IN THE SUPREME COURT OF OHIO

LAURA L. PATTERSON, et al., Plaintiffs-Appellees, vs. **AMERICAN FAMILY INSURANCE COMPANY, et al.,** Defendants, -and- **SWAGELOK ASSOCIATES WELFARE BENEFITS PLAN,** Defendant-Appellant.	Case No. 2021-1388 On Appeal from the Medina County Court of Appeals, Ninth Appellate District, Ohio Court of Appeals Case Nos. 20CA0075-M 20CA0078-M

APPELLEES' MEMORANDUM IN OPPOSITION TO JURISDICTION

- AND -

APPELLEES' CONDITIONAL CROSS-PROPOSITIONS OF LAW

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I. EXPLANATION OF WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST

There is no conflict amongst any courts in Ohio, either at the state or federal level, as to any of the issues decided by the trial and appellate courts in this case. To the contrary, the lower courts' decisions were in conformity with all state and federal court precedent in Ohio (including the United States Supreme Court and this Court) such that the acceptance of either of Swagelok's propositions of law by this Court would conflict with consistent state and federal precedent.

Swagelok's arguments in its Memorandum in Support of Jurisdiction ("Memo") which attempt to create the appearance of a legal issue of great public interest rely on the changing of facts, changing the nature of Patterson's claim, misinterpreting case law that is inapposite to the present case while ignoring the case law that is on point, ignoring applicable contract terms while giving other terms illogical interpretations, and misstating the lower courts' decisions.[1] Swagelok does all this in an attempt to create the appearance that the trial court, Ninth District, and the District Court for the Northern District of Ohio[2] (that's 5 judges from 3 separate courts) all errored and created some novel concepts regarding complete preemption by ERISA and contract interpretation. This does not create legitimate questions of great public or general interest.

Regarding Swagelok's Proposition of Law No. 1: Citizens in Ohio (and ERISA plan entities) have asserted declaratory judgment claims to determine contractual assignment/subrogation and reimbursement rights (hereafter referred to as "S/R" rights) in the same state court cases in which the corresponding tort claims are maintained since contractual S/R became a thing. Swagelok's proposition of law misstates Patterson's claim as one that sought an injunction. It was not. Nor was it a claim pursuant to ERISA. It was a claim for

[1] The trial court's order filed September 25, 2018 that is at issue will be referred to as "T.O." and the Ninth District's opinion will be referred to as "*Patterson*" herein.

[2] Following the trial court's decision, Swagelok filed a separate lawsuit against Ms. Patterson and her counsel in federal court asserting a duplicative claim to enforce its contractual reimbursement right. During a hearing on a motion to dismiss Swagelok's complaint, the court indicated that it reviewed and agreed with the trial court's decision and analysis in this case and that Swagelok's complaint would be dismissed. In its written order, however, the court stayed the case and its ruling on the motion to dismiss until the appeals process in this case had been exhausted based on parallel litigation. *Swagelok Co. v. Patterson*, N.D.Ohio No. 5:18CV2822 (Apr. 29, 2019) (attached as Ex. 10 to *Plaintiffs/Appellees' Motion to Dismiss Defendant/Appellant's Appeal* filed in Ninth Dist. Case No. 20CA0075-M).

declaratory judgment to declare certain contractual rights. Assuming Swagelok's Proposition of Law No. 1 accurately stated the nature of Patterson's claim, it would create serious practical problems. Swagelok's Proposition of Law No. 1 would then have the effect of requiring every tort case in which there is health insurance payments from an ERISA plan (the vast majority), and potential S/R rights or claims, to be filed in federal court if the plaintiff wishes to confirm or question the validity or extent of such claimed rights. Aside from overloading federal courts and creating the likelihood of conflicting federal and state court judgments, Swagelok's proposition would create a bigger practical problem. Federal courts in Ohio and elsewhere that have addressed Swagelok's counsel's exact same argument here—that such claims are completely preempted by 29 U.S.C. §1132(a)(3)— have consistently rejected it and remanded the cases back to the Ohio state trial court after removal was sought. Thus, while convenient for Swagelok here, such a rule would leave state and federal courts in Ohio without jurisdiction to hear such claims, thus placing insureds in a jurisdictional purgatory and providing ERISA plan fiduciaries with a new type of jurisdictional immunity from any claims seeking to declare their claimed contractual S/R rights.

Earlier this year, this Court declined to hear the exact same Proposition of Law No. 1 that relied on the same arguments set forth in Swagelok's Memo in a separate case between another insured under the Swagelok Plan—Ms. Patterson's husband—and Swagelok. There, Swagelok filed a Memorandum in Support of Jurisdiction with this court raising the same jurisdiction argument (stated accurately, complete preemption by 29 U.S.C. § 1132(a)(3) that would have the effect of subjecting the case to removal) under an identical set of facts, which involved the same declaratory judgment claim brought against it, involving the same Swagelok Plan and the same documents. *Patterson v. Nationwide Truck Brokers, Inc*., 2021-Ohio-106 (Swagelok's Memo. in Support of Jurisdiction filed Nov. 4, 2020, Proposition of Law No. 2) (attached as **Exhibit 1** for ease of reference). This court declined jurisdiction to review the Ninth District's decision in that case for good reason, as, like here, there was no validity to Swagelok's proposition of law regarding Swagelok's complete preemption argument or great public interest

to undo appropriately and consistently exercised jurisdictional powers by state courts over declaratory judgment claims to determine contractual S/R rights involving ERISA entities. *Id.* Nothing has changed over the past year, and this Court should again decline the invitation to address Swagelok's Proposition of Law No. 1.

