Director of Sales and Marketing at the Philadelphia Marriott), in 1978 and 1979 (as Regional Director of Marketing), and in 1988 and 1989 (as General Manager of the St. Louis Marriott).[84] Bond testified that Marriott selected him because he "was doing a good job and … was in … a position that … was

[79] JA-383; 506-07.

[80] JA-383; 534-35.

[81] JA-535; 539; 534-35.

[82] JA-469; 478; 481; 502; 509.

[83] JA-547.

[84] JA-384.

helping the company."[85] Bond admits that the 1978 Prospectus informed plan participants that ERISA's vesting terms did not apply to the Retirement Awards.[86] In total, Bond was awarded 1,344 shares of Marriott stock through Retirement Awards issued between 1976 and 1989.[87] Bond voluntarily resigned from Marriott on October 19, 1991, two years before his awards would have fully vested.[88] In 2006, Marriott paid Bond all of his vested shares based on the vesting schedule expressly set forth in the awards.[89]

B. Appellant Steigman

Steigman joined Marriott in 1973 as an Assistant Restaurant Manager for the Capriccio Restaurant at the Los Angeles Marriott.[90] Steigman admits that as Capriccio's Assistant Manager he was part of Marriott management, but was ineligible to receive a bonus or a Retirement Award.[91] Marriott promoted him to Restaurant Manager in 1974. As Restaurant Manager, Steigman managed a staff

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[85] JA-468-69.

[86] JA-503-06.

[87] JA-101-08.

[88] JA-564-66; 383.

[89] Bond's 2006 payout was part of a one-time, plan-wide distribution occasioned by changes in the federal income tax laws governing the taxation of deferred compensation. *See* JA-644.

[90] JA-646-47.

[91] JA-683-84.

of 40 people.[92] Steigman relocated to Colorado in 1975 as General Manager of Capriccio Restaurant at the Denver Marriott, again supervising 40 people.[93] As the General Manager of Capriccio, Steigman occupied a Marriott-approved bonus-eligible position, and he received Retirement Awards in 1974 and 1975.[94]

In 1976, Steigman became an Assistant Controller at the Denver Marriott.[95] Marriott had not approved this position for bonus eligibility, and thus, Steigman was again ineligible for, and did not receive, Retirement Awards in this position. In 1978, Marriott promoted him to Controller, managing a staff of eight people.[96] The Controller position and all subsequent posts Steigman held were bonus-eligible positions.[97] In 1982, Steigman took part in a Resident Manager Training Program at Marriott, after which he became Resident Manager and later Acting General Manager of the Chicago Marriott.[98] From 1985 until he resigned from Marriott in 1991, Steigman served as a hotel General Manager, first of the

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[92] JA-646.

[93] JA-647.

[94] JA-648.

[95] JA-647.

[96] JA-648.

[97] JA-723.

[98] JA-647.

Bloomington, Minnesota Marriott, and later of the Miami Airport Marriott.[99] As General Manager, Steigman managed a staff of 400 to 500 hotel employees.[100] Steigman concedes that each position he held at Marriott from 1982 through 1991 was a management position.[101]

Like Bond, Steigman received multiple benefits as a Marriott employee. By 1989, Steigman earned $125,797 per year in salary and participated in Marriot's profit-sharing plan and the salaried employee stock ownership plan.[102] Steigman received Retirement Awards from Marriott in 1974 and 1975, both prior to ERISA's effective date.[103] In 1978 and every year thereafter, Steigman elected to receive Pre-Retirement Awards under the 1978 Plan that were not subject to ERISA.[104] Marriott granted Steigman 693 shares of Marriott stock under the Retirement Award program between 1978 and 1989.[105] Shortly after his

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[99] *Id.*

[100] *Id.*

[101] JA-689; 714; 734; 751.

[102] JA-763.

[103] JA-648.

[104] JA-749.

[105] JA-101-08.

termination in 1991, Steigman signed a release and Marriott paid him all of the vested shares due under the express terms of his Awards.[106]

X. In 1991, Marriott Amended The Deferred Stock Bonus Plan Based On The Department Of Labor's Newly Announced Statutory Interpretation.

In 1990, after Marriott issued the Retirement Awards challenged in this case, the Department of Labor ("DOL") issued a two-page Advisory Opinion ("AO 90-14A") interpreting the "unfunded" requirement of the top hat provision. In AO 90-14A, DOL for the first time suggested that top hat plan participants must have the ability to "affect or substantially influence… their deferred compensation plan."[107] In addition, DOL announced a new policy position, interpreting the word "primarily" to modify "for the purpose of providing deferred compensation" and not "for a select group of management or highly compensated employees."[108] The latter statement appeared in a footnote and was wholly irrelevant to the subject of the opinion letter.

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[106] JA-843-44.

[107] *See* DOL Advisory Op. 90-14A, 1990 WL 123933 (May 8, 1990).

[108] *Id.*

While it did not have the force of law, ERISA practitioners considered DOL's pronouncement a "sea change" and "bombshell."[109] Out of an abundance of caution, Marriott amended the 1978 Plan (creating the "1991 Amended Plan"). Marriott's 1991 Proxy Statement filed with the S.E.C. explicitly states that Marriott amended the plan "in light of changing government interpretations…."[110]

Under the 1991 Amended Plan, Marriott employed the same four-step process to select Retirement Award recipients. The only significant change was that a manager who satisfied the negotiated performance objectives could receive a Retirement Award only if Marriott classified the manager's position in pay grade 56 or above. If the manager received a salary less than pay grade 56, he or she received a Pre-Retirement Award. Appellants do not challenge the top hat status of the 1991 Amended Plan.

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[109] Agency advisory opinions are not accorded the weight of law. *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000); *see* JA-1560; *see also* Vincent Amoroso *et al.*, *SERP Sponsors Beware*, 24 Pen. & Ben. Rep. (BNA) 1001 (1997) (recognizing that "DOL's focus shifted" with Opinion 90-14A, resulting in "a noticeable change" in the reasoning used by courts addressing top-hat issues).

[110] JA-934.

SUMMARY OF ARGUMENT

This appeal raises two issues: (1) whether the district court correctly determined that the Retirement Awards Marriott granted between 1976 and 1989 were maintained "primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees" and thus qualified as "top hat" plans exempt from ERISA's vesting requirements; and (2) whether the district court erred by rejecting Marriott's statute of limitations defense and permitting Appellants to challenge the top-hat status of these 1976-1989 Awards in 2010. Marriott respectfully submits that the former decision should be affirmed, and the latter decision should be reversed.

A. THE DISTRICT COURT CORRECTLY RULED THAT RETIREMENT AWARDS ARE TOP HAT PLANS.

The district court thoroughly reviewed the voluminous record and applied well-established legal standards in finding the Retirement Awards qualified as top hat plans. The court determined that Marriott satisfied the "quantitative" standard, as less than 2% of its workforce received Retirement Awards, and the "qualitative" test, as Marriott limited these awards to "primarily" a "select group of management or highly compensated employees."

In their opening brief, Appellants jettison their principal argument below that the raw number of recipients failed the "quantitative" test and instead focus

almost exclusively on rewriting the statutory language relevant to the "qualitative" prong.

1. Appellants' Attempt To Rewrite The Statute And Alter The Meaning Of "Primarily" Fails.

The statute defines a top hat plan as one "maintained… primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." Rather than apply the statute as written, Appellants claim that top hat plans must consist "exclusively" of "high-ranking executives" not "primarily" of "a select group management or highly compensated employees." The words "exclusively" and "high-ranking executives" do not appear in the statute, and court after court has rejected this formulation.

Appellants' attempt to alter the meaning of "primarily" fares no better. Appellants address the word "primarily" in a vacuum, sealed off from the applicable legal standards, the dispositive case law, and the undisputed record, and parse the statute's language beyond recognition. The statute provides that the purpose of a top hat plan is "primarily… providing deferred compensation for a select group of management or highly-compensated employees." "Primarily" clearly modifies the entirety of the "purpose" clause that follows. Yet Appellants seek to parse these words by limiting "primarily" so that it modifies only "for the purpose of providing deferred compensation" and severing it from "for a select group of management or highly compensated employees." By disconnecting

"primarily" from "select group of management or highly compensated employees," Appellants claim that participants must be "exclusively" high-ranking executives. Were this the case, a single borderline recipient would destroy the top-hat nature of a plan, entitling all participants (at least according to Appellants) to benefits they were never promised and never earned. The courts, however, including the First Circuit, have rejected Appellants' "bizarre" position and determined that a top hat plan need only consist "primarily" of management or highly compensated employees.

