No. 11-1285

IN THE

Supreme Court of the United States

U.S. AIRWAYS, INC., in its capacity as Fiduciary and Plan Administrator of the U.S. AIRWAYS, INC. EMPLOYEE BENEFITS PLAN,

Petitioner,

v.

JAMES MCCUTCHEN and ROSEN, LOUIK & PERRY, P.C.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

Petitioner explained in its opening brief that ERISA reimbursement provisions should be enforced as written for two reasons: ERISA authorizes appropriate equitable relief to "enforce * * * the terms of the plan," 29 U.S.C. § 1132(a)(3), and equity courts treat the equitable lien by agreement as a mechanism to enforce bargains by their terms. Respondents offer no persuasive response. Instead, they put all their chips on a lone assertion: that "[t]his case is about 'subrogation,' " and that as a result Petitioner's claim "must be measured according to the equitable principle of unjust enrichment." Resp. Br. 2, 13.

That assertion is wrong. To begin with, it is foreclosed by *Sereboff* v. *Mid Atlantic Medical Services, Inc.*, which rejected an identical attempt to treat an ERISA reimbursement claim as subrogation. As the

Court explained there, "Mid Atlantic's claim is not considered equitable because it is a subrogation claim. * * * Accordingly, the parcel of equitable defenses the Sereboffs claim accompany any [subrogation] action are beside the point." 547 U.S. 356, 368 (2006). So too here.

Respondents' "subrogation" gambit is likewise foreclosed by the treatises. Those treatises explain that reimbursement and subrogation are "different both in their functioning and in their legal effect." 16 L. Russ et al., *Couch on Insurance* § 226:4 (3d ed. 2011) (Couch). They explain that when a claim "is based upon the subrogation right," "[t]his is not an express lien based on agreement." 1 G. Palmer, *The Law of Restitution* § 23.18, at 470 (1978) (Palmer). And they make clear that an equitable lien by agreement is "distinguish[ed] * * * from the equitable lien imposed by the courts to prevent unjust enrichment." 1 D. Dobbs, *Law of Remedies* § 4.3(3), at 601 (2d ed. 1993) (Dobbs).

Respondents, in short, have put all their stock in a legal framework that does not apply. They also mischaracterize the record in several significant respects. Respondents assert, for example, that the U.S. Airways Plan was "unilaterally drafted," Resp. Br. 2, but neglect to mention that it was collectively bargained, CA3 Appendix 201. And Respondents assert that they "asked for a 'complete copy of the plan or trust document.' " Resp. Br. 6 & n.1 (quoting J.A. 44-45). But there is no period after "document" in the original, because what Respondents asked for was "a complete copy of the plan or trust document, *or summary description*." J.A. 44-45 (emphasis added). The summary description is in the record, J.A. 20, and as the Solicitor General notes, "the

parties * * * have treated the SPD provisions as accurately reflecting the relevant plan terms." U.S. Br. 3 n.2.[1]

In the final analysis, Respondents' misdirections do not undermine the approach adopted by most circuits and set forth in the opening brief. As the Solicitor General put it: "Because petitioner's suit under Section 502(a)(3) is one to enforce an equitable lien by agreement, respondent's obligation to petitioner is determined by the plan, not by general unjust enrichment or other principles of equitable restitution." U.S. Br. 14. The decision below should be reversed.

ARGUMENT

I. SECTION 502(a)(3) AND EQUITABLE-LIEN-BY-AGREEMENT CASES, NOT SUBROGATION PRINCIPLES, SUPPLY THE RULE OF DECISION.

A. Section 502(a)(3) And The Equitable-Lien-By-Agreement Doctrine Require Reversal.

1. We begin, unlike Respondents, with the statutory text. Section 502(a)(3) authorizes "appropriate equitable relief" to "enforce * * * the terms of the plan." 29 U.S.C. § 1132(a)(3). As this Court has recognized, that provision plainly "provides for equitable remedies *to enforce plan terms*." *Sereboff*, 547 U.S. at 363. Under Respondents' approach, however, courts would not "enforce plan terms"; they would rewrite them. That is inconsistent with

[1] Which they do. Respondents now claim the Plan "contains several material differences" from the SPD. Resp. Br. 7 n.1. But they identify no such differences. Moreover, *CIGNA Corp.* v. *Amara*, 131 S. Ct. 1866 (2011), was decided while this case was pending below, and Respondents knew about it; they even raised it as supplemental authority for another point. And yet they never argued that the SPD should no longer control.