Regarding Swagelok's Proposition of Law No. 2: This Court should also decline to accept Swagelok's second proposition of law as it would require this Court to ignore findings of fact made by the trial court, and affirmed by the Ninth District, which were based on uncontroverted evidence that included the interpretation of unambiguous language contained in documents, testimony from Swagelok's own representative, and common sense.

II. STATEMENT OF THE CASE AND FACTS

In 2015, Ms. Patterson ("Patterson") was insured under a group employee health plan (the "Plan") that was offered through her husband's employer, Swagelok, and subject to ERISA regulation.

Upon enrolling into the Plan, the Pattersons agreed to the terms and conditions contained in the document titled the "Plan Document" pertaining to the Swagelok Plan, which is required by 29 U.S.C. § 1102 of ERISA. The Plan Document did not provide Swagelok with S/R rights.

Following their enrollment, the Pattersons and other insureds under the Plan received Summary Plan Descriptions ("SPDs") periodically which were required by 29 U.S.C. § 1022 and which served to summarize and inform insureds of their rights and benefits. The SPDs stated that Swagelok had contractual S/R rights.

Both the Plan Document and SPDs stated that the Plan Document the insureds agreed to was the controlling document in determining insured's rights, not the SPDs, and that if the two "differ[ed]" or were "inconsistent," the contractually agreed to Plan Document controlled.

At all relevant times, Swagelok was contracted with United to administer the Plan and adopted United's medical benefit network or schedule of medical benefits for the Plan, which set forth the medical coverage (what services and by which providers were covered and for how much) that would be provided to insureds of the Plan. This schedule of benefits was derived

from the agreements negotiated and entered into between United and its network medical providers. The Plan Document and SPDs both stated this, as well as Swagelok's representative under oath, and this is typically where benefits are derived from for group medical benefit plans like the Plan. The Plan Document referred to the Swagelok-United agreement in which Swagelok adopted United's schedule of benefits as a "Benefits Contract."

After sustaining injuries in a motor vehicle accident, United claimed Patterson was obligated to reimburse Swagelok for the medical benefits allegedly paid on her behalf that was caused by the collision pursuant to contractual S/R rights. On June 19, 2017, Pattersons filed suit in state court, which included a declaratory judgment claim by Ms. Patterson pursuant to R.C. 2721.02 and R.C. 2721.03 against Swagelok, asking the court to interpret the governing contract to determine whether Swagelok's contractual S/R rights exist and to what extent. **It was not a claim pursuant to ERISA, a claim for a violation of an ERISA statute, or a claim seeking an injunction to prevent Swagelok from enforcing otherwise valid contractual rights.** Swagelok even acknowledged this at the trial level at times and on appeal. For example, in its docketing statement filed with its appeal to the Ninth District:

> Probable issues for appeal: The granting of Summary Judgment in a declarations action finding no subrogation or reimbursement rights on the part of a health Plan.
> Type of action in trial court? Declaratory Judgment

Initially during the litigation Swagelok only produced and relied on the SPDs, including in response to discovery requests for the Plan Document referred to in the SPDs, and claimed no such Plan Document existed such that the SPDs controlled. After the trial court ruled that representative(s) of Swagelok could be deposed in response to Swagelok's objections, Swagelok produced the Plan Document, and switched strategies to arguing the controlling Plan Document incorporated the SPDs such that the S/R terms contained in the SPDs were contractually enforceable. Swagelok also refused and objected to producing the "Benefits Contract" between it and United and any other "Governing Documents" referred to in the Plan Document, despite those being requested. The court ruled Swagelok did not have to produce those.

In its motion for summary judgment, Swagelok argued, in the alternative, that Patterson's claim was not really a declaratory judgment claim pursuant to R.C. 2721, but a claim for injunctive relief under 29 U.S.C. § 1132(a)(3) of ERISA over which federal courts have exclusive jurisdiction pursuant to 29 U.S.C. § 1132(e)(1). Swagelok did not argue that Patterson's claim was a state law claim that was completely preempted by 29 U.S.C. § 1132(a)(3). Nor did Swagelok ever seek removal to federal court based on such a defense.

The trial court entered summary judgment in favor of Patterson, holding: (1) all the evidence including the language of the documents themselves did not provide Swagelok with contractual S/R rights; and (2) Patterson's claim was not a claim under § 1132(a)(3), but was a declaratory judgment claim pursuant to R.C. 2721 such that the trial court had jurisdiction; and (3) even if Patterson's claim were to be considered a claim under § 1132(a), it would appropriately be considered a claim under subsection § 1132(a)(1)(B), over which state courts have concurrent jurisdiction anyways under § 1132(e)(1).