2. DOL's Footnotes Are Not Entitled To Deference

Nor can Appellants rely on DOL to salvage their strained interpretation of the statute's language. Appellants argue that DOL clearly articulated the scope and meaning of the word "primarily" throughout the 1976-1990 period and that these alleged pronouncements should be afforded deference. The reality is quite different. In 1990, 14 years after ERISA's implementation, DOL announced in a footnote that "primarily" modified only the "deferred compensation" part of the statutory language not the "select group of management or highly compensated" part. Subsequent to this pronouncement, the First Circuit soundly rejected DOL's interpretation as unpersuasive and "bizarre."

3. Appellants Do Not Identify Any Non-Compliant Plan Participants.

Finally, the entire factual premise of Appellants' argument is incorrect. Appellants claim that Marriott "concedes" that a *de minimis* number of recipients, approximately 0.13% of the total, were neither management nor highly compensated and that the district court found as much. Neither is true. Marriott has never conceded that any ineligible employees received Retirement Awards and the district court never found otherwise. Nor could it, as Appellants have never identified a single Retirement Award recipient who fell outside of the manager or highly-compensated categories.

B. APPELLANTS' CLAIMS ARE UNTIMELY.

Under Fourth Circuit law, there are two ways to trigger the statute of limitations for an ERISA benefit claim: (1) an employer's formal administrative denial of a benefit claim; or (2) when no benefit claim has been made, pursuant to *Cotter v. Eastern Conference of Teamsters Retirement Plan*,[111] upon "some event other than a denial of a claim" that should have alerted the claimant to his claims. Respectfully, the district court erred by applying the "formal denial" test, and not the *Cotter* test. Appellants did not submit a benefit claim and thus Marriott never issued a formal claim denial. Indeed, the "formal denial" test cannot apply here as

[111] 898 F.2d 424, 428 (4th Cir. 1990).

Appellants do not seek benefits under the terms of the plan. Rather, Appellants challenge the legal status of the Retirement Awards claiming Marriott miscategorized the Retirement Awards as a top hat plan, and ask the Court to rewrite the plan's terms. A challenge to the legal status of an ERISA plan is not the type of claim that can be properly adjudicated by an employer's administrative claims process. Accordingly, in the absence of a formal denial, the district court should have applied the *Cotter* standard. Had it done so, it would have easily found that multiple events outside the three-year statute of limitations triggered the limitations period in this case.

By 1978, Appellants knew everything they needed to know regarding their alleged harm to challenge the ERISA status of the Retirement Awards. Appellants claim that the participation of unit managers, like themselves, destroyed the top-hat status of the Retirement Awards plan. Thus, Appellants should have known in 1978 that their participation in the plan gave rise to their claims. Moreover, the 1978 Prospectus that Marriott provided to Appellants clearly identified the Retirement Awards as exempt from ERISA's vesting requirements. Appellants principally argued to the district court that the sheer number of Retirement Award recipients invalidated the plan's top-hat status. The 1978 Prospectus identified that more than 1,300 employees had received Retirement Awards. Accordingly, Appellants had all the information they needed to bring their claim in 1978 and

knew when they received their final payments – Steigman in 1991 and Bond in 2006 –that they were not fully vested in their Awards. It is not necessary that Appellants understood the legal nuances of their ERISA claims; all that is necessary is that they possessed the facts needed to investigate their legal rights.

STANDARD OF REVIEW

This Court reviews "a district court's grant of a motion for summary judgment de novo, applying the same legal standards as the district court." *Glynn v. EDO Corp.*, 710 F.3d 209, 213 (4th Cir. 2013). Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Emmett v. Johnson*, 532 F.3d 291, 297 (4th Cir. 2008). A "material fact" is one "that might affect the outcome of the suit under the governing law." *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 183 (4th Cir. 2001) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (a dispute is only "genuine" if sufficient evidence favoring the non-moving party exists for the trier of fact to return a verdict for that party)).

While Marriott bears the initial burden of proof on its affirmative defenses, "[w]hen the defendant has produced sufficient evidence in support of its affirmative defense, the burden of production shifts to the plaintiff to 'come forward with specific facts showing that there is a genuine issue for trial.'" *Ray*

Commc'ns, Inc. v. Clear Channel Commc'ns, Inc., 673 F.3d 294, 299 (4th Cir. 2012) (quoting *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 614 (4th Cir. 1999)). "A mere scintilla of proof… will not suffice to prevent summary judgment." *Peters v. Jenney*, 327 F.3d 307, 314 (4th Cir. 2003). Nor may the non-moving party "create a genuine issue of material fact through mere speculation or the building of one inference upon another." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985).

ARGUMENT

I. MARRIOTT'S RETIREMENT AWARDS SATISFY THE TOP HAT EXEMPTION.

To qualify as a top hat plan, the plan must be unfunded and 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). Appellants contest only the second factor: whether Retirement Award participants constitute "primarily… a select group of management or highly compensated employees." *See* Appellants' Opening Br. at 2.

In their brief, Appellants conspicuously never identify the standards applicable to the "select group" analysis. The requirement that a top hat plan cover a "select group of management or highly compensated employees" is "a fact specific inquiry that examines both quantitative and qualitative factors." *Guiragoss v. Khoury*, 444 F. Supp. 2d 649, 660 (E.D. Va. 2006) (citing *Demery v.*

Extebank Deferred Comp. Plan (B), 216 F.3d 283, 288 (2d Cir. 2000)). These "include the percentage of the total workforce invited to join the plan (the quantitative factor) and the nature of their employment duties, the compensation disparity between top hat plan members and non-members, and the actual language of the plan agreement (the qualitative factors)."[112] *Id.* (citing *Carrabba v. Randalls Food Mkts., Inc.*, 38 F. Supp. 2d 468, 479 (N.D. Tex. 1999), *aff'd*, 252 F.3d 721 (5th Cir. 2001)). Marriott's Retirement Awards easily satisfy both the quantitative and qualitative tests.

A. Marriott Satisfies The Quantitative Test As It Granted Retirement Awards To Less Than 2% Of The Total Workforce.

From a quantitative perspective, plans covering as much as 15% of the company's total workforce may qualify as top hat plans, although 15% "is probably at or near the upper limit of the acceptable size for a 'select group.'" *Demery*, 216 F.3d at 289; *see also Guiragoss*, 444 F. Supp. 2d at 660 (same). Other courts, including this Court, have found that the select group criteria is satisfied if the plan is limited to a reasonably small percentage of the company's total workforce. *See Darden v. Nationwide Mut. Ins. Co.*, 796 F.2d 701, 708 (4th

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[112] Appellants' statistics expert, Dr. Cowan, admits that he was aware of these factors but nonetheless, at the request of counsel, failed to perform either the quantitative or qualitative analysis. JA-1880-83. He conceded that Marriott's expert Kevin Dages performed both analyses. JA-1884-85.

Cir. 1986) ("The term 'select group' seems to imply a small percentage of the total number."); *Alexander v. Brigham & Women's Physicians Org., Inc.*, 513 F.3d 37, 44 (1st Cir. 2008) (plan in which no more than 8.7% of workforce met the eligibility requirements served a sufficiently "select group" to qualify as a top hat plan); *Belka v. Rowe Furniture Corp.*, 571 F. Supp. 1249, 1252 (D. Md. 1983) (between 1.6% and 4.6% of the defendant's total work force was sufficiently limited); *Godina v. Resinall Int'l, Inc.*, 677 F. Supp. 2d 560, 574 (D. Conn. 2009) (2.3% of total workforce qualified as top hat plan); *cf. Guiragoss*, 444 F. Supp. 2d at 663 (plan covering 75% of total workforce was not limited to a sufficiently select group); *Darden v. Nationwide Mut. Ins. Co.,* 717 F. Supp. 388, 397 (E.D.N.C. 1989), *aff'd*, 922 F.2d 203 (4th Cir. 1991), *rev'd*, 503 U.S. 318 (1992) (plan offered to 18.7% of the workforce was too large to meet selectivity requirement).