Section 502(a)(3)'s text. It is equally inconsistent with two fundamental guideposts of ERISA: Plans choose their own terms, and those terms control. Petr. Br. 5-6; U.S. Br. 13.

Respondents offer two responses, neither well-grounded in the text. They first say the statutory "reference to the 'terms of the plan' " merely signals "the types of *claims* that a party may assert under § 502(a)(3)"—namely, those arising from the plan. Resp. Br. 44. Again, however, Respondents omit a key word. Section 502(a)(3) does not merely "reference" the "terms of the plan." It authorizes appropriate equitable relief to "*enforce*" the terms of the plan.

Respondents next point out that the adjacent Section 502(a)(1) authorizes plan beneficiaries, but not plans themselves, to enforce ERISA plans by a contract action at law. Resp. Br. 46. According to Respondents, the fact that Congress denied plans a remedy at law in Section 502(a)(1) must mean plans cannot turn around and enforce plan terms through Section 502(a)(3).

That argument relies on a fallacy: that enforcement of an agreement's terms is necessarily a remedy at law. It is not. As this Court has explained, *Sereboff*, 547 U.S. at 365, there exists an *equitable* remedy—the equitable lien by agreement—designed to make a promisor pay what it agreed to pay. That is not legal relief. *See* 4 S. Symons, *Pomeroy's Equity Jurisprudence* § 1234, at 695 (5th ed. 1941) (Pomeroy). Moreover, when a plan advances an equitable-lien-by-agreement claim, it must meet the requirements for that relief, including specification of "a particular fund." *Sereboff*, 547 U.S. at 357. Petitioner's claim accordingly is different from an action at law. There

is no "end-run" around Section 502(a)(3). Resp. Br. 47.

That is all Respondents offer in the way of statutory analysis. And that itself is notable. For Respondents make little attempt to press the theory that drove their argument below: that the word "appropriate" in Section 502(a)(3) authorizes courts to import freewheeling equitable offsets to override plan terms. And they make *no* attempt to counter the showing, by Petitioner and the United States, that this Court has interpreted "appropriate" to have a more sensible meaning. *See* Petr. Br. 21 (Court interprets "appropriate" to denote a mode of equitable relief suitable to enforce the plan); U.S. Br. 6 (same); *Varity Corp.* v. *Howe*, 516 U.S. 489, 512 (1996) ("appropriate" also signals that Section 502(a)(3) is a "catch-all" and that if a beneficiary can proceed under another remedial provision, he must do so). The Court should reject a reading of "appropriate" so broad that it undercuts Congress's express purposes and overbears the remaining statutory text.

2. *Sereboff* held that ERISA reimbursement provisions create an equitable lien by agreement. 547 U.S. at 365. Petitioner demonstrated in the opening brief that the *raison d'etre* of the equitable lien by agreement is to "enforce[]" the terms of the "agreement of the parties." Dobbs § 4.3(3), at 601; Petr. Br. 31-37. That showing suffices to resolve the case, even apart from the statute. And Respondents do nothing to rebut it.

Instead, Respondents launch what amounts to an attack on *Sereboff* itself. Respondents argue that our reliance on equitable-lien-by-agreement cases is misplaced because they "ha[ve] nothing to do with subrogation." Resp. Br. 37. True; they have nothing

to do with subrogation. That is because *Sereboff* made clear that ERISA reimbursement provisions should be analyzed as equitable liens by agreement and *not* as subrogation. 547 U.S. at 365, 368; *see also infra* at 7-14. *Sereboff* in turn drew its rule from a case—*Barnes* v. *Alexander*, 232 U.S. 117 (1914)—that had nothing to do with subrogation. Respondents' critique of our equitable-lien-by-agreement argument ignores this Court's decisions.[2]

Respondents next argue that while equitable liens may arise out of agreements, they nonetheless are enforced only to the extent necessary to prevent unjust enrichment. Resp. Br. 37-38. Here Respondents repeat the Third Circuit's mistake: conflating disparate equitable doctrines. An equitable lien *for restitution* is enforced to prevent unjust enrichment. Petr. Br. 38-39; Dobbs § 4.3(3), at 601. But an equitable lien *by agreement* is enforced to make a promisor live up to its bargain. *Good* v. *Jarrard*, 76 S.E. 698, 702 (S.C. 1912); Petr. Br. 31-35. Courts in equitable-lien-by-agreement cases thus have rejected offsets akin to the one Respondents seek. *See Barnes*, 232 U.S. at 121-123. And *Sereboff* made clear that reimbursement provisions like the one