On appeal, Swagelok argued for the first time that Patterson's claim was a state law claim but that the claim was completely preempted by § 1132(a)(3). The Ninth District unanimously affirmed the trial court, and despite being raised for the first time addressed Swagelok's preemption argument and held that Patterson's state law claim was not completely preempted by § 1132(a)(3) since it sought declaratory relief and not equitable injunctive relief, and that even if Patterson's state law claim was completely preempted by 1132(a), it would appropriately be completely preempted by subsection (1)(B) which provides concurrent jurisdiction anyways.

III. LAW AND ANALYSIS

Proposition of Law No. 1. An action seeking an injunction to bar an ERISA benefit plan's exercise of its rights under certain plan provisions constitutes an action for "appropriate equitable relief" under ERISA Section 502(a)(3), within the exclusive jurisdiction of federal courts pursuant to 29 U.S.C. § 1132(e)(1).

Appellees' Counter-Proposition of Law No. 1: A claim by an insured against an ERISA entity for declaratory judgment pursuant to R.C. 2721.02 and 2721.03 to determine claimed contractual S/R rights by that ERISA entity is not completely preempted by 29 U.S.C. § 1132(a), and even if it was, it would appropriately be completely preempted by

subsection (1)(B) of 29 U.S.C. § 1132(a), over which state and federal courts have concurrent jurisdiction pursuant to 29 U.S.C. § 1132(e)(1).

A. Federal Preemption Under ERISA

Congress has the power to preempt state laws pursuant to the Supremacy Clause of the United States Constitution. *Girard v. Youngstown Belt Ry. Co*., 134 Ohio St.3d 79, 2012-Ohio-5370, 979 N.E.2d 1273, ¶ 13, citing *In re Miamisburg Train Derailment Litigation*, 68 Ohio St.3d 255, 259, 626 N.E.2d 85 (1994). "Preemption may be either expressed or implied." *Id*. at ¶ 14, citing *Gade v. Natl. Solid Wastes Mgt. Assn*., 505 U.S. 88, 98, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992).

> Express preemption occurs when Congress explicitly defines "the extent to which its enactments pre-empt state law." Implied preemption of state law may occur when Congress has created a " 'scheme of federal regulation * * * so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' or where an Act of Congress 'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.' "

Id., quoting *English v. Gen. Elec. Co*., 496 U.S. 72, 78-79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990); *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987).

ERISA contains both types of preemption. "Express" preemption is derived from 29 U.S.C. § 1144 of ERISA, whereas "implied" preemption is derived from 29 U.S.C. § 1132(a) of ERISA, known as ERISA's civil enforcement scheme.[3] *K.B. v. Methodist Healthcare–Memphis Hospitals*, 929 F.3d 795, 800 (6th Cir.2019) ("There are two forms of ERISA preemption: express preemptions (which applies broadly) and complete preemption (which applies narrowly). Express preemption applies when a state claim falls within ERISA's preemption clause [1144(a)]. * * * A state suit may be completely preempted (and subject to removal) if * * * that suit conflicts with or duplicates the federal cause of action provided in ERISA's enforcement provision, 29 U.S.C. § 1132(a)(1)(B)"); *Meadows v. Jackson Ridge Rehabilitation and Care*, 5th Dist. Stark No. 2018 CA 00184, 2019-Ohio-2879, ¶¶ 36-38.

[3] Courts refer to "express" preemption as "conflict," "defensive," and "ordinary" preemption as well, and "implied" preemption is also referred to as "complete" preemption. Express/conflict preemption will be referred to as "conflict" preemption, and implied/complete preemption will be referred to as "complete" preemption hereafter.

While Congress intended ERISA to establish uniform regulations to protect beneficiaries, it did not wish to preempt all state laws, and specifically provided that state courts retain jurisdiction to hear claims based on both state and federal-ERISA law involving ERISA entities and to enforce certain state laws affecting ERSA entities in 29 U.S.C. §§ 1132(e)(1) and 1144(b). *Richland Hosp., Inc. v Ralyon*, 33 Ohio St.3d 87, 88, 516 N.E.2d 1236 (1987), citing 29 U.S.C. §§ 1001(b), 1132, and 1144.