Appellants largely ignore the quantitative factor of the "select group" analysis and do not dispute that Marriott granted Retirement Awards to less than 2% of its total workforce. Appellants' only response is to argue that Marriott's calculation is "misleading" because it is based on "Award recipients as a percentage of Marriott's entire employee base." *See* Appellants' Opening Br. at 61. Yet this Court and others have been consistent and clear that the correct

denominator for the "select group" calculation is the company's *total* workforce.[113] *See, e.g.*, *Darden*, 796 F.2d at 708 (relevant inquiry is the "percentage of [the employer]'s total employee complement who participated in the… Plan"); *Belka*, 571 F. Supp. at 1252 (analyzing "select group" element as the "percent of the defendant's work force" that participated in the plan); *see also Alexander*, 513 F.3d at 41 (proper method for determining whether group is select is to divide number of employees who met plan eligibility requirements and actually benefited from the plan by the total workforce); *Bakri v. Venture Mfg. Co.*, 473 F.3d 677, 678 (6th Cir. 2007) ("In determining whether a plan qualifies as a top hat plan, we consider…the percentage of the total workforce invited to join the plan…."); *Demery*, 216 F.3d at 288 (applying "percentage of the workforce" standard); *Van Gent v. St. Louis Country Club*, No. 4:08CV959 FRB, 2013 WL 6198122, *10 (E.D. Mo. Nov. 27, 2013) (assessing plan participants as percentage of total workforce including full and part-time employees for purposes of "select group" analysis).

Appellants now concede that even using the most Appellant-friendly numbers, Marriott issued Retirement Awards to less than two percent – and in most years less than one percent – of its workforce. *See* Appellants' Opening Br.

[113] The district court twice remarked that Appellants' analysis was reminiscent of Darryl Huff's 1954 book "How to Lie with Statistics." JA-3541; 3548.

at 59-60. This falls far below the threshold for the "select group" criteria for top hat plans. *See, e.g.*, *Demery*, 216 F.3d at 288; *Belka*, 571 F. Supp. at 1252. By any standard, a plan covering no more than 2% of the workforce is quantitatively select.

B. Marriott's Individualized Selection Process Ensured That Retirement Award Recipients Were Qualitatively A Select Group Of Management.

While largely ignoring the quantitative factor, Appellants attack the plan participants qualitatively, suggesting they were not a sufficiently "select group" to satisfy the top hat standard because Marriott did not restrict the plan to its top-level Bethesda-based executives. To satisfy the qualitative component of the "select group" test, the top hat plan's participants must primarily be comprised of either "management or highly compensated employees." 29 U.S.C. § 1051(2).

Here, Marriott reserved Retirement Awards for a small percentage of management employees, individually selected and designated, who satisfied both individual and corporate performance criteria. To receive a Retirement Award, a Marriott employee had to satisfy the four criteria described above: (1) occupy a position Marriott designated as a management position; (2) occupy a position Marriott designated as bonus-eligible; (3) meet annually-set and individually-

negotiated performance objectives; and (4) actually receive a cash bonus. *See* Statement of Facts Section VI, *supra*.[114]

Employees who did not satisfy all four requirements were not eligible to receive Retirement Awards. JA-459. This process reflected Marriott's business judgment as to which specific positions at which specific locations involved sufficient managerial and/or financial responsibilities materially contributing to the success of the business. JA-406; 514-15; 577-79. The district court described Marriott's selection criteria as a "rigorous" and "highly selective process that from a qualitative standpoint satisfies the requirements of the top hat exemption." JA-3546.

Marriott's selection process yielded a very small percentage of management employees who received or were eligible to receive Retirement Awards between 1976 and 1989. In fact, at least 82% of Marriott managers did not receive Retirement Awards, and at least 78% received neither a Retirement Award nor a Pre-Retirement Award. JA-1446; 1250; 1518. Appellants do not mention, much less dispute, that 99.63% of Retirement Award recipients fell into Marriott's top

[114] Appellants persist in relying on Marriott's Marrpay database in an attempt to create a discrepancy regarding the number of employees eligible to receive Retirement Awards. *See* Appellants' Opening Br. at 16. It is undisputed, however, that Marriott did not track or record Retirement Award eligibility in Marrpay. *See* JA-3283 ¶ 6. It is further undisputed that the "bonus-eligibility" fields in Marrpay were not consistently maintained and therefore were unreliable. *Id.*

three management employee classifications ("Executive Staff," "Senior Salaried," and "Exempt Salaried"). JA-1338; JA-1487 (98.9% including Pre-Retirement Awards).

These macro-level statistics hold true at the micro-level as well. While the most common job title to receive a Retirement or Pre-Retirement Award from 1976 through 1989 was "Unit Manager I" (typically representing the general manager of an individual hotel or restaurant), from 1976 through 1989, only 60% of employees with that title received Awards. JA-1488. The remaining 40% either were not in jobs that Marriott determined to have sufficient managerial or financial responsibility or, if they were, they did not satisfy their bonus criteria. *Id.*

This is precisely the sort of "select management" plan routinely held to satisfy the top hat standards. *See, e.g.*, ; *Alexander*, 513 F.3d at 44-46; *Demery*, 216 F.3d at 285-88; *Belka*, 571 F. Supp. at 1252. Indeed, the only expert offered by either party to describe how top hat plans were implemented and understood during the relevant period characterized Marriott's selection process as a "best practice" at the time. JA-1561.

C. Retirement Award Recipients Were Also Highly Compensated Compared With Marriott's Overall Workforce.

The district court also correctly determined that"[t]he employees who received… or who were invited to receive these benefits… were clearly highly-compensated employees by any standard in relation to the rest of the company."

JA-3545. While "highly compensated" is not defined in the statute, courts evaluate this factor relatively, comparing average compensation earned by the top hat group with average compensation earned by the overall workforce.[115] Marriott has performed this calculation; Appellants have not.[116]

On average, Retirement and Pre-Retirement Award recipients earned at least 8.68 times the average compensation earned by Marriott employees between 1978 and 1989. JA-1443; 1515. Courts routinely determine that much smaller average compensation ratios satisfy the top hat "highly compensated" standard. *See Alexander*, 513 F.3d at 46 (more than five times the average income of employees as a whole); *Demery*, 216 F.3d at 289 ("the average salary of plan participants was more than double that of the average salary of all Extebank employees.");; *Belka*, 571 F. Supp. at 1251 (between three and five times greater than company-wide average); *Fishman*, 539 F. Supp. 2d at 1045-46 ("employees earning 3.75 or 4 times more than the average Zurich employee are 'highly compensated'"); *Duggan*

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[115] *See, e.g.*, *Alexander*, 513 F.3d at 46 ("To come within the compass of the top-hat provision, the employer must be able to show a substantial disparity between the compensation paid to members of the top-hat group and the compensation paid to all other workers."); *Demery,* 216 F.3d at 289; *Belka*, 571 F. Supp. at 1252-53; *Fishman v. Zurich Am. Ins. Co.*, 539 F. Supp. 2d 1036, 1045 (N.D. Ill. 2008) ("[A] comparison must be made between that employee's compensation and the average compensation of all corporate employees").

[116] JA-1068-69, 1443-44, 1884-85, 2234-35.

v. Hobbs, No. C-93-0316 EFL, 1995 WL 150535, at *4 (N.D. Cal. Mar. 28, 1995) ("approximately two-to-three times more than employees not covered by the plan.").[117]

Comparisons at the unit-level reinforce this conclusion. For example, in 1989, Marriott paid Bond $176,322, making him the highest paid of the 659 employees at the St. Louis Marriott Pavilion Hotel. JA-2143. The fact that the St. Louis Marriott was one of hundreds of Marriott hotels does not negate Bond's status as a highly compensated employee in comparison to the St. Louis Marriott workforce or, for that matter, Marriott's entire workforce. Indeed, Appellants admit that the general manager of a Marriott hotel "is high-ranking, top-level or highly compensated when compared to the remainder of the employees at that particular hotel" and that even a hotel gift shop manager "would be more highly compensated than the totality of employees." JA-1873.

The *Van Gent* decision illustrates this point. *See* 2013 WL 6198122, at *10. *Van Gent* involved a challenge to a country club's top hat plan where, among other positions, the club's general manager, clubhouse manager, executive chef and locker room manager participated. The court found this a valid top hat plan and

[117] Appellants do not dispute that at least 90% of Retirement Award recipients between 1978 and 1989 fell within the top 10% of earners in Marriott's overall workforce each year. *See* JA-1068; 1443-44.

highlighted the importance of these individuals to the success of the club. Similarly, the executive team of each Marriott hotel and restaurant were critical to the success of their business unit. The importance of the unit-level managers to these standalone units is not somehow diminished because Marriott also has a centralized corporate headquarters.