[2] Respondents mischaracterize certain additional facts. They assert that Petitioner's agent Ingenix ignored their letters, Resp. Br. 7-8, but in fact the parties corresponded throughout summer 2008, J.A. 33; CA3 Appendix 198-200, 205, 213, 216. And they say Ingenix never "provided * * * adequate documentation that it was self-funded," Resp. Br. 7, but in fact Ingenix supplied the relevant document (the Plan's IRS form 5500), CA3 Appendix 201-202. In any event, the District Court rejected any notion that this is not a self-funded plan (Pet. App. 22a), and Respondents did not renew the argument in the Third Circuit.

here amount to equitable liens by agreement—*not* equitable liens for restitution, a "different species of relief." 547 U.S. at 364-365.[3] Remedial conditions associated with one form of relief do not apply to the other.

B. This Case Is About Neither Subrogation Nor Unjust Enrichment.

Respondents spend most of their brief trying to change the subject: They assert that "[t]his case is about subrogation" and that Petitioner's relief "must be measured according to the equitable principle of unjust enrichment," Resp. Br. 2, 13, and they proceed to describe at length the limits some courts apply to subrogation, *id.* at 13-37. That subrogation premise drives every one of Respondents' arguments about "double recovery." But the premise is wrong; indeed, it is flatly rejected by *Sereboff* and Respondents' preferred treatises.

1. *Sereboff* squarely forecloses Respondents' contention that "[t]his case is about subrogation." The plan participants in *Sereboff* argued that "they would in an equitable *subrogation* action be able to assert certain equitable defenses," including the "made whole" principle—a principle that, like the double-recovery rule Respondents seek, arises in subrogation. 547 U.S. at 368. This Court rejected that premise:

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[3] Respondents (at 39-42) contend that "three-party" cases are somehow different from "two-party" ones. But the notion that third parties are relevant is just another manifestation of Respondents' mistaken focus on subrogation. The key fact in equitable-lien-by-agreement cases is the existence of a specified fund, and share thereof, that a promisor agrees to hand over.

> Mid Atlantic's claim is not considered equitable because it is a subrogation claim. * * * [It] qualifies as an equitable remedy because it is indistinguishable from an action to enforce an equitable lien established by agreement. * * * Mid Atlantic need not characterize its claim as a freestanding action for equitable subrogation. Accordingly, the parcel of equitable defenses the [participants] claim accompany any such action are beside the point. [*Id.*]

The Court could hardly have been clearer: "A subrogation lien 'is not an express lien based on agreement.' " *Id.* (quoting Palmer § 23.18(d), at 470). And so a case involving an ERISA reimbursement provision is not "about subrogation." Resp. Br. 13. The defenses and offsets applicable to subrogation do not apply.

Respondents make a convoluted attempt to distinguish *Sereboff*. They argue that the case was only about "whether the plan there had asserted a claim that was cognizable in equity," not about "what relief a plan was entitled to receive on proof of that claim." Resp. Br. 33. That is incorrect. *Sereboff* considered the very assertion Respondents now advance: that subrogation-based limits *that alter the measure of relief*, including make-whole, apply in equitable-lien-by-agreement actions. 547 U.S. at 368. And the Court rejected the idea, explaining that such limits on subrogation relief "are beside the point." *Id.* Respondents' theory collapses under that holding.

2. The standard treatises likewise reject every aspect of Respondents' argument.

- Respondents say this case is about subrogation and that subrogation and reimbursement are "governed by the same controlling principles." Resp. Br.

14 n.4 (citing Couch § 222:2). But nearly every page of their cited treatise demonstrates that is incorrect. The treatise explains that "the concepts of reimbursement and subrogation are, indeed, different both in their functioning and in their legal effect." Couch § 226:4. It explains that reimbursement is the "right of an insurer to a refund directly from the insured" while "subrogation derives from the equitable doctrine providing that the insurer * * * is placed in the position of its insured so that it may recover not from the insured, but from the third party[.]" *Id.* § 222:82. It explains that reimbursement "differs" from subrogation in that the reimbursement right is "derived from contractual relations." *Id.* § 226:1. And it explains that a health policy's reimbursement clause like the one here is an agreement "*for reimbursement and not subrogation*." *Id.* § 226:21 (emphasis added). These are just a few examples of the many pages from Respondents' treatises that disprove their assertion. *See, e.g.*, Couch §§ 222:23, 226:3, 226:5, 226:7, 226:21; Palmer § 23.18, at 462-463, 470; *see also*, *e.g.*, *Unisys Med. Plan* v. *Timm*, 98 F.3d 971, 973 (7th Cir. 1996) ("[S]ubrogation and reimbursement * * * are distinct doctrines.").