The effects of conflict and complete preemption are also different. Conflict preemption of a state law under § 1144 of ERISA completely bars that claim and subjects it to dismissal, not removal. *Zahuranec v. CIGNA Healthcare, Inc*., N.D.Ohio No. 1:19cv2781, 2020 WL 7335286, *10 (Dec. 14, 2020) (Citations omitted). Whereas complete preemption under § 1132(a) of ERISA has the effect of converting that state law claim into a claim under § 1132(a), thereby subjecting a case to removal to federal court, but not dismissal. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987), syllabus; *Taylor*, 481 U.S. 58, 67, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987); *Darcangelo v. Verizon Communications, Inc*., 292 F.3d 181, 187 (4th Cir.2002) (a claim based on state law that is completely preempted by 29 U.S.C. § 1132 "is transformed into a federal claim under [29 U.S.C. § 1132]."); *Beeler v. Western Southern Life Ins. Co.*, 247 F.Supp.2d 913, 920 (S.D.Ohio Nov. 7, 2002) ("[t]he complete preemption doctrine does not terminate the claim[.]"); *Rudel v. Hawai'i Mgmt. All. Ass'n*, 937 F.3d 1262, 1270 (9th Cir.2019) (When complete preemption applies, "a state-law claim ceases to exist, because, upon removal to federal court, 'the state-law claim is simply recharacterized as the federal claim that Congress made exclusive.' "). Thus, complete preemption may have jurisdictional implications, and subject a case filed in state court to removal, while conflict preemption does not. *Zahuranec* at *9-10 (" '[E]xpress preemption under 1144 is a defense; it is grounds for dismissal but not for removal.' * * * Complete preemption, on the other hand, is grounds for removal but *not* grounds for dismissal.") (Emphasis in original) (Citations omitted); *Wright v. General Motors Corp*., 262 F.3d 610, 614 (6th Cir.2001) ("[a] state law claim is removable to the federal courts only if it is

'completely preempted.' ") (Citation omitted); *Wurtz v. Rawlings Co., LLC*, 761 F.3d 232, 238-239 (2d Cir.2014) (summarizing authority).

B. The Lower Courts Correctly Addressed Swagelok's Complete Preemption by § 1132(a)(3) Argument.

Swagelok's arguments regarding preemption and jurisdiction over the past five years in this case have evolved, but have consistently confused, conflated, and misapplied the two types of ERISA preemption and their implications, and subject matter jurisdiction. *See Meadows* at ¶ 35 (recognizing the distinction between these concepts and holding "[a]ppellants' argument erroneously equates [ERISA] preemption with jurisdiction."). It now brings that confusion to this Court in an attempt to manufacture the appearance that it was the lower courts that misapplied these doctrines.

As the lower courts recognized, under § 1132(e)(1) of ERISA, federal courts have exclusive jurisdiction over claims brought pursuant to § 1132(a)(3), and state and federal courts have concurrent jurisdiction over claims brought pursuant to § 1132(a)(1)(B) of ERISA.

In its motion for summary judgment, Swagelok argued that the trial court lacked jurisdiction over Patterson's claim against it because it was really a claim pursuant to § 1132(a)(3) for injunctive relief, as opposed to a claim under R.C. 2721.02 and 2721.03 to declare contractual rights. T.O. at P. 4. This was different than, and Swagelok did not argue that Patterson's claim was a state law claim (pursuant to R.C. 2721) that was completely preempted by § 1132(a)(3).[4] Nonetheless, after acknowledging that Patterson's claim was pursuant to R.C. 2721.02 and .03, the trial court went on to hold that even if it was to be considered a claim under § 1132(a) of ERISA, it could just as easily, if not more appropriately, be considered a claim under subsection (1)(B) as opposed to (3) of § 1132(a), such that the trial court would have concurrent jurisdiction anyways. *Id*. at pp. 7-10.

[4] Swagelok would have had to acknowledge that Patterson's claim was a state law claim to be able to argue that it was completely preempted since, by its very nature, only state law claims can be completely preempted.

On appeal, Swagelok argued for the first time that Patterson's claim was a state claim under Chapter 2721 of the Ohio Revised Code for declaratory judgment but that it was completely preempted by § 1132(a)(3), despite not raising this argument in its motion for summary judgment, and despite never seeking removal to federal court which was Swagelok's only available remedy for its complete preemption argument as explained *supra*. *See* Swagelok's Assignments of Error raised in *Patterson* at ¶ 2. Swagelok's assignments of error therefore confused its own prior arguments to the trial court (since complete preemption was not raised) and confused the concept of complete preemption since Swagelok never sought removal despite that being the only remedy available for that that defense.

Nonetheless, the Ninth District held that "the trial court did not err when it determined that the Pattersons' declaratory judgment claim against Swagelok **was not preempted**." (Emphasis added) *Patterson* at ¶ 12. Thus, Swagelok's claim in its Memo at pp. 6 and 8 that the lower courts held that Patterson's claim was simultaneously completely preempted by subsections (1)(B) and (3) of § 1132(a) is inaccurate (misstatement). The appellate court went on to address Swagelok's assignments of error further, which were premised on misstatements of what the trial court held, and correctly explained that even if Patterson's claim was completely preempted by 1132(a), preemption under subsection (1)(B) was more appropriate than under subsection (3) which would provide the trial court with concurrent jurisdiction over Patterson's claim anyways. *Id*. at ¶¶ 10-12 ("Multiple courts have held that a declaratory judgment action seeking a declaration of rights, status, or other legal relations is an action 'to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan' under Section 1132(a)(1)(B)."). **This holding was in line with state and federal court precedent, which requires that where a plaintiff could bring a cause of action under §§ 1132(a)(1)(B) or 1132(a)(3), the action must be maintained under § 1132(a)(1)(B) unless the remedy afforded by 1132(a)(1)(B) is shown to be inadequate—the exact opposite of what Swagelok claims the law is in its Memo (misstatement of law).** *Varity Corp. v. Howe*, 516 U.S. 489, 515, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996); *Outward v. Eaton Corp. Disability Plan*