Confronted with the actual standards and the unfavorably high compensation differentials they yield, Appellants seek to change the standards. Rather than comparing the recipient group to the non-recipient group, Appellants seek to compare the compensation of lower-paid managers with higher-paid managers, or lower-paid Retirement Award recipients with higher-paid recipients. Appellants' Opening Br. at 11, 53, 56. Appellants do not and cannot cite any support for this wholly manufactured "standard." Instead, they send the Court on a scavenger hunt for clues to the meaning of "highly compensated" in irrelevant dictionary definitions, "experience under the FLSA," and IRS regulations promulgated under irrelevant portions of the tax code. *See* Appellants' Opening Br. at 47-48; 54-55. None of this is relevant, especially where a large body of existing authority provides uniform guidance about the meaning of the statutory language at issue. This Court has cautioned against using the meaning of a term in one statute to interpret a different statute, especially where the two serve different purposes. *See, e.g.*, *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 364-65 (4th Cir. 2000). Indeed,

even Appellants are forced to concede that "[b]oth DOL and the IRS have recognized that the tax-law understanding of 'highly compensated' is not controlling for ERISA purposes." *See* Appellants' Opening Br. at 54 (citing 53 Fed. Reg. 4965, 4967 (Feb. 19, 1988)).

D. Appellants Do Not Identify Any Retirement Award Recipient Who Does Not Meet The "Management Or Highly Compensated" Standard.

Appellants' opening brief rests on the false premise that the district court identified a subset of plan participants that did not fall into either the "highly-compensated" or "management" bucket and dismissed these exceptions as immaterial to the top hat determination. Appellants are wrong on both counts.

The district court did not find that any individual plan member failed to meet the top-hat standard. To the contrary, after studying the voluminous record, the district court found that "[t]he employees who received… or who were invited to receive these benefits… were clearly highly-compensated employees by any standard in relation to the rest of the company and they primarily were management." JA-3545. Yet in their brief, Appellants claim the trial court "held that the Plan attained top-hat status even though 'a few positions managed to get in there that did not meet one of [the statutory] criterion.'" Appellants Opening Br. at 28 (quoting JA-3550). The actual context of the quote is far different than Appellants suggest. The district court was not referring to Marriott's Retirement

Awards, but instead quoting approvingly from the Second Circuit's decision in *Demery* "[s]oundly *rejecting* the notion that if a few positions managed to get in there that did not meet one of those criterion [*sic*], that the plan itself would fail to qualify for the exemption." JA-3550 (emphasis added). The district court never determined that *any* Retirement Award recipients failed to meet the top hat plan criteria.

Nor do Appellants identify a single Award recipient who was not management or highly compensated in relation to Marriott's overall workforce. Instead, they cherry-pick a handful of job titles among Retirement Award recipients who they claim, without evidence, illustrate the over-breadth of the plan's coverage. *See* Appellants' Opening Br. at 17-18. At the summary judgment stage, Appellants simply speculated that the people who held these jobs were not sufficiently compensated, or did not possess sufficient management responsibilities, to satisfy the "select group" standard. This is insufficient. *See Beale*, 769 F.2d at 214 (a party may not "create a genuine issue of material fact through mere speculation or the building of one inference upon another" but instead must present evidence sufficient to support a verdict for that party at trial). In contrast, Marriott produced substantial evidence of the process that it used to select those specific managers and highly compensated employees who received Retirement Awards.

Despite years of discovery, Appellants provide no description of the job responsibilities or compensation associated with the handful of positions they list and no evidence showing that any of these positions lacked management responsibilities. Nor do Appellants provide any information about the individual recipients who held these positions. Appellants also make no effort to determine whether the positions they list are in fact accurate. Several job codes had been recycled over the years, meaning that a current job code may not accurately reflect the job a Retirement Award recipient actually held during the relevant time period. For example, an individual coded as an "Assistant Banquet Chef" was actually a Marriott Vice President earning over $117,000 in the year in which he received a Pre-Retirement Award. JA-2288-89. In any event, Appellants' cherry-picked job titles represent less than 0.1% of Retirement Award recipients.[118] At best, then, Appellants identify *de minimis* exceptions in an effort to undermine the entire plan.

II. THE COURT SHOULD DECLINE APPELLANTS' INVITATION TO READ NON-EXISTENT TERMS INTO ERISA.

Throughout their brief, Appellants elect not to grapple with the actual standards used by courts assessing top-hat plan status. Nor do they present evidence sufficient to overcome summary judgment. Instead, Appellants rest their

[118] *See* JA-1488-1514.

appeal on two strained statutory construction arguments, both aimed at narrowing the top hat exemption far more strictly than the statute permits.

First, Appellants claim that the word "management" in the top hat provision means only "high-level executives" with "responsibility for corporate policy or strategic direction." Appellants' Opening Br. at 4, 26. Second, Appellants claim that the word "primarily" in the phrase "maintained by an employer *primarily* for the purpose of providing deferred compensation for a select group of management or highly compensated employees" modifies only the benefits provided, and not the composition of the plan participants, such that the plan must be offered "exclusively" to management or highly-compensated employees. The combined effect is to limit the top-hat exemption so severely that the (even inadvertent) inclusion of a single participant who is not a top corporate-level executive would destroy the top-hat status of a plan.[119]

Rather than explicitly define the terms "primarily," "select group," "management," or "highly compensated employees," Congress allowed employers

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[119] The impact of this argument is even more startling when considered with Appellants' statute of limitations' position. Appellants ask the Court to hold that if a single non-executive plan participant is identified, even decades after the plan ceased offering benefits, the entire plan loses its top-hat status and the plan sponsor must retroactively reform the entire plan and pay all participants benefits they never earned or expected. Notably, even DOL does not share Appellants' view that this is an appropriate remedy. *See* DOL Br. at 24 n.5.

to make good faith determinations about whether new and existing plans qualified as top hat plans under the statute. *See Guiragoss*, 444 F. Supp. 2d at 659 (noting that the "employer's intent when establishing the plan . . . may influence the court's determination"); *Carrabba v. Tom Thumb Food & Drugs, Inc.*, No. 4:96-CV-651-A, 1997 WL 810030, *3 (N.D. Tex. Dec. 30, 1997) ("Subjective intent" of employer "at the time the plan was established and during the years that it was in existence" is of weight in the top hat analysis, particularly where the "[plan] existed years before the Department of Labor attempted to define the top hat exemption."); *see also Alessi*, 451 U.S. at 511-14 (in enacting ERISA, Congress set outer bounds on permissible practices and left the details largely to the discretion of the private parties creating the plans). Appellants' arguments would expose courts to a flood of litigation premised on a witch-hunt for even one non-executive plan participant. Unsurprisingly, there is no authority embracing such a severe reading of the top-hat provision. Indeed, Appellants' position has been soundly rejected by every federal appellate court to have considered the issue.

A. ERISA Does Not Limit Top Hat Plan Participants To "High Ranking" Management In The Highest Salary Grades.

Appellants do not, and cannot, dispute that Marriott granted Retirement Awards to a small percentage of its designated management population, itself comprising less than ten percent of Marriott's workforce. Instead Appellants claim that some of the managers who received Retirement Awards were not the right

kind of manager, and that the Court should simply disregard the key employees who managed Marriott's hotels and restaurants.

Throughout their brief, Appellants attempt to inject into the statute a requirement that a top hat plan consist only of "high-level executives." *See, e.g.*, Appellants' Opening Br. at 4, 7, 18, 25-26. Appellants contend that only Marriott's highest-level corporate executives, not the unit managers actually responsible for the profitability of the hotel and restaurant assets, should have received Retirement Awards. *Id.* Notably, this premise would exclude Appellants themselves from eligibility for Retirement Awards, despite their admission that they held management positions at Marriott.

Substituting post-hoc armchair appraisals for Marriott's contemporaneous business judgment, Appellants characterize many of Marriott's managers as "low-level" and "blue-collar" employees whom Appellants suggest are not of sufficient import to participate in a top hat plan. Appellants' Opening Br. at 4, 51-52. Appellants grossly distort the importance of these managers by claiming they "performed menial tasks (such as cleaning tables) on a daily basis." *Id.* at 51. Appellants also belittle their age, education and salaries, and diminish their contributions to Marriott's success, arguing that "their unit-level positions afforded them virtually no influence over Marriott corporate policy." *Id.* Yet Appellants

cite nothing for this notion, and identify no law requiring that participants hold "top-level management" positions directing "corporate policy."

