No. 21-761

IN THE
Supreme Court of the United States

OPTUMHEALTH CARE SOLUTIONS, LLC,

Petitioner,

v.

SANDRA M. PETERS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

D. BRIAN HUFFORD
Counsel of Record
JASON S. COWART
ZUCKERMAN SPAEDER LLP
485 Madison Avenue
10th Floor
New York, NY 10022
(212) 704-9600
dbhufford@zuckerman.com

Counsel for Respondent

QUESTION PRESENTED

Reversing the Western District of North Carolina, the Fourth Circuit held that a service provider that enters a relationship with a plan fiduciary can qualify as a "party in interest" with respect to subsequent transactions that are prohibited under Section 406(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1106(a). The court of appeals remanded this case to the district court for further proceedings consistent with its decision. Relying on a factually inapposite decision of the Tenth Circuit, the "Question Presented" in the petition misleadingly suggests that Respondent Sandra M. Peters challenges the transaction that established the relationship between the "service provider" and "plan fiduciary." The question raised by the petition is more accurately stated as:

Whether this Court should grant interlocutory review of the Fourth Circuit's holding that a reasonable factfinder could conclude, based on evidence produced by Peters in her summary judgment opposition, that Petitioner OptumHealth Care Solutions, LLC's agreement with plan fiduciary Aetna created a preexisting relationship with Aetna (and with Aetna-administered health plans) such that Optum was an ERISA "party in interest" when it later executed transactions that violated ERISA § 406(a).

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 1

I. FACTUAL BACKGROUND 2

II. PROCEEDINGS BELOW 4

REASONS FOR DENYING THE WRIT 5

I. THIS CASE PRESENTS A POOR VEHICLE FOR REVIEW. 7

II. THERE IS NO CONFLICT BETWEEN THE FOURTH AND TENTH CIRCUITS' RULINGS THAT WARRANTS THIS COURT'S REVIEW. 8

III. NO OTHER COMPELLING POLICY REASON WARRANTS REVIEW OF THE FOURTH CIRCUIT'S HOLDING THAT OPTUM MAY BE HELD LIABLE AS A PARTY IN INTEREST. 12

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.,
389 U.S. 327 (1967)..8

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,
240 U.S. 251 (1916)..8

Mt. Soledad Mem'l Ass'n v. Trunk,
567 U.S. 944 (2012)..7

Ramos v. Banner Health,
1 F.4th 769 (10th Cir. 2021)..........................*passim*

Sweda v. Univ. of Penn.,
923 F.3d 320 (3d Cir. 2019)...........................*passim*

Va. Military Inst. v. United States,
508 U.S. 946 (1993)..8

STATUTES

29 U.S.C. § 1002(14)(B)..11

29 U.S.C. § 1106 ....*passim*

RULES

Sup. Ct. R. 10..6

INTRODUCTION

To the Honorable Supreme Court:

Peters respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Fourth Circuit's decision in this case, which is reprinted at pages App. 1–81 in Petitioner's Appendix.

STATEMENT OF THE CASE

Optum's petition for a writ of certiorari is premature. The Fourth Circuit did not decide whether either party was entitled to summary judgment; rather, the court of appeals held that the district court applied the incorrect legal standard for determining whether Optum was an ERISA party in interest and remanded the case for further proceedings in light of its opinion. Final judgment has not yet been entered on this (or any other) issue, and instead of waiting for the district court's ruling, Optum seeks this Court's interlocutory review, which is highly disfavored.

Indeed, even if Optum sought review of a final judgment, the question presented by Optum's petition would not be worthy of this Court's review. The Fourth Circuit's ruling was consistent with the findings of this Court and other circuits. To manufacture a circuit split that does not exist, Optum's petition omits key facts and distorts the Fourth Circuit's decision.

I. FACTUAL BACKGROUND

In 2012 and 2013, through a series of service agreements, Aetna, in its role as the administrator for health plans like Peters's, hired Optum as a subcontractor to perform some of Aetna's duties under the plans. Specifically, Optum agreed to make its network of chiropractors and physical and occupational therapists available and to provide utilization review services to Aetna-administered plans. *See* Pet. App. 3–4.

Optum characterizes itself as simply receiving fees for providing garden variety third-party services for Aetna, a plan fiduciary. But the evidence shows that Optum knew that it was legally problematic to structure its administrative fee in a way that would require plans and plan beneficiaries to pay it on a claim-by-claim basis. Optum nonetheless agreed to it because it was good for business.

To determine Optum's compensation under these service agreements, Aetna "requested a proposal that buil[t] the [administrative services only] pricing into the provider fee schedule/claims process[.]" *Id.* at 51. As Optum described it, the goal of this design was "to 'bury' the admin fee within the claims process (to ensure Aetna didn't have to pay [it] out of [its] own bank account)." *Id.* To effectuate this scheme, Optum agreed to add "dummy codes" to the benefit claims it processed to disguise its administrative fees as medical expenses. The purpose of Aetna and Optum's arrangement was to later divert plan assets to pay Optum's administrative expenses, under the guise that they were medical expenses.