for U.S. Employees, 808 Fed.Appx. 296, 314 (6th Cir.2020); *Wilkins v. Baptist Healthcare Sys., Inc.*, 150 F.3d 609, 615 (6th Cir.1998) ("The Supreme Court clearly limited the applicability of § 1132(a)(3) to beneficiaries who may not avail themselves of § 1132's other remedies."); *Korotynaska v. Metropolitan Life Ins. Co*., 474 F.3d 101, 106-107 (4th Cir.2006) (collection of cases); *Cottrill v. Allstate Ins. Co.*, S.D. Ohio No. 2:09-cv-714, 2009 WL 3673017, *4 (Oct. 30, 2009), quoting *Community Ins. Co. v. Rowe*, 85 F.Supp.2d 800, 816 (S.D.Ohio 2009) (" 'neither the Supreme Court nor the Sixth Circuit has extended the complete preemption doctrine to claims under § 1132(a)(3).' "); *Girard*, 134 Ohio St.3d 79, ¶ 16, quoting *Mims v. Arrow Fin. Servs., L.L.C.*, 565 U.S. 368, 378 (2012) ("In determining the scope of its jurisdiction under a federal statute, a state court of general subject-matter jurisdiction possesses a 'deeply rooted presumption in favor of concurrent' state and federal jurisdiction."), *Accord Patterson* at ¶ 9. It would follow that if a state claim could be completely preempted by either subsections (a)(1)(B) or (3) of 1132(a),[5] then it must be completely preempted by (a)(1)(B). Again, this is why there is no certified conflict here.

Swagelok also argues in its Memo, as it has over the past five years in this case, that Patterson's claim was not a claim for declaratory judgment to declare the contractual S/R rights claimed by Swagelok, but was a claim to bar the enforcement of such contractual rights even if they existed, and to enjoin Swagelok from enforcing its contractual S/R rights, regardless of the validity of such contractual rights. As was explained *ad nauseum* over the past five years in this case, in numerous pleadings filed and as recognized by the trial court in multiple orders and the Ninth District, Patterson's claim was to determine the contractual rights between Patterson and Swagelok as it pertained to Swagelok's claimed contractual S/R rights, not an injunction to prevent the enforcement of such rights in the event they existed, and that's exactly how the lower courts treated it. It goes without saying that in the event the court declared that Swagelok did not have contractual S/R rights, it could not then enforce such rights because they would not exist.

[5] Again, here, since Patterson sought declaratory relief, and not an injunction, her state claim could only arguably be completely preempted by 1132(a)(1)(B), not (a)(3), since (a)(3) only provides for equitable relief.

Both courts recognized Swagelok's semantics and incorrect interpretation which attempted to change the facts—that being the nature of Patterson's claim—to conform to Swagelok's 1132(a)(3) narrative (misstatement of facts). *See also, MacDonald v. Barnard*, 1 Ohio St.3d 85, 86 fn. 1, 438 N.E.2d 410 (1982), citing Civ.R. 1(B) (recognizing the "basic and general rule that pleadings * * * shall be construed liberally in order that the substantive merits of the action may be served.").

Further, Patterson could not have brought the type of injunction claim that Swagelok has tried to convince the lower courts that Patterson's declaratory judgment claim was. This is because neither R.C. 2721 *et seq.*, § 1132(a)(1)(B), nor § 1132(a)(3) provided for an injunction to enjoin Swagelok from enforcing otherwise valid contractual S/R rights as Swagelok claims.

No statute in Chapter 2721 of the Ohio Revised Code permits the overriding or prevention of the enforcement of contractual rights, only the determination of parties' contractual rights when they are in dispute. Further, § 1132(a)(1)(B) only permits a beneficiary "to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan," not to override, re-write, prevent or enjoin the enforcement of the terms of a plan when they exist. *CIGNA Corp. v. Amara*, 563 U.S. 421, 436, 131 S.Ct. 1866, 179 L.Ed.2d 843 (2011) ("*Amara*") ("[§ 1132(a)(1)(B)] speaks of '*enforc[ing]*' the 'terms of the plan,' not of *changing* them.") (Emphasis in original); *Soehnlen v. Fleet Owners Ins. Fund*, 844 F.3d 576, 583 fn. 2 (6th Cir.2016) ("[A]n action attempting to re-write the terms of a plan is unavailable under § 1132(a)(1)(B).").