In fact, the law is quite the opposite. While the ERISA statute does not define "management," courts, including courts in this Circuit, have resoundingly found that the "management" designation is not reserved for "executive" level employees and may in fact cover a broad range of management positions. *See, e.g.*, *Demery*, 216 F.3d at 289 ("While Plan B participants did include assistant vice presidents and branch managers, and therefore swept more broadly than a narrow range of top executives, it was nonetheless limited to highly valued managerial employees."); *Belka*, 571 F. Supp. at 1252 (plan covering order processing manager, assistant general manager, director of purchasing, assistant controller, fleet equipment manager, and assistant director of marketing qualified as top hat plan for management employees); *Van Gent*, 2013 WL 6198122, at *10 (country club deferred compensation plan qualified as top hat plan for a select group of management employees where plan covered general manager, clubhouse manager, golf course superintendent, maintenance superintendent, controller/comptroller, executive chef and locker room manager).

The words "high ranking," "high-level" or "senior" do not appear in the top-hat provision. Nor is it appropriate to read such limiting language into the statute. *See Dunn v. Borta*, 369 F.3d 421, 433 (4th Cir. 2004) ("it would be inappropriate

for a court to imply" terms into a statute that the legislature did not include); *Bostick v. Smoot Sand & Gravel Corp.*, 260 F.2d 534, 539-40 (4th Cir. 1958) ("Had it been intended that the words should have a more restrictive meaning than that ordinarily attributable to them, simple, direct language expressing that intention could easily have been employed.... We think the words should be given their usual meaning and that we should not strain to find in them some hidden import."). The broader term "management" accommodates employers with varying business models, and allows companies the flexibility to determine which management and highly-compensated employees will be invited to participate in a top hat plan. *See Demery*, 216 F.3d at 289.

Even Appellants' own authorities do not support the sweeping "executives only" rule they proclaim. *See* Appellants' Opening Br. at 46 n.24. For example, in *Spacek v. Maritime Association*, 134 F.3d 283, 296 n.12 (5th Cir. 1998), a case that did not even address whether the plan at issue was a top hat plan, the court simply observed, in a footnote and without analysis, that participants in top hat plans are "typically" high-ranking management personnel. This is a far cry from the categorical rule Appellants proclaim. The remaining cases Appellants cite likewise do not declare that "management" means "executives" for top hat purposes. *See Demery*, 216 F.3d at 289 (plan offered to 15% of the workforce and actually covering 7 to 10% of all employees was a top hat plan because, although it "swept

more broadly than a narrow range of top executives, it was nevertheless limited to highly valued managerial employees."); *Gallione v. Flaherty*, 70 F.3d 724, 727 (2d Cir. 1995) (plan at issue was a top hat plan where more than 32% were participants).[120]

Yet even if a "high ranking management" standard could be imported into the top hat requirements, Appellants' argument would still fail. As Mr. Ehrlich testified, "high ranking" management within Marriott's hierarchy was "relative" and unit managers were in fact "high ranking" compared to the total workforce. JA-2755-57. Hotel and restaurant managers who received Retirement Awards certainly outranked the employees in the hotels and restaurants they managed. They also outranked, by Appellants' own admission, the 90% of Marriott's workforce that was hourly-paid and low-skilled.[121]

Ignoring the foregoing, Appellants turn to inapposite decisions interpreting "managerial employees" under a separate statutory regime, the National Labor Relations Act ("NLRA"). *See* Appellants' Opening Br. at 44-45. But the Supreme Court has long "affirmed that identical language may convey varying content when

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[120] Appellants also cite *Plazzo v. Nationwide Mutual Insurance Company*, 697 F. Supp. 1437, 1451 (N.D. Ohio 1988), *rev'd* 892 F.2d 79 (6th Cir. 1989), but that case did not even address the meaning of "management" in the top hat provision.

[121] *See* JA-469-70; 713; 777; 1872-78 (admitting that a Marriott hotel general manager "is high-ranking, top-level, or highly compensated when compared to the remainder of the employees at that particular hotel").

used in different statutes, sometimes even in different provisions of the same statute." *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) (collecting cases); *see also Robinson v. Shell Oil Co.*, 519 U.S. 337, 342-44 (1997) ("employee" has different meaning in different sections of Title VII of the Civil Rights Act of 1964). Accordingly, words should not be presumed to have a single meaning, nor does the meaning accorded a word in one statute dictate its meaning in another:

> Most words have different shades of meaning and consequently may be variously construed.... Where the subject matter to which the words refer is not the same in the several places where [the words] are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed.

Yates, 135 S. Ct. at 1082. Regardless of what "managerial employee" may mean under the NLRA, there is no need to look beyond the ERISA statute itself to interpret "management" in the top-hat provision. The plain meaning of the word is clear: "'[e]xecutive' level seniority is not required; 'management' level is sufficient." *In re IT Group, Inc.*, 305 B.R. 402, 410 (Bankr. D. Del. 2004).

B. ERISA Requires Top Hat Plans Be "Primarily," Not "Exclusively," Limited To Management Or Highly-Compensated Employees.

Appellants also declare that "an employer must maintain a top-hat plan *solely* for management or highly compensated employees." Appellants' Opening Br. at 28 (emphasis added). The statute is not so limiting. ERISA describes top hat plans as those plans "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) (emphasis added). The First and Second Circuits have adopted the "sensible proposition that it is the configuration of the group as a whole that controls." *Alexander*, 513 F.3d at 48; *Demery*, 216 F.3d at 289 ("[I]f 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."). While this Court has not addressed the issue, district courts in this Circuit have consistently concluded that "primarily" modifies the entire prepositional phrase that follows, including "select group," and thus that a small number of non-select group members could be covered under the plan without sacrificing its top-hat status as long as most of the covered employees were members of the select group. *See Belka*, 571 F. Supp. at 1252 ("the statute provides an exemption to those plans which are 'primarily' designed for those

individuals who are either management or highly compensated"); *Guiragoss*, 444 F. Supp. 2d at 663-64 ("[I]t is true that not every member of a top hat plan must be highly compensated or in a management position as long as the plan is primarily for such individuals.").

In *Alexander*, the First Circuit directly confronted the question of whether a top hat plan must consist solely of executives who possess bargaining power sufficient to influence the terms of their compensation arrangement. The *Alexander* plaintiffs relied heavily on the same DOL opinion letter on which Appellants rely here. *See Alexander*, 513 F.3d at 46-48.

The First Circuit squarely rejected such a strict reading of the top-hat provision and declined to afford deference to DOL's "unpersuasive" interpretation. The court found no support in the plain language or legislative history to support the "bizarre" notion that a top hat plan must be strictly limited to "only," rather than "primarily," a select group of management or highly compensated employees:

> [R]elying on that [DOL opinion] letter to justify a nascent requirement that every employee covered by a top-hat plan possess the power to negotiate the terms of that plan is simply too much of a stretch….
>
> [W]e are further counseled against [this position] by the bizarre consequences that would follow from it. Most important, that thesis implies that every top-hat plan can be rendered noncompliant by demonstrating that a single covered employee lacks individual bargaining power, no matter the overall characteristics of the 'select group of

> management or highly compensated employees' to which he belongs.
>
> Such an absolutist construction clashes with the essential nature of the top-hat provision, which has been interpreted more generally to mean that ***not every member of the select group need belong to the upper tier of management or fit within the highest stratum of compensation. These cases recognize the sensible proposition that it is the configuration of the group as a whole that controls.***

Id. at 47-48 (emphasis added) (citing *Demery*, 216 F.3d at 289; *Guiragoss*, 444 F. Supp. 2d at 663-64; *Belka*, 571 F. Supp. at 1252-53).

The Second Circuit in *Demery* reached a similar conclusion, holding "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." *Demery*, 216 F.3d at 289. Notably, both *Alexander* and *Demery* were decided long after the 1990 DOL opinion letter articulating the agency's interpretation of "primarily," and neither found that interpretation persuasive or worthy of deference.[122]

[122] Appellants and DOL cite the Third Circuit's decision in *In re New Valley Corp.*, 89 F.3d 143 (3d Cir. 1996), suggesting that court has limited top hat plans *exclusively* to management and highly-compensated employees. But the parties in *In re New Valley* stipulated that the plan was a top hat plan and the court's general description of the nature of top hat plans was dicta.