- Respondents assert that "every equitable authority" says claims like Petitioner's "must be measured according to the equitable principle of unjust enrichment." Resp. Br. 2. But that is simply not so. The treatises say *subrogation* is measured by unjust enrichment, because it involves placing the subrogee in the subrogor's shoes to the extent warranted by the equities. 174 J. Appleman et al., *Insurance Law & Practice* §§ 4054, 4128 (1981). But equitable liens are "not restricted to cases of unjust enrichment." Restatement (Third) Restitution & Unjust Enrich-

ment § 56, reporter's note f (2011) (Restatement). Quite the contrary: The treatises explicitly "distinguish" the equitable lien "to prevent unjust enrichment" from the equitable lien by agreement. Dobbs § 4.3(3), at 601. The latter is different because it arises from an *agreement*, not from " 'general considerations of right and justice.' " Restatement § 56, reporter's note f (citation omitted). But it is also different because the agreement itself specifies the measure of relief: "[B]y means of" the equitable lien by agreement, "the plaintiff is enabled to follow the identical thing, *and to enforce the defendant's obligation by a remedy which operates directly upon that thing*." Pomeroy § 1234, at 695 (emphasis added); *see also id.* (equitable lien by agreement "creat[es] a * * * hypothecation of the specific thing"). Indeed, *Sereboff* itself "emphasized that the equitable remedy" in equitable-lien-by-agreement cases "is based on the specific terms of the plan, not general unjust enrichment or other restitutionary principles." U.S. Br. 10. Respondents' contrary assertion finds no support in law.

- Respondents finally assert that no matter what sort of equitable claim an ERISA plan asserts, its "relief is measured by the same specific equitable rules that applied to all subrogation-based claims," including the "double-recovery" rule. Resp. Br. 14. Again, the treatises establish otherwise (as does *Sereboff*). Couch, for example, says that the make-whole doctrine often is applied in subrogation, but "[w]here a policy was explicitly worded so as to require *reimbursement* * * * it has been held that *an insurer is entitled to recovery of its payment, even though the insured has not fully recovered*." Couch § 226:34 (emphases added). Couch likewise explains

that the "double-recovery" concept Respondents advance here has not been applied to reimbursement clauses: "In true subrogation cases, recovery by the insurer is generally limited to the same elements as those for which it has made payment," but "*[t]his need to 'match' items of the third-party recovery to items paid by the insured appears * * * to be another area in which some courts, especially under ERISA, have determined that the language of the agreement should take precedence*[.]" *Id.* § 226:36 (emphasis added); *accord id.* §§ 226:7, 226:38.

3. In short, Respondents' bold claim (at 12) that "[n]o credible authority concurs" with the distinction between subrogation on the one hand, and reimbursement and equitable liens by agreement on the other, is flatly wrong. In fact, *every* credible authority concurs. That fact destroys the remainder of their argument, for the authorities they cite discuss subrogation, not reimbursement or equitable liens by agreement. *See* Resp. Br. 16 (citing Couch § 222:8); *id.* (citing Palmer § 23.16(b)); *id.* at 21 (citing *Svea Assurance Co.* v. *Packham*, 48 A. 359 (Md. 1901)); *id.* at 23 (citing *Wimberly* v. *American Cas. Co.*, 584 S.W.2d 200 (Tenn. 1979)). *Svea* is a pure subrogation case. *See* 48 A. at 360. The same is true of *Wimberly*. *See* 584 S.W. at 203. The cases have nothing to say about reimbursement or equitable-lien-by-agreement measures of recovery.

4. Respondents advance several additional arguments in support of their subrogation theory. First, they argue repeatedly that the reimbursement agreement between Petitioner and McCutchen does not matter because the same "limitation on an insurer's recovery * * * applied regardless of whether a subrogation claim was based on an express agree-

ment or simply arose by virtue of payment." Resp. Br. 19; *see id.* at 20-21. That may be true when it comes to *subrogation*: Some authorities state that the subrogation right is always grounded in unjust enrichment, such that subrogation operates the same way even when formalized by contract. *See Memphis & Little Rock R.R.* v. *Dow*, 120 U.S. 287, 301 (1887). But—again—this case does not involve a subrogation claim; it involves an equitable lien by agreement based on reimbursement. *Sereboff*, 547 U.S. at 365. And the law with respect to reimbursement is different. The reimbursement right, after all, *is* "derived from contractual relations," Couch § 226:1, and the parties have agreed to a particular bargain: One has agreed (for consideration) to turn over a specific fund to another. Equity enforces that bargain by its terms. Petr. Br. 25-26, 31-35, 41. Respondents' attempt to conflate express *subrogation* agreements with express *reimbursement* agreements should be rejected.[4]