Only § 1132(a)(3) would permit the type of injunctive relief to prevent contract term enforcement that Swagelok claims Patterson's claim was for to "*enjoin* any act or practice which violates any provision of [ERISA] or the terms of the plan, or" "to obtain other appropriate *equitable* relief * * * to enforce any provisions of [ERISA] * * *." (Emphasis added). Since Patterson did not seek to override or bar the enforcement of terms if they should exist, Patterson's claim could have only been considered a claim under § 1132(a)(3) if Patterson sought to bar the enforcement of Swagelok's contractual S/R rights based on a statute in ERISA that

bans the inclusion or enforcement of S/R terms in plans. Because there is no statute in ERISA that either permits, bars, or otherwise regulates S/R rights, Patterson's claim could not have been considered one pursuant to § 1132(a)(3) to enjoin the enforcement of such contractual rights for being non-enforceable pursuant to some statute in ERISA. *U.S. Airways, Inc. v. McCutchen,* 569 U.S. 88, 89, 133 S.Ct. 1537, 185 L.Ed.2d 654 (2013) ("*McCutchen*") ("Courts construe ERISA plans, as they do other contracts, by 'looking to the terms of the plan' as well as to 'other manifestations of the parties' intent.' ") (citations omitted); *Wurtz v. Rawlings Co., LLC,* 761 F.3d 232, 243 (2d Cir.2014) ("ERISA says nothing about subrogation provisions. ERISA neither requires a welfare plan to contain a subrogation clause nor does it bar such clauses or otherwise regulate their content.") (citations omitted.); *Clardy v. ATS, Inc. Employee Welfare Benefit Plan,* 921 F.Supp. 394, 398 (N.D.Miss. 1996) ("Rights of subrogation are contractual, and there is no federal common law rule of subrogation in ERISA cases."); *Cottrill,* S.D. Ohio No. 2:09-cv-714, 2009 WL 3673017, *3-4 (Oct. 30, 2009) (addressing the same complete preemption argument under a set of identical facts to the present case and holding that the Plaintiff's declaratory judgment claim to determine contractual S/R rights could not be considered a claim under § 1132(a)(3) since ERISA does not bar contractual S/R rights and remanding the case to the Ohio state court following the defendant's removal).

Thus, Patterson's claim could not be twisted into the type of injunction claim that Swagelok claims it was because such a claim would not have even been possible of being brought in this case under R.C. 2721, § 1132(a)(1)(B), or § 1132(a)(3).

The lower courts' analysis was therefore in conformity with the statutes at issue and state and federal precedent. This is why state courts in Ohio (and elsewhere) have always been able to hear declaratory judgment claims to determine contractual S/R rights involving an ERISA entity. *See, e.g., Griner v. Minster Bd. of Educ*., 3d Dist. Auglaize No. 2-01-10, 2001-Ohio-2256 (declaratory judgment claim against ERISA administrator to determine contractual S/R rights could be considered a claim under § 1132(a)(1)(B) if completely preempted such that trial court had jurisdiction); *Leasher v. Leggett & Platt, Inc*., 96 Ohio App.3d 367, 645 N.E.2d 91 (12th

Dist. 1994) (declaratory judgment claim against ERISA plan employer to determine contractual S/R rights not preempted by ERISA); *Bradburn v. Merman*, 12th Dist. Clermont No. CA99-02-011, 1998 WL 1145402 (Oct. 25, 1999) (same), *Accord Beasecker v. State Auto Ins. Co*., 2d Dist. Drake No. 1530, 2001 WL 85782 (Feb. 2, 2001); *Petsch v. Hampton Inn*, 8th Dist. Cuyahoga No. 95039, 2011-Ohio-838, ¶ 28; *Melesky v. SummaCare, Inc*., 5th Dist. Stark No. 2011-CA-00206, 2012-Ohio-1336; *Cottrill* at *2-4 (remanding case back to Ohio state trial court and rejecting Swagelok's counsel's same argument that the plaintiff's state declaratory judgment claim was completely preempted by § 1132(a)(3) under set of identical facts); *See also, Davis v. Huron Road Hosp*., 8th Dist. Cuyahoga No. 57722, 1990 WL 180647, *4 (Nov. 21, 1990) (recognizing "[t]rial courts have proceeded to consider ERISA claims when the state-law claims have been preempted by ERISA.") (Citations omitted). This is why in practice trial courts in Ohio have been able to declare contractual S/R rights involving ERISA entities that are in dispute in cases along with the related tort claims. *See, e.g., Galusha v. Pass*, 6th Dist. Lucas No. L-02-1132, 2003-Ohio-1036; *Stephens v. Emanhiser*, 3d Dist. Senaca No. 13-99-03, 1999-Ohio-849.

State courts in other states also agree, as the Ninth District in this case indicated. *Patterson* at ¶ 11, citing *Edgefield Holdings, LLC v. Gilbert*, No. 02-17-00359-CV, 2018 WL 4495566, *6 (Tex.App. Sept. 20, 2018); *See also, Serraiocco v. Seba*, 286 F.Supp.2d 860 (E.D.Mich. Sept. 30, 2003); *Coleman v. Blue Cross and Blue Shield of Alabama, Inc*., 53 So.3d 1052, 1054-1055 (Fla.App. 2010); *Reeds v. Walker*, 157 P.3d 100, (Okla. 2006).