To avoid the fatal effect of these cases, Appellants continue to misstate the holding in and circumstances of *Darden v. Nationwide Insurance Company*. As they did in the district court, Appellants contend that *Darden* addressed an employee's bargaining power in the context of the "select group" analysis. This is inaccurate. In *Darden*, the Court evaluated whether Nationwide insurance agents were employees or independent contractors, as only the former are subject to ERISA's protections. 796 F.2d at 706-707. This determination turned on whether the agents "lacked sufficient bargaining power to obtain contractual rights to nonforfeitable benefits," rendering them employees who Congress designed ERISA to protect. Notably, this Court explicitly divorced its analysis of individual employee status and influence from its assessment of the top-hat status of the overall plan. The Court ruled that if the agents were "employees" who "lacked sufficient bargaining power to obtain contractual rights to nonforfeitable benefits," and thus ranked among those Congress intended ERISA to protect, "the district court should allow the parties to present further evidence on the question of whether [defendant]'s plan constituted an unfunded plan for the compensation of a select group of highly compensated employees." *Id.* at 709. In other words, this

Court recognized that certain individual plan participants may lack individual power and influence, but the plan may nonetheless be a valid top hat plan.[123]

C. Appellants' Parsing Does Not Alter The Meaning Of "Primarily."

Appellants claim that a top hat group must be exclusively limited to management or highly-compensated employees because "primarily" modifies only the "purpose" of "providing deferred compensation." Appellants' Opening Br. at 31-32. But Appellants read the "purpose" clause too narrowly. Statutory terms must be construed in "the specific context in which that language is used, and the broader context of the statute as a whole." *Yates*, 135 S. Ct. at 1076-77. Appellants artificially divide the prepositional "purpose" clause into two separate elements, suggesting that "primarily" modifies only the "compensation" element, and not the "select group" element. The far more natural reading is that "primarily" modifies the words immediately following – "for the purpose" – and that Congress articulated a single primary purpose for top hat plans: to provide deferred compensation to a select group of management or highly compensated employees.

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[123] As the First Circuit explained in *Alexander*, "[i]f, as the appellant suggests, Congress was singularly concerned with an individual's ability to fend for himself or herself, we think it unlikely that Congress would have framed the statute in terms of 'groups' at all." 513 F.3d at 48.

Thus, a valid top hat plan may serve other purposes, and include other participants, so long as the plan *primarily* provides deferred compensation for the "select group" contemplated by the statute. It is neither logical nor grammatically correct to read "primarily" as modifying only a portion of the prepositional phrase that immediately follows, much less to inject a far more restrictive word, "exclusively," to apply mid-phrase.

A similarly-structured hypothetical illustrates the flaws in Appellants' attempt to artificially subdivide the singular "purpose" clause. Imagine a city wishes to exempt certain parks from local property tax in order to encourage park development for the benefit of its citizens. The city may pass an ordinance using this language: "this exemption applies to a park which is maintained by its owner primarily for the purpose of providing recreation for local residents." Obviously, the tax-exemption would apply to a park that is maintained *primarily* for local residents. The fact that out-of-town visitors are allowed to use the park would not destroy its tax-exempt status. So too, the presence of a small number of non-management or highly-compensated participants does not remove an otherwise qualifying plan from the top-hat exemption, so long as the plan primarily consists of a select group of management or highly compensated employees.

D. DOL's Interpretation Of "Primarily" Is Not Entitled To Deference.

Finally, Appellants lean heavily on DOL's interpretation of the term "primarily," arguing that "DOL has long held that it 'refers to the purpose of the plan (*i.e.*, the benefits provided) and not the participant composition of the plan.'" Appellants' Opening Br. at 29. Appellants urge the Court to defer to this view under the principles articulated in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *See* Appellants' Opening Br. at 29 (quoting DOL Op. No. 90-14A, 1990 WL 123933 at *1 n.1 (May 8, 1990)). DOL submits a brief as *amicus curiae* ("DOL Brief"), echoing Appellants' argument, and requesting deference to its interpretation.

Appellants place more weight on DOL's opinion than it can bear. Agency opinion letters are not binding, do not carry the force of law, and are entitled to deference "only to the extent that those interpretations have the 'power to persuade." *Christensen*, 529 U.S. at 587 (quoting *Skidmore*, 323 U.S. at 140). Accordingly, courts afford deference to informal agency opinions only where the agency's interpretation stems from a body of specialized experience and the relative expertise of the agency tasked with enforcing the statute at issue. *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001).

Even where an agency is tasked with enforcing a statutory regime, deference to the agency's statutory interpretation is not automatic. Instead, "[t]he fair

measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." *Id.* To gauge persuasiveness, this Court looks to "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade…." *Wheeler v. Newport News Shipbuilding & Dry Dock Co*., 637 F.3d 280, 290 (4th Cir. 2011) (quoting *Skidmore*, 323 U.S. at 140).

DOL's interpretation of "primarily" bears none of the hallmarks of persuasiveness. In 1990, DOL responded to a request from CSX Corporation asking whether a proposed deferred compensation plan would be considered "unfunded" for purposes of establishing top-hat status. DOL AO 90-14A, 1990 WL 123933. In its response, DOL took the opportunity to generally describe top hat plans, and tacked on, unsolicited, an interpretation of "primarily" in a footnote completely devoid of reasoning or analysis:

> 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'… 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. at *1, n.1.[124]

There is no evidence that this interpretation is the result of thorough, considered reasoning flowing from a body of specialized administrative experience. To the contrary, "the Secretary [of Labor]'s bare textual analysis of ERISA, without more, does not 'constitute a body of experience and informed judgment to which courts' should defer." *Smith v. Aegon Cos. Pension Plan*, 769 F.3d 922, 928-29 (6th Cir. 2014), *petition for cert. filed*, 83 U.S.L.W. 3768 (Mar. 24, 2015) (No. 14-1168) (quoting *Skidmore*, 323 U.S. at 140); *see also Shikles v. Spring/United Mgmt. Co.*, 426 F.3d 1304, 1315-16 (10th Cir. 2005) (declining to

[124] DOL and Appellants point to two other opinion letters in which they claim DOL articulated this same statutory construction. The first is a 1985 letter to the IRS concerning the difference between "funded" and "unfunded" plans in the context of "rabbi trusts." *See* DOL Br. at 4. There DOL noted in passing that *if* the agency were to issue regulations defining top hat plans, it would limit top hat plan status to plans maintained "only for a select group of management or highly compensated employees." *Id.* DOL has never issued the hypothetical regulations contemplated in this letter. "*Skidmore* deference does not apply to a line of reasoning that an agency could have, but has not yet, adopted." *OfficeMax, Inc. v. United States*, 428 F.3d 583, 598 (6th Cir. 2005). Second, DOL identifies a 1992 advisory opinion, again addressing the unfunded status of a "rabbi trust." *See* DOL Br. at 5. Again in a footnote, DOL simply cited Advisory Opinion 90-14A and stated "[w]e note that employers must design and maintain 'top hat' plans only for a select group of management or highly compensated employees." DOL Advisory Op. 92-13A, 1992 WL 112914, at *3 n.1 (May 19, 1992).

give deference to EEOC interpretation absent evidence that it had been subjected to public scrutiny or was the product of thorough consideration).

If DOL wished to secure the courts' deference, it could have followed standard administrative procedures and issued regulations or formal rules to that effect in the forty years since ERISA's enactment. *See Christensen*, 529 U.S. at 587. Where DOL arrives at a statutory interpretation after formal notice-and-comment rulemaking, subjecting its views to public scrutiny and an opportunity for judicial review, the court must give effect to the agency's regulation if it is reasonable. *See id.* (citing *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984)). By contrast, *Chevron* deference does not apply to an informal interpretation set forth only in an agency opinion letter. *Id.*; *see also Reno v. Koray*, 515 U.S. 50, 61 (1995) (internal agency guideline, which is not "subject to the rigors of the Administrative Procedur[e] Act, including public notice and comment," entitled only to "some deference" if persuasive (internal quotation marks omitted)); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256–258 (1991) (interpretative guidelines do not receive *Chevron* deference); *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991) (interpretative rules and enforcement guidelines are "not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated

lawmaking powers"). Where, as here, the agency's interpretation is both informal and unpersuasive, deference is neither required nor appropriate.