Second, Respondents suggests that Petitioner is attempting to evade rules that apply uniformly to insurers. Resp. Br. 2, 19, 21. But a self-funded ERISA plan like Petitioner is *not an insurer*, and the benefits Petitioner offers are not an insurance plan. ERISA explicitly provides that a self-funded plan may not "be deemed to be an insurance company" for

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[4] Respondents suggest that Petitioner should suffer the consequences of choosing to "sit back" and let McCutchen sue the driver who injured him. Resp. Br. 2, 28. But this argument, too, is based on subrogation; it has no resonance in reimbursement. *See* Couch § 226:5 (reimbursement "is not dependent on [the insurer's] active cooperation in efforts to recover from a tortfeasor, in the absence of a positive refusal to cooperate").

state-law purposes. 29 U.S.C. § 1144(b)(2)(B). The statute preempts application of state-law insurance principles to self-funded plans, allowing them to rely on the primacy of ERISA and written plan documents. *See FMC Corp.* v. *Holliday*, 498 U.S. 52, 62 (1990). That Congressional judgment sharply undermines Respondents' effort to apply general insurance principles. And it also cuts against their proposed rule more generally: Respondents would reintroduce through the back door the very state-law doctrines Congress ousted from the field. That is a patently illogical understanding of the statute.

Third, Respondents rely on *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204, 211 n.1 (2002), for the proposition that relief on a reimbursement claim "is measured by the same specific equitable rules that applied to all subrogation-based claims." Resp. Br. 14. That is wrong. The cited footnote contains neither the words "reimbursement" nor "subrogation," and stands for the unremarkable proposition that a claim for equitable relief must meet the requirements that attach to it; otherwise it is unavailable. There is no dispute that the relief sought here, an equitable lien by agreement, meets equitable requirements and was typically available in equity.

Finally, Respondents advance a series of farfetched hypotheticals, telling the Court that under Petitioner's rule, plans could draft reimbursement provisions requiring participants to give back "five, ten, or even one-hundred times" what the plan paid. Resp. Br. 35-36. But Respondents cannot point to a case where anything remotely like this has happened. And if it did, courts would have tools to address the problem. For one, courts have suggested

that an equitable lien by agreement would be unenforceable where the agreement constituted usury. Petr. Br. 36.

The bottom line: Respondents' effort to use subrogation, unjust enrichment, and insurance principles as a shield against Section 502(a)(3) and *Sereboff* cannot withstand scrutiny. The reimbursement agreement should be enforced by its terms, without offsets for "double recovery" or otherwise.

II. THE COMMON-FUND DOCTRINE DOES NOT APPLY.

Respondents double down on their flawed unjust-enrichment argument when it comes to common fund: "Like the double recovery cap," they say, "the common fund rule rests on the principle of unjust enrichment." Resp. Br. 26. That is correct. And that is precisely why the rule does not apply. Instead, just as with the double-recovery analysis, ERISA itself and equitable-lien-by-agreement principles require that the plan's terms be enforced as written.

1. Here, as above, the analytical guideposts are the statute and the law of equitable lien by agreement. Neither makes any room to import a "common fund" reduction when that reduction contradicts plan terms. As discussed, Section 502(a)(3) authorizes appropriate equitable relief to "enforce * * * the terms of the plan," not to override them. 29 U.S.C. § 1132(a)(3). And ERISA is designed to effectuate plans, not eviscerate them. *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 150 (2001). Respondents would undercut that design, authorizing courts to second-guess plan administrators' decisions without clear statutory authority. This improperly diminishes the primacy of written plan documents. *See*

NASP *Amici* Br. 10-11; *Kennedy* v. *Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 300 (2009).