In *Richland Hosp., Inc. v Ralyon*, 33 Ohio St.3d 87, 89-90, 516 N.E.2d 1236 (1987), this Court addressed both types of ERISA preemption in a case brought in state court and involving different claims than the one at issue in this case, including claims specifically brought under 1132(a)(1)(B). In *Ralyon*, this Court held that the state trial court had jurisdiction over the plaintiff's 1132(a)(1)(B) claim for medical benefits that had been denied because 1132(a)(1)(B) "provides for the enforcement of contractual rights and remedies" over which state courts have concurrent jurisdiction. *Id*. at 90. In *Ralyon*, the Court went on to hold that the portions of state claims that sought, what it termed as "extracontractual remedies," which included punitive

damages, were not remedies provided for under 1132(a)(1)(B), such that the court did not have jurisdiction over those portions of the claims. *Id*. at 90-91. Here, Patterson's declaratory judgment claim did not seek "extracontractual remedies," as such remedies are not available under a claim pursuant to R.C. 2721.02 or .03. The lower courts' decision was in conformity with *Ralyon* and all other federal and state precedent regarding 1132(a) complete preemption, and this Court's decision in *Ralyon* was and still is in conformity with federal precedent.

Nonetheless, Swagelok argues that *Ralyon* needs to be revisited, but fails to provide any reason other than the length of time since *Ralyon* was decided. Given that the law hasn't changed, Swagelok's own self-interest does not warrant the review of the portion of *Ralyon* that applied ERISA complete preemption.

With federal courts remanding cases after removal based on the same arguments made by Swagelok here under the same set of facts (*e.g., Cottrill, supra*.), accepting Swagelok's Proposition of Law No. 1 would effectively lock beneficiaries out of both state and federal courts who wish to assert a declaratory judgment claim to determine contractual S/R rights claimed by an ERISA entity, leaving them with no possible forum to verify such claimed rights. Such a rule is not supported by any state or federal precedent. The lower courts correctly held that Patterson's declaratory judgment claim was not completely preempted by §1132(a), and even if it was, it would have to be completely preempted by § 1132(a)(1)(B), not § 1132(a)(3), thereby providing the trial court with concurrent jurisdiction anyways.

> ***Proposition of Law No. 2.*** An SPD is an enforceable ERISA plan document where it is part of the plan or otherwise incorporated as a governing document or instrument, and where the SPD is the only document outlining the benefits available under the plan.
>
> ***Appellees' Counter-Proposition of Law No. 2:*** A party to a contract is not bound by terms contained in a document (whether an "SPD" document required by 29 U.S.C. § 1022 or any other type of document) that is unilaterally created on behalf of the other contracting party, post-hoc to the original agreement, and which was not agreed to by both parties.

Swagelok's second proposition of law would effectively upend one of the most basic principles in law—that a party to an agreement cannot unilaterally change or add terms to that agreement, and then enforce those terms against the other party who did not agree to the

changes/additions. Swagelok's second proposition would also eviscerate certain document requirement statutes contained in ERISA.

As previously explained and correctly acknowledged by the lower courts, ERISA does not provide for, ban, or otherwise address S/R rights. Thus, such rights, if they are to exist and to what extent, must be derived from the contract agreed to, even in the context of an ERISA plan. P. 12, *supra*.

Initially in this case, Swagelok only produced and relied on the SPDs in pleadings and in response to discovery requests to support its contractual S/R rights claim, and claimed that there was no separate plan document such that the SPDs were the documents agreed to by the Pattersons and other insureds of the plan and therefore the enforceable contracts. Swagelok made this claim despite: (1) there being no manifestation of agreement in the SPDs; (2) the SPDs stating that they were only summaries of other documents, including contracts from which the covered medical benefits are derived from; (3) the SPDs referring to a separate plan document as controlling; and (4) the SPDs failing to satisfy all the requirements set forth in § 1102(b), but satisfying the SPD requirements set forth in § 1022 and 29 C.F.R. § 2520.102-3.[6] *See United Wisconsin Life Ins. Co. v. Neust,* S.D.Ohio No. C2-010335 (Feb. 18, 2003) (unreported) (attached as Ex. 1 to *Appellees/Cross-Appellants Notice of Supplemental Authority* filed in 9th Dist. Case No. 20CA-0078-M on Apr. 12, 2021) (imposing sanctions for same tactics). After the trial court ruled that the deposition(s) of one or more of Swagelok's representatives could go forward in response to Swagelok's objections and attempts to prevent any such deposition, only then did Swagelok disclose the Plan Document that pertained to the Swagelok Plan. T.O. at pp. 22-23. Once disclosed, Swagelok switched strategies and tried arguing that even though the Plan Document was controlling between Swagelok and the Pattersons, it somehow incorporated the SPDs such that the S/R terms contained in the SPDs were contractually enforceable against Patterson.

[6] The SPDs even contained the model statement of ERISA rights required to be in SPDs that is contained in 29 C.F.R. § 2520.102-3.

Swagelok argued this because the Plan Document did not provide Swagelok with S/R rights despite the SPDs stating that such rights exist.

Swagelok acknowledged, and all the evidence was uncontroverted in supporting that upon enrolling into the Swagelok Plan, the Pattersons agreed to the Plan Document, such that it was the controlling contract. T.O. at P. 2; Plan Doc. at P. 1 ("Eligibility for, and the amount of, any benefits payable with respect to Participants shall be determined pursuant to the terms and conditions of this Plan document."). Swagelok's own representative testified to this. Leslie Dep. 57:7-10 ("An employee agrees to be a participant in the Plan by doing open enrollment, thereby, accepting what's in the **Plan Document**.") (Emphasis added).