DOL's interpretation of "primarily" stands in stark contrast to the sort of thorough reasoning to which courts defer. For example, in *Kasten v. Saint-Gobain Performance Plastics, Corp.*, 131 S. Ct. 1325 (2011), the Supreme Court gave "a degree of weight to [DOL's] views about the meaning of" the word "filed" and whether oral complaints were covered by the FLSA's anti-retaliation provisions. The Court afforded the agency *Skidmore* deference because DOL's interpretation had been consistently held for nearly fifty years, and was well-documented by a history of enforcement actions, amicus briefs, agency practice, and EEOC guidelines throughout that time. *Id.* at 1335. Here, DOL included an irrelevant statement in a footnote of one letter issued twenty-five years ago, and Appellants exalt this as the definitive statement on the issue. This is hardly the well-reasoned, consistent analysis to which courts should defer.[125]

[125] Nor does the fact that DOL filed an amicus brief in this case – twenty-five years after its last non-litigation pronouncement on the issue – provide any reason to afford it deference. As the Sixth Circuit recently noted, "[t]he Secretary of Labor has been particularly aggressive in "[a]ttempting to mold statutory interpretation and establish policy by filing 'friend of the court' briefs in private litigation." *Smith*, 769 F.3d at 927 n.5 (declining to afford *Skidmore* deference to agency's statutory interpretation articulated in amicus brief).

The touchstone for deference is persuasiveness, and DOL's interpretation is simply not persuasive as the First Circuit has already concluded. There is no support in ERISA's text or legislative history for a requirement that *every* plan member have influence and power within the sponsoring employer's organization, and relying on DOL's opinion letter "to justify [such] a nascent requirements… is both unwarranted and unpersuasive." *Alexander*, 513 F.3d at 47. Indeed, the First Circuit held that the entire notion is inconsistent with the "essential nature of the top-hat provision, which has been interpreted more generally to mean that not every member of the select group need belong to the upper tier of management or fit within the highest stratum of compensation." *Id.* at 48.[126]

Appellants cite a series of unexceptional cases in which courts found further support for statutory constructions in informal agency pronouncements that both reinforced the plain language of the statute and aligned with the weight of existing authority. *See, e.g.*, *Marcella v. Capital Dist. Physicians' Health Plan, Inc.*, 293 F.3d 42, 48 (2d Cir. 2002) (DOL opinion letters further reinforces statute's plain language and existing case law); *Monahan v. Cnty. of Chesterfield, Va.*, 95 F.3d

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[126] In 1990, out of an abundance of caution, Marriott amended the Retirement Award plan in light of DOL's newly articulated interpretation of the top-hat provision. But Marriott's conservative decision to amend the plan is not a "concession" that the earlier plan did not comply with the top hat plan exemption. Rather it is evidence that Marriott viewed DOL's footnote as a newly articulated change in policy, not a reaffirmation of existing policy.

1263, 1283 (4th Cir. 1996) (DOL letter ruling consistent with the legislative intent of the FLSA, current DOL regulations and "a long history of FLSA case law" considered as "additional support"); *Desmond v. PNGI Charles Town Gaming, LLC*, 630 F.3d 351, 355-56 (4th Cir. 2011) (noting, but not deferring to, DOL opinion letter consistent with Supreme Court and other Circuit Courts' precedent); *Stern v. Int'l Bus. Machs. Corp.*, 326 F.3d 1367, 1371 (11th Cir. 2003). Here, by contrast, DOL's interpretation of "primarily" is directly at odds with existing authority on the issue. *See* Argument, Section II.B., *supra*; *see also U.S. Dep't of Labor v. N.C. Growers Ass'n*, 377 F.3d 345, 353-54 (4th Cir. 2004) (declining to defer to DOL interpretation of FLSA provision because the agency's interpretation "lack[ed] the power to persuade" and opposing interpretation was more consistent with plain meaning of the statute); *Ball*, 228 F.3d at 364 (declining deference to DOL interpretation of FLSA provision where the grammatical construction of the clause did not support the agency's interpretation).[127]

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[127] Even DOL recognizes the extreme consequences that would flow from strictly, and retroactively, applying its interpretation of "primarily." The Secretary asserts in his amicus brief that the appropriate remedy may be "to provide relief only to those non-management, non-highly compensated employees who were improperly included in the plan." DOL Br. at 24 n.5. This approach, DOL contends, "would avoid providing a windfall gain to the management and highly-compensated employees who could properly have been included in the plan." *Id*. This is the very windfall Appellants seek here.

III. APPELLANTS' CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

This Court should reverse the district court's ruling on the statute of limitations and order that judgment be entered in Marriott's favor because the district court applied the wrong accrual standard to Appellants' ERISA claims, and because Appellants were in possession of all facts necessary to assert their claims decades before commencing this lawsuit.

A. Appellants' Claims Expired Three Years From The Date Of Accrual.

The parties do not dispute that the statute of limitations in this case is three years. *See* JA-1036. ERISA is silent on the statute of limitations for claims other than claims for breach of fiduciary duty, and the Court therefore must apply the "most analogous statute of limitations" from the forum state's laws. *Id.*; *Shofer v. Hack Co.*, 970 F.2d 1316, 1319 (4th Cir. 1992). Maryland's three-year statute of limitations for contract actions governs Appellants' ERISA claims. *See, e.g.*, *Cotter v. Eastern Conference of Teamsters Ret. Plan*, 898 F.2d 424, 428 (4th Cir. 1990).

B. The District Court Applied The Wrong Accrual Standard.

This Court recognizes two methods for determining the date of accrual for ERISA non-fiduciary claims. Because ERISA claims often involve a dispute over an individual's entitlement to a specific benefit, most claims originate with an administrative claim pursuant to the plan's terms, and then, following denial of that

claim, a suit in court. Thus, "[o]rdinarily, 'an ERISA cause of action does not accrue until a claim of benefits has been made and formally denied.'" *Cecil v. AAA Mid-Atl., Inc.*, 118 F. Supp. 2d 659, 666 (D. Md. 2000) (quoting *Rodriguez v. MEBA Pension Trust*, 872 F.2d 69, 72 (4th Cir. 1989)).

The "formal denial" rule, however, applies only where the beneficiary actually made an unsuccessful claim for benefits. Where no claim is made or denied, this Court applies "the alternative approach of determining the time at which some event *other* than a denial of a claim should have alerted [the beneficiary] to his entitlement to the benefits he did not receive." *Cotter*, 898 F.2d at 429 (emphasis added). In *Cotter*, the Court explained that this "alternative formulation for triggering the statute of limitations makes more sense than the usual claim-denial trigger in cases… where the participant may never have filed a formal claim for the disputed benefits." *Cotter*, 898 F.2d at 429. This is because applying the formal denial rule in situations without a formal claim "would lead … to the anomalous result that the statute of limitations… [could] not begin to run until after [a] lawsuit was filed." *Id.*

If "formal denial" were the rule in cases where there was no formal claim, the statute of limitations would *never* accrue prior to suit, and plan beneficiaries could wait years – or, as in this case, decades – to file an action while in possession of facts sufficient to state their claim. Such an approach would eviscerate the

fundamental policy and purpose underlying statutes of limitations. *See id.; see also Gabelli v. S.E.C.*, 133 S. Ct. 1216, 1221 (2013) ("[T]he basic policies of all limitations provisions [are] repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." (internal quotation marks and citation omitted)).

The nature of this case further demonstrates why this Court has recognized the need for an alternative accrual rule. Appellants here do not seek benefits under the terms of the plan. Indeed they do not dispute any plan term. Rather, they challenge the legality of the plan itself. Such a claim is ill-suited for the administrative review process, which is designed to address individual disputes over benefit calculations, plan interpretations, and determinations, not challenges to a plan's legality under ERISA. *See Smith v. Sydnor*, 184 F.3d 356, 365 (4th Cir. 1999) ("Unlike a claim for benefits under a plan, which implicates the expertise of a plan fiduciary, adjudication of a claim for a violation of an ERISA statutory provision involves the interpretation and application of a federal statute, which is within the expertise of the judiciary.").