That is why *every* circuit to consider the question—until the Ninth Circuit's recent decision in *CGI Technologies & Solutions* v. *Rose*, 683 F.3d 1113 (9th Cir. 2012)—rejected the idea that the common-fund doctrine applies to an ERISA plan whose terms decline to incorporate common-fund principles. *See*, *e.g.*, *Harris* v. *Harvard Pilgrim Health Care, Inc.*, 208 F.3d 274, 279 (1st Cir. 2000); *Ryan* v. *Federal Express Corp.*, 78 F.3d 123, 127-128 (3d Cir. 1996); *United McGill Corp.* v. *Stinnett*, 154 F.3d 168, 173 (4th Cir. 1998); *Bombardier Aerospace Emp. Welfare Benefits Plan* v. *Ferrer, Poirot & Wansbrough*, 354 F.3d 348, 361-362 (5th Cir. 2003); *Health Cost Controls* v. *Isbell*, 139 F.3d 1070, 1072 (6th Cir. 1997); *Administrative Comm. of Wal-Mart Stores, Inc.* v. *Varco*, 338 F.3d 680, 692 (7th Cir. 2003); *Zurich Am. Ins. Co.* v. *O'Hara*, 604 F.3d 1232, 1237 n.4 (11th Cir. 2010). As the Seventh Circuit explained: "[O]ne of ERISA's primary purposes is to ensure the integrity of written plans. * * * Therefore, it is inappropriate to fashion a common law rule that would override the express terms of a private plan[.]" *Varco*, 338 F.3d at 692. And notably, in this case, the Third Circuit did not announce it accepted the doctrine either.

The equitable-lien-by-agreement cases require the same result. Respondents offer nothing to dispute our showing (Petr. Br. 33-37) that courts sitting in equity did not apply the common-fund rule or other offsets in equitable-lien-by-agreement cases. And they have not cited a single pre-*McCutchen* case that stands for the proposition that an equitable lien by agreement is subject to a common-fund offset when

the agreement itself prohibits application of the doctrine. That is because, to our knowledge, there is no such case; equity enforced such agreements by their terms. *See supra* at 7-13. Indeed, even Respondents' preferred treatise and one of their own cited cases recognize that the common-fund doctrine *may be overcome by "an agreement to the contrary*." Couch § 223:113 (emphasis added); *accord State Farm Mut. Auto. Ins. Co.* v. *Clinton*, 518 P.2d 645, 658 (Or. 1974). Just so. Respondents cannot cast aside the unambiguous Plan language forbidding them from "negotiat[ing] any agreements with a third party that would undermine" the Plan's rights. J.A. 20.

2. Respondents' contrary theory is based, yet again, on unjust enrichment and subrogation. They admit, correctly, that the common-fund doctrine "rests on the principle of unjust enrichment." Resp. Br. 26; *see Boeing Co.* v. *Van Gemert*, 444 U.S. 472, 478 (1980). But as we have shown, equitable liens by agreement do not rest on unjust enrichment; they rest on agreement. Respondents likewise claim that the "overwhelming majority of decisions" embraces the common-fund doctrine. Resp. Br. 27. But by that Respondents mean an overwhelming majority of *subrogation* decisions; their cited authorities nearly all arise in that context. *See id.* at 26-30 & nn.10-11. When it comes to authority actually relevant here—namely, equitable-lien-by-agreement cases and cases applying ERISA reimbursement provisions—the "overwhelming majority of decisions" comes out the other way. The equitable-lien-by-agreement cases do not embrace the common-fund doctrine. And Courts of Appeals considering common fund's applicability

to ERISA reimbursement provisions have almost uniformly rejected it. *See supra* at 15.

Indeed, in rejecting common fund, courts have criticized the approach Respondents take: conflating reimbursement and subrogation. The First Circuit in *Harris*, for example, rejected a participant's reliance on a subrogation decision, *Waller* v. *Hormel Foods Corp.*, 120 F.3d 138 (8th Cir. 1997), that embraced common fund. "[R]eimbursement and subrogation are distinct remedies," the court wrote. "*Waller* held simply that a plan member might interpret the term 'subrogation' to mean that 'the Plan will pay reasonable fees and expenses so as to encourage beneficiaries to press claims to which the Plan will be partially subrogated.' *No such inference would be compelled, however, were the plan to seek recovery, not through subrogation, but independently, based on its own right to direct reimbursement.*" *Harris*, 208 F.3d at 278 (citation omitted; emphasis added). Respondents' claim to enjoy "overwhelming" precedential support rests on inappropriate conflation of separate lines of authority.