The lower courts simply relied on the plain and unambiguous terms contained in the Plan Document and SPDs, and the testimony of Swagelok's representative, all of which corroborated each other and coincided with the requirements set forth in ERISA in determining that the Plan Document was the controlling document agreed to, not the SPDs that were unilaterally created by United after the Plan Document was created. Leslie Dep. 91:6-92:4.

The Plan Document stated, "Employer shall issue to each Associate a Summary Plan Description, which shall outline the Associate's benefits under this Plan. **In the case of any discrepancy between the terms contained in this Plan document and the Summary Plan Description, this Plan document shall control."** (Emphasis added) Plan Doc. at P. 29. The SPDs corroborated that the Plan Document was controlling, and not the SPDs:

> **This SPD is designed to meet your information needs and the disclosure requirements of the Employee Retirement Income Security Act of 1974 (ERISA).** It supersedes any previous printed or electronic SPD for this Plan. **If the language, terms or meaning of the actual text of the Swagelok Company Welfare Plan Document <u>differs</u> from Language, text or meaning of this Summary, the Swagelok Welfare Plan Document will control. * * * If there should be <u>any inconsistency</u> between the contents of this summary and the content of the Plan, your rights shall be determined under the Plan and not under this summary.**

(Emphasis added.) SPD at pp. 1-2; Leslie Dep. 95:7-96:24 (acknowledging that if the Plan Document did not contain terms providing S/R rights but the SPDs did, then the two would "differ."). The lower courts held that because the Pattersons agreed to the terms in the Plan

Document such that is was controlling, and not the SPDs, and because the Plan Document did not provide S/R rights, Swagelok did not have contractual S/R rights. Further, the lower courts held that this was consistent with the unambiguous language contained in the documents themselves, since the two documents "differ[ed]" and were "inconsistent" as it pertained to providing Swagelok with S/R rights since the Plan Document did not provide for such rights even though the SPDs stated that such rights exist. *Patterson* at ¶¶ 13-17; T.O. at pp. 12-20; *McCutchen* at 89; *Health Cost Controls v. Isbell*, 139 F.3d 1070, 1072 (6th Cir.1997) ("[T]he plain language of an ERISA plan should be given its literal and natural meaning.") (citations omitted); *Burnham v. Guardian Life Ins. Co. of America*, 873 F.2d 486, 489 (1st Cir.1989) ("Notwithstanding the ennobling purposes which prompted passage of ERISA, courts have no right to torture language in an attempt to force particular results * * * the contracting parties never intended or imagined. To the exact contrary, straightforward language in an ERISA-regulated insurance policy should be given its natural meaning.").

Despite these unambiguous terms, Swagelok still attempted to claim that the SPDs were incorporated by the Plan Document by arguing the SPDs constitute "Governing Documents" as that term is defined in the Plan Document, and that because the Plan Document states that "any conflict between * * * this Plan and the Governing Documents, the provisions of the Governing Documents will prevail," the S/R terms in the SPDs are contractually enforceable against Patterson since they are not contained in the Plan Document and therefore conflict. Memo. at P. 14.[7] As was recognized by the lower courts, this argument is contrary to all the evidence in this case, including the plain language of the documents themselves and the testimony of Swagelok's own representative, and would ignore the reality of where substantive medical benefit coverage (including what medical services are covered and how much providers are reimbursed for such

[7] By making this argument, Swagelok again contradicts another one of its own arguments, that being that the Plan Document and SPDs do not contradict each other for the Plan Document not providing for S/R rights but the SPDs stating that such rights exist. (Memo. at P. 13, fn. 3). If that were accepted, it would have to follow then that there is no contradiction between these two documents regarding S/R rights if the SPDs were considered "Governing Documents" as Swagelok also argues here in an attempt to make the SPDs' binding over the Plan Document.

services) are derived from for a group health plan. Further, accepting this argument would create numerous conflicts with other terms contained in these documents that otherwise wouldn't exist.

Contrary to Swagelok's argument, Memo at P. 15, the Plan Document did not "expressly define the SPD as a 'Governing Document' " (misstatement of fact), and would also contradict the clauses contained in each document which specifically state that the Plan Document controls over any SPD such that if there is any difference between the two, the Plan Document controls.

In reality, the Plan Document defined "Governing Documents" as "the documents that contain the **substantive provisions governing benefits** provided by each of the Welfare Programs listed in the attached Appendices." (Emphasis added) Plan Doc. at P. 6. Appendix A of the Plan Document pertained to the health benefits portion of the Plan. Under Article V of the Plan Document titled "Description of Benefits," it stated "The Health Care Program" and "**Health Care Coverage for Participants shall be provided through a Benefits Contract with the health insurance carrier listed in Appendix A.**" (Emphasis added) Plan Doc. at pp. 11-12. The health insurance carrier and administrator listed in Appendix A was