This Court and the district courts in this circuit consistently apply the *Cotter* standard to determine the accrual date for ERISA claims where no formal claim was made (or denied) prior to litigation. *Cotter*, 898 F.2d at 429; *Dameron v. Sinai Hosp. of Balt. Inc.*, 815 F.2d 975, 981 (4th Cir. 1987); *Cecil*, 118 F. Supp. 2d at

667; *Woody v. Walters*, 54 F. Supp. 2d 574, 579 (W.D.N.C. 1999) (applying *Cotter* "[i]n a case where no formal claim was made"); *Wise v. Dallas & Mavis Forwarding Co.*, 753 F. Supp. 601, 606 (W.D.N.C. 1991) (same); *Herman v. Lincoln Nat'l Life Ins. Co.*, No. 11-cv-03378, 2012 WL 1999879, at *3 (D. Md. June 4, 2012) (same); *Corrado v. Life Investors Owners Participation Trust & Plan*, No. 08-0015, 2011 WL 886635, at *6 (D. Md. Mar. 11, 2011) (same); *Christian v. Vought Aircraft Indus., Inc.*, No. 5:09-cv-186, 2010 WL 4065482, at *9 (E.D.N.C. Oct. 15, 2010) (same); *Davis v. Bowman Apple Prods. Co., Inc.*, No. Civ. A. 5:00-cv-00033, 2002 WL 535068, at *5 (W.D. Va. Mar. 29, 2002) (same).

In the absence of any prior administrative claim or review, "the pertinent analysis involves a determination of the time at which [the plaintiff] was sufficiently aware that he had been harmed," for example, by failing to receive the benefits to which he claims to be entitled. *Cecil*, 118 F. Supp. 2d at 667. This does not require the beneficiary to understand the "exact reason" for any alleged underpayment, and the statute of limitations does not wait for the plaintiff to develop such an understanding. *See, e.g.*, *Dameron*, 815 F.2d at 982 n.7 (rejecting argument that statute of limitations did not commence to run until plaintiff discovered the method by which the plan was calculating her benefits); *Cecil*, 118 F. Supp. 2d at 667 ("that [the beneficiary] could not ascertain the reason for the deficiency [in his benefit payments] does not imply he was not on notice that his

rights possibly were being infringed"). In other words, for the statute of limitations to accrue, the beneficiary need not understand *why* he is not receiving the benefits to which he believes he is entitled but need only be on notice *that* he is not receiving them. *Childers Oil Co., Inc. v. Exxon Corp.*, 960 F.2d 1265, 1272 (4th Cir. 1992) (the "'injury' [is] the thing to be discovered," not the cause of action that "may legally entitle the plaintiff to recover damages"); *see also Dameron*, 815 F.2d at 982 n.7.

C. Appellants' Claims Accrued More Than Three Years Before They Filed Suit.

Because the *Cotter* accrual rule applies here, this Court must determine when Appellants possessed facts sufficient to inform them that Marriott treated their Retirement Awards as exempt from ERISA's vesting requirements. See JA-1035 (noting Appellants' allegation that they "received benefits from [Marriott] based on the application of vesting terms that violate ERISA . . . ."). The evidence shows that Appellants knew of this alleged harm decades ago.

Appellants do not dispute that in 1978 (and again in 1980, 1986, 1991, 1993, 1996 and 1998), Marriott issued Prospectuses to all Retirement Award recipients describing, *inter alia*, the terms of the deferred stock incentive plan. Each included a paragraph entitled "ERISA" which disclosed explicitly that ERISA governed the Retirement Awards, but because they qualified as "top hat" plans, they were exempt from ERISA's vesting requirements. JA-298. The 1978 Prospectus also

disclosed the number of participants in the plan, and all of the Prospectuses disclosed the number of shares awarded, and the number of shares already vested. *Id.*[128]

Appellants acknowledge they received the Prospectuses, but testified that they did not understand ERISA or how it applied to their benefits. "[F]or statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should [not] receive identical treatment." *United States v. Kubrick*, 444 U.S. 111, 122 (1979). Where a plaintiff is "in possession of the critical facts that he has been hurt and who has inflicted the injury," he is "no longer at the mercy of [the defendant]. There are others who can tell him if he has been wronged, and he need only ask." *Id.*

During their employment, Appellants knew the facts underlying their ERISA claims. Appellants argue that the plan was not a top hat plan because it included unit-level managers and was not limited to "high-ranking executive[s] whose position affords substantial influence over corporate policy." Appellants' Opening Br. at 46. Bond and Steigman themselves were unit-level managers and received

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[128] *See Union Pac. R.R. Co. v. Beckham*, 138 F.3d 325 (8th Cir. 1998) (finding claims accrued when claimants received unequivocal notice regarding calculation of benefit plans); *Hirt v. Equitable Ret. Plan for Emps., Managers & Agents*, 285 F. App'x 802 (2d Cir. 2008) (finding claims accrued at the time plaintiffs received summary plan document communicating terms of pension plan).

awards. JA-452-53, 460, 478, 493, 535, 688, 698-700, 713, 723. Appellants also knew of others on their unit-level staffs who were bonus-eligible. JA-538, 710-11, 770, 774-75, 782. Accordingly, Appellants were on notice by the late 1970s that plan participants included individuals they now claim rendered the plan ineligible for top-hat treatment.

Appellants' knowledge also derived from Marriott's benefits election process. Each year bonus recipients had to *choose* whether to receive a Pre-Retirement Award, which vested after ten years, or a Retirement Award that did not fully vest until age 65. JA-442, 497, 749, 785, 1675; *see also* JA-1805-06. Appellants understood the vesting schedule of the Retirement Awards. JA-465-66, 488, 553, 555, 692, 695, 702. Having knowledge of these facts more than thirty years ago, Appellants were on inquiry notice of the claims they now assert. *Kubrick*, 444 U.S. at 122.

If Appellants were not on notice of their claims during the time of their employment, they certainly were on notice no later than 1990, when Marriott amended the plan. Indeed, Appellants argue that Marriott's 1990 amendment "was intended to comply with ERISA," and constituted "an admission that the prior Plan was deficient." Appellants' Opening Br. at 26. As the district court observed, Marriott informed plan participants of this alleged "admission" in November 1990, and announced it again in 1991 following a shareholder vote. JA-1030. Thus,

Appellants concede that almost twenty years before filing suit, they were in possession of facts that they now contend constituted an "admission" by Marriott of the very violation they allege in their Complaint.

Appellants' receipt of their full benefits is also a triggering "event." Marriott paid Steigman all vested shares due him in 1991, and paid Bond all vested shares due in 2006. JA-1031. Upon payment, Appellants were indisputably on notice that they were not fully vested. *See Herman*, 2012 WL 1999879, at *3 (receipt of benefits payments more than three years before suit provided actual knowledge of the alleged benefits miscalculation); *Christian*, 2010 WL 4065482, at *9 (same); *Davis*, 2002 WL 535068, at *5 (when the plaintiff received his payout, "it was clear to plaintiff that he was receiving only thirty percent of his vested profits").[129] And even before these final disbursements, Appellants received annual benefits statements identifying the number of awarded shares and how many had vested. JA-581-82, 804-05, 815-16.

Finally (and perhaps most tellingly), Appellants admit they did not learn *any* new facts underlying their claims from the time they left Marriott until they filed suit decades later. Bond testified that the only thing he learned between his departure from Marriott in 1991 and filing this suit was that his attorney believed

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[129] Steigman's signing of a release upon his termination of employment was, likewise, another triggering event.

Marriott violated ERISA. JA-619. Similarly, when asked what he learned about his claims since leaving Marriott, Steigman stated that he knows "[n]othing more than what [he] knew then." JA-682. Thus, whatever Appellants knew in 2010, when they chose to file suit, they knew at the latest in 1991, nearly two decades earlier.

Appellants' claims are therefore time-barred.

CONCLUSION

For the foregoing reasons, Marriott respectfully requests that the Court affirm the final judgment of the district court in favor of Marriott.

REQUEST FOR ORAL ARGUMENT

Marriott respectfully requests oral argument in this matter. This appeal presents important questions about the scope of the top hat exemption and the application of ERISA's statute of limitations that would benefit from discussion at oral argument.

June 25, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH FEDERAL RULES OF APPELLATE PROCEDURE 28.1(e) and 32(a)

I, Jeffrey L. Poston, one of the attorneys for Appellees/Cross-Appellants Marriott International, Inc. and Marriott International Stock and Cash Incentive Plan hereby make the following certification:

This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e) and 32(a)(7)(B) because this brief contains 16,445 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) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

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Date: June 25, 2015

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Appellees/Cross-Appellants Marriott International, Inc. and Marriott International Stock and Cash Incentive Plan hereby certifies that on June 25, 2015, I caused a true and correct copy of the foregoing Opening/Response Brief of Appellees/Cross-Appellants Marriott International, Inc. and Marriott International Stock and Cash Incentive Plan to be filed via electronic case filing with the United States Court of Appeals for the Fourth Circuit, which caused a copy to be served upon the following counsel of record via the Court's CM/ECF system:

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