Moreover, even if unjust-enrichment principles applied, there would be no unjust enrichment here because "one who is enriched by what he is entitled to under a contract or otherwise is not unjustly enriched." Dobbs § 4.1(2), at 558; *accord* Restatement § 2 cmt. c; *Ryan*, 78 F.3d at 127. The U.S. Airways Plan, like every ERISA plan, is a bargain involving tradeoffs on each side. Nothing in ERISA required U.S. Airways to cover McCutchen's medical payments in the first instance, and as the Seventh Circuit has explained, the tradeoff participants make in accepting benefits under a reimbursement provision like the one here is sensible: They trade the

possibility of a "common-fund-type" reduction for the certainty of having medical benefits paid up front in third-party-liability situations. *Varco*, 338 F.3d at 692 (citing *Cutting* v. *Jerome Foods, Inc.*, 993 F.2d 1293, 1297-98 (7th Cir. 1993) (Posner, J.)). They "in effect trad[e] an uncertain bundle of tort rights for a larger certain right, which is just the sort of trade that people seek through insurance." *Cutting*, 993 F.2d at 1297-98. Participants should be held to that bargain. "[A]ny so-called enrichment" that flows to *either* party as a result "is not unjust." *Varco*, 338 F.3d at 692.

3. The United States supports Petitioner throughout most of its brief, explaining that "[t]he plan terms, not unjust enrichment principles * * * define the parties' rights and responsibilities," and that the Court accordingly should reject the double-recovery rule and enforce the Plan as written. U.S. Br. 16, 12-21. And yet when it comes to the common-fund doctrine, the United States reverses itself; suddenly, it would allow unjust-enrichment principles to trump plan terms. *Id.* at 21-30. There is no justification for (or logic to) this about-face. The United States' recognition that the statute and equitable-lien-by-agreement principles govern is correct. Its attempt to carve out a common-fund exception should be rejected.

a. By way of explanation for its mid-course reversal, the United States maintains that the common-fund doctrine is a "core" equitable principle and is therefore somehow "different" from other, "general" equitable principles such as the double-recovery doctrine. *Id.* at 13, 21, 26. It cites no authority to support that unlikely proposition. And it has argued directly to the contrary before. The Secretary of

Labor argued in *Bombardier*, *supra*, that "the terms of the plan should override any 'common fund' doctrine that may otherwise be available[.]" Brief of *Amicus Curiae* Elaine L. Chao 21, *Bombardier*, No. 03-10195, 2003 WL 23472065. The United States offers no explanation for its change in position other than to say it is the result of "further reflection." U.S. Br. 23 n.9.

The government's new position does not even flow from its new logic. It suggests that the parties' "core relationship involving benefits" is "properly defined by the plan" but that "when the question shifts away from * * * the terms of the plan," the court's background equitable powers take over. U.S. Br. 26. But the "question" does *not* "shift[ ] away" from the plan terms when it comes to attorneys' fees. The U.S. Airways Plan requires full reimbursement and expressly forbids participants from entering into agreements with third parties that impair the Plan's rights. J.A. 20. By the United States' own logic, the common-fund doctrine has no application here.

b. The United States points out that in a number of federal statutes, Congress has chosen to limit beneficiaries' reimbursement obligations to account for attorneys' fees. U.S. Br. 28-33; *see, e.g.*, 5 U.S.C. § 8132. The United States apparently views these statutory implementations of common-fund principles as evidence that Congress favors the doctrine. *See* U.S. Br. 28. But the statutes in fact demonstrate a different point: When Congress intends to limit reimbursement obligations and apply the common-fund doctrine, it does so expressly. It did not do so in ERISA. That silence is significant, particularly in the context of a statute where "Congress did *not* intend to authorize other remedies that it simply

forgot to incorporate expressly." *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 146 (1985). *Compare Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 719-721 (1967) (finding similar intent in Lanham Act and refusing to apply common-fund doctrine), *with Hall* v. *Cole*, 412 U.S. 1, 9-10 (1973) (finding no such intent in Labor-Management Reporting and Disclosure Act and therefore applying common-fund doctrine). Respondents would have this Court do what Congress declined to do. But the Court has demonstrated great "reluctan[ce] to tamper" with ERISA's carefully crafted enforcement scheme. *Russell*, 473 U.S. at 147. It should follow that course here as well.

4. Respondents and their *amici* advance several policy arguments for why the common-fund doctrine should override agreed-to plan terms.

First, they assert that in the absence of a common-fund principle, some plan participants may make the strategic decision not to bother suing tortfeasors who injured them, thus deterring socially beneficial suits. Resp. Br. 30. But that is no reason not to enforce the parties' bargain. Plans—in collaboration with participants—should be free to decide what terms the plans should contain. If those terms create unwelcome incentives, they can be reconsidered over time to reflect marketplace realities.[5]

Next, Respondents argue that enforcing the plan is unfair to McCutchen and his attorneys. Resp. Br. 30-31. Not so. McCutchen traded the possibility of a common-fund reduction for "the guarantee that

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[5] For that matter, plans are free to draft their terms in such a way as to *adopt* the common-fund rule. The rule Petitioner advances would simply let plan terms govern.

medical bills will be paid immediately." *Varco*, 338 F.3d at 692. As for his attorneys, their fees are governed by their separate contract with McCutchen. And McCutchen and his attorneys knew the Plan required reimbursement and pursued third-party recovery anyway. McCutchen cannot "partake of the benefits of the Plan and then * * * invoke common law principles to establish a legal justification for [his] refusal to satisfy [his] end of the bargain." *Ryan*, 78 F.3d at 128.