Optum recognized that paying itself administrative fees out of plan assets that were reserved for medical expenses would be a "very problematic" approach to member and plan responsibility. Indeed, some Optum employees anticipated that the practice would trigger a Department of Insurance ("DOI") complaint. One employee predicted,

> [T]he essence of the DOI complaint on this will be [that] patients are being forced to pay a % of our fee[.] . . . Our thinking so far feels a bit like circling the wagons and drinking our own Koolaid to support a position we have a hard time explaining and understanding, and one that most certainly will be viewed negatively by the DOI.

Id. at 71 n.20.

Internally, Optum's Chief Clinical Officer also warned, "While we can spin it however we like, it is virtually impossible for the member and provider to make the math work on the co-insurance if we are basing claims adjudication on the co-insurance being calculated inclusive of our [administrative fee]. This will lead to inquiries and complaints." *Id.* Another Optum employee cautioned, "This isn't going away and won't take much longer to bubble up to be a substantial issue. I'm not sure anyone can explain the math to a provider, patient, or DOI[.]" *Id.*

Despite these serious concerns about the legality of its scheme with Aetna, Optum went along with it to enrich itself. As one key Optum employee wrote,

"[W]hile we don't like the admin fee, if we refuse we'll lose business." *Id.* at 71 n.20.

Thereafter, Aetna and Optum executed thousands of discrete benefit claim transactions in which they used plan assets to pay Optum's administrative fees—transactions Peters alleges to be prohibited by ERISA. The Fourth Circuit found that a reasonable fact-finder could conclude that these payments violated the written terms of Aetna's plans, which state that the plans and beneficiaries only pay for medical expenses, and that the dummy codes communicated to Peters and her plan were misleading.

II. PROCEEDINGS BELOW

Peters brought this case in 2015 alleging various ERISA violations against Optum and Aetna, including that they engaged in prohibited transactions under § 406 each time they overcharged a putative class member or their plan on a benefit claim by using a bundled rate that included Optum's administrative fee under the guise of medical expenses through the use of dummy codes. Notably, Peters did not object to the entire Aetna-Optum relationship or the right of Optum (or Aetna) to enter into a relationship; she challenged only what came after the formation of that relationship, *i.e.*, each individual benefit determination in which plans and members were forced to pay Optum's disguised administrative fees.

On summary judgment, the district court held that Optum could not be held liable as a party in interest because Optum had no preexisting relationship with the plan or Aetna. *See* Pet. App. 100–01. The Fourth

Circuit reversed the district court's ruling and remanded Peters's claims against Optum to the district court for further proceedings consistent with its opinion, explaining:

> It is true enough that Optum had no prior relationship with the Plan before entering a service agreement with Aetna. But that means only that Optum was not a party in interest *at the time it entered the agreement*. Optum could become a party in interest after the execution of the Aetna-Optum contracts, when it became a service provider to the plan—that is, by making available its network of providers to plan members like Peters. Thus, Optum could be a party in interest because it provided services to the plan at the time its administrative fees were paid.

Id. at 70 (emphasis added) (citations omitted) (internal quotation marks omitted).

Upon issuance of the Fourth Circuit's mandate, the district court ordered supplemental briefing regarding class certification. That supplemental briefing has concluded, and the parties eagerly await the district court's decision on remand so that they can litigate the case to final judgment.

REASONS FOR DENYING THE WRIT

Optum presents no compelling reasons to justify this Court's immediate review of the Fourth Circuit's

decision, *see* Sup. Ct. R. 10, and indeed, the petition should be denied for several reasons.

First, Optum seeks interlocutory review of the Fourth Circuit's decision before the district court has ruled on remand. This magnifies the petition's other defects.

Second, even if Optum's petition had been filed after entry of final judgment, Optum fails to demonstrate any conflict at all, much less an intolerable one, between the Fourth and Tenth Circuit's legal standards for determining who qualifies as a party in interest to a prohibited transaction under ERISA § 406. In fact, both circuits applied the same rule: that "some prior relationship must exist between the fiduciary and the service provider to make the provider a party in interest." *Ramos v. Banner Health*, 1 F.4th 769, 787 (10th Cir. 2021). The Tenth Circuit and Fourth Circuit applied that same standard to different factual circumstances in the respective cases before them and reached results that did not conflict with each other because they were based on those differing facts. The Third Circuit also applied the same rule in *Sweda v. Univ. of Penn.*, 923 F.3d 320, 338–39 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 2565, 206 L. Ed. 2d 496 (2020). There is no circuit split.

Third, Optum's sky-is-falling assertion—that the Fourth Circuit's decision means that service providers now risk ERISA liability merely by entering into service contracts with plan fiduciaries—ignores the actual transactions challenged by Peters and the evidence about those transactions on which the Fourth Circuit rested its decision. As explained below,

supra Part III, the Fourth Circuit did not hold that the formation of the Aetna-Optum relationship constituted (or could constitute) a prohibited transaction. Rather, the Fourth Circuit found that a reasonable factfinder could conclude that Optum was a party in interest to *subsequent* prohibited transactions with plan fiduciary Aetna—transactions which knowingly diverted plan assets to Optum for its work as a service provider under the guise of medical expenses, so that plan participants and plans paid Optum's fee instead of Aetna. The ruling by the Fourth Circuit reinforces ERISA's central purpose of preventing plan insiders and parties in interest from diverting, for their own benefit, assets held in trust for plan participants and beneficiaries for the specifically defined purpose—paying for covered medical services—set out in the written terms of Peters's plan.

I. THIS CASE PRESENTS A POOR VEHICLE FOR REVIEW.

The Fourth Circuit's decision, which reversed the district court's application of the incorrect legal standard and remanded the case to the district court for further proceedings consistent with its opinion, is interlocutory. Accordingly, Optum's petition is premature.

This Court disfavors interlocutory grants of certiorari. *See Mt. Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944 (2012) (Alito, J., concurring in denial of certiorari) ("The current petitions come to us in an interlocutory posture. . . . Because no final judgment has been rendered and it remains unclear precisely what action the Federal Government will be required to take, I agree with the Court's decision to deny the

petitions for certiorari."); *Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."). As this Court has explained, "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam). Indeed, the lack of a final judgment in this case "alone furnishe[s] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

The interlocutory posture of this case makes it a poor vehicle to resolve the issue raised by Optum's petition. With the case now remanded to the district court by the Fourth Circuit, decisions by the district court—and then by the Fourth Circuit in any appeal after final judgment—could obviate the need for review by this Court. Optum presents no compelling reason to disturb this Court's well-established practice of awaiting final judgment in the lower courts.

II. THERE IS NO CONFLICT BETWEEN THE FOURTH AND TENTH CIRCUITS' RULINGS THAT WARRANTS THIS COURT'S REVIEW.

Even if Optum's petition were not premature, the Court should decline review because there is no circuit split on the issue raised. Indeed, the Third, Fourth, and Tenth Circuits agree that a service provider must have a preexisting relationship with a fiduciary or

plan to qualify as a party in interest to a prohibited transaction for purposes of liability under ERISA § 406. *See* Pet. App. 70; *Ramos*, 1 F.4th at 787; *Sweda*, 923 F.3d at 338–39. In determining that a reasonable factfinder could conclude based on the factual record in this case that Optum participated in prohibited transactions as a party in interest under ERISA, the Fourth Circuit applied the same rule articulated by the Tenth Circuit in *Ramos*. The different outcomes in this case and *Ramos* are attributable to the distinct factual circumstances in each case.

In *Ramos*, the class challenged the contract that created the relationship between the plan fiduciary and a service provider to the plan as the prohibited transaction. The Tenth Circuit found that it was nothing more than a run-of-the-mill recordkeeping service agreement between Banner Health Inc. ("Banner"), which administered a 401(k) plan for its employees, and third-party subcontractor Fidelity Management Trust Company ("Fidelity"). Thus, because Banner and Fidelity did not have a preexisting relationship before the contract was executed, and the class presented no evidence that the agreement was anything but an arm's-length deal, that relationship-creating contract did not constitute a prohibited transaction under ERISA. 1 F.4th at 787–88. The Tenth Circuit reasoned that entering into an agreement with a service provider does not simultaneously transform that service provider into a party in interest and make that same transaction prohibited under ERISA § 406. Instead, "some prior relationship must exist between the fiduciary and the service provider to make the provider a party in interest under [§ 406]." *Id.* at 787.

In this case, the Fourth Circuit applied the same rule to a different question: whether the service agreements between Aetna and Optum could form the basis for a preexisting relationship such that Optum was a party in interest when it and Aetna engaged in *subsequent* prohibited transactions. Peters's theory is that a prohibited transaction occurred every time Aetna and Optum processed a benefit claim that caused the transfer of plan assets to Optum for administrative fees pursuant to the Aetna-Optum agreement. Far from an "arm's-length" transaction, Optum knowingly engaged in a scheme with Aetna, a plan fiduciary, to have plans and beneficiaries pay Optum's fees, claim-by-claim, by burying Optum's administrative fees in medical claims. The parties created this arrangement so that Aetna would not have to pay Optum's fees. As the Fourth Circuit found, a reasonable factfinder could conclude that each one of those fee payments violated § 406.

In *Sweda*, the Third Circuit also found that a preexisting relationship was formed between a fiduciary and a third party service provider through the contract for the third party service provider to provide services to a plan, such that the service provider became a "party in interest" for purposes of deciding if subsequent transactions were prohibited by § 406. Sweda, representing a class of participants in the University of Pennsylvania's 403(b) plan, brought prohibited transaction claims based on the plan's "lock-in" agreement with service providers requiring the plan to include a provider's accounts among the plan's investment options and to use a service provider's recordkeeping services. 923 F.3d at 338–39. The Third Circuit found that although Sweda

did not sufficiently allege that the service providers were parties in interest at the time they entered into the "lock-in" agreement with the plan, Sweda did plausibly allege that the service providers were parties in interest in subsequent transactions "every time property was exchanged or services were rendered pursuant to the 'lock-in' agreement" because "they provided services to the plan at the time fees were paid." *Id.* at 339 (citing 29 U.S.C. § 1002(14)(B)). Ultimately, the Third Circuit affirmed the dismissal of the prohibited transaction claim because Sweda failed to plausibly allege any prohibited transactions between the service provider parties in interest and the plan. *Id.* at 339–40.[1]

In short, there is no circuit split. The Tenth, Fourth, and Third Circuits are in accord. A fiduciary must have a preexisting relationship with a service provider for the service provider to be considered a party in interest to prohibited transactions under ERISA.[2] In *Ramos*, the class challenged the very

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[1] Optum's argument that the Fourth Circuit misconstrued the ruling of the *Sweda* court also falls flat. *See* Pet. 15–16. In *Sweda*, the Third Circuit concluded that the service providers to the plans were parties in interest for ERISA purposes but that the plaintiffs-appellants did not plausibly allege that those parties in interest engaged in any prohibited transactions with the plans. *See Sweda*, 923 F.3d at 340. This inquiry is distinct from the narrow question that Optum presents to this Court, *i.e.*, what is required for a service provider to qualify as a party in interest for purposes of ERISA liability. *See* Pet. i–ii.

[2] It bears mention that Optum mischaracterizes the Tenth Circuit's opinion in *Ramos* as requiring a preexisting relationship "independent of the relationship created" by the prohibited transaction. Pet. at i–ii. Such an "independence" requirement—like Optum's contention that the preexisting relationship must be specifically with the plan, as opposed to *any*

transaction that *created* the service provider's relationship with the plan fiduciary, and so the service provider was not a party in interest as to that relationship-creating transaction. However, *Peters* and *Sweda* confirm that after a service provider enters a relationship with a plan fiduciary, it is properly considered a party in interest for purposes of subsequent transactions.

III. NO OTHER COMPELLING POLICY REASON WARRANTS REVIEW OF THE FOURTH CIRCUIT'S HOLDING THAT OPTUM MAY BE HELD LIABLE AS A PARTY IN INTEREST.

The foregoing discussion shows that Optum's warning that plan fiduciaries or service providers will be deterred from entering into ordinary contracts to provide services to plans is illusory. In fact, Optum seeks a rule that would place service providers who contract with ERISA fiduciaries beyond the reach of § 406. There is no support in the text or policy of ERISA to support such expanded protection for parties like Optum. Optum's conduct as reflected in the evidentiary record before the Fourth Circuit underscores the correctness of the rule set out by the Court of Appeals.

The Fourth Circuit's finding in this case is wholly consistent with the Tenth Circuit's admonition that "ERISA cannot be used to put an end to run-of-the-mill service agreements, opening plan fiduciaries up to litigation merely because they engaged in an arm's

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ERISA fiduciary—is nowhere to be found in the text of ERISA or in either *Ramos* or *Sweda*.

length deal with a service provider." *Ramos*, 1 F.4th at 787. Rather than challenging a "run-of-the-mill" service agreement or seeking to expand plan fiduciary liability, Peters challenges transactions that Optum executed with Aetna in which they used plan assets to pay Optum for services the plans had already paid Aetna to provide, and even though such payments violated the unambiguous written terms of those plans. Based on the factual record before it, the Fourth Circuit correctly held that a reasonable factfinder could conclude that Aetna and Optum established their relationship in their service agreements, and then each time Optum collected plan funds for its administrative fees, it was a party in interest to a prohibited transaction.

The Fourth Circuit's finding is also consistent with ERISA's purpose "to prevent fiduciaries from engaging in transactions with parties whom they have pre-existing relationships, raising concerns of impropriety." *Id*. The Fourth Circuit's rule preserves the full protection of § 406 against the improper diversion of plan assets by ERISA fiduciaries and the parties in interest with whom they team up.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

D. BRIAN HUFFORD
Counsel of Record
JASON S. COWART
ZUCKERMAN SPAEDER LLP
485 Madison Avenue
10th Floor
New York, NY 10022
(212) 704-9600
dbhufford@zuckerman.com

Counsel for Respondent

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