Finally, Respondents' *amici* suggest that the basic principle on which Petitioner relies—that people should be held to their promises—does not apply here because an ERISA plan is essentially a contract of adhesion. *See* United Policyholders Br. 11. That argument is flawed for many reasons. First, the U.S. Airways Plan was collectively bargained. CA3 Appendix 201. Second, McCutchen was never forced to accept payment for his medical costs; he did so under Plan terms that required reimbursement. Finally, the adhesion argument has no resonance in the common-fund context; any time a third-party tort recovery is in the offing, the participant's counsel will know there is a potential lien on any recovery and will take that into account before deciding whether to take the case. Respondents' own *amici* confirm as much. Consumer Watchdog Br. 25. McCutchen's attorneys knew of the potential lien. And they took the case. That informed choice does not provide a rationale for ignoring plan language.[6]

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[6] Even if the common-fund doctrine could apply to ERISA reimbursement in some circumstances, moreover, it cannot apply here. "A party may not recover and try to monopolize a fund, but then, failing in the attempt, declare it a 'common

III. RESPONDENTS' RULE WOULD IMPOSE NEW BURDENS ON PLANS, PARTICIPANTS, AND COURTS.

Respondents and their *amici* offer various reasons why their approach would do no harm. Each is wrong.

1. First, Respondents dispute the notion that reimbursements impact plan premiums. Resp. Br. 50. But numerous courts and commentators have concluded otherwise. *See* Petr. Br. 27-28, 43-44. Their conclusions are supported by actuarial practice: Governing standards instruct that when actuaries engage in "development of rates," they must "take into account" reimbursement and subrogation recoveries "and make appropriate adjustments." Actuarial Standards Board, *Actuarial Standard of Practice No. 5, Incurred Health & Disability Claims* § 3.3.5, at 6 (effective May 1, 2011).[7] They are also supported by common sense. Self-funded ERISA plans cover their own costs. And plans recover some $1 billion annually under reimbursement provisions. Petr. Br. 42-43. If plans lose some portion of those reimbursements under Respondents' rule, that money will need to come from *somewhere*.

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fund' and obtain his expenses from those whose rightful share of the fund he sought to appropriate." *United States* v. *Tobias*, 935 F.2d 666, 668 (4th Cir. 1991); *Hobbs* v. *McLean*, 117 U.S. 567, 581-582 (1886). That is what Respondents did here. They avoided informing the Plan of their settlement negotiations and, once their settlement was discovered, assiduously sought to eliminate the Plan's recovery. *See* J.A. 34 ¶¶ 4-6.

[7] *Available at* http://www.actuarialstandardsboard.org/pdf/asops/asop005_126.pdf.

The most likely outcome is that the shortfall will be built into rates (thus imposing costs on other participants) or that plans will cease to advance medical expenses in third-party-liability cases. The other possibility is that plan sponsors will absorb the shortfall. In many cases, of course, that will not be fatal, but in some it may well cost employees their coverage. After all, even a one percent cost increase can translate to 315,000 employees losing health coverage. NASP *Amici* Br. 29. And despite Respondents' attempts to minimize the impact of their rule, substantial plan savings are at stake here. *See* Blue Cross *Amici* Br. 4.

2. Respondents also argue there is no evidence their approach would increase administrative costs. But they have nothing to say about Wisconsin's system of mini-trials that does just that. Petr. Br. 47-48. Moreover, this Court has long recognized that "[t]he time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney's fees * * * pose substantial burdens for judicial administration." *Fleischmann,* 386 U.S. at 718.

3. Finally, Respondents do not even attempt to answer Petitioner's final practical point: that their rule undermines Congress's effort to create a statutory regime guaranteeing predictable liabilities. Petr. Br. 26-28. Their silence is telling. Respondents' rule is "fundamentally at odds with the goal of uniformity that Congress sought to implement," *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 142 (1990), and this Court should reject it.

CONCLUSION

For the foregoing reasons, and those in the opening brief, the decision below should be reversed.

Respectfully submitted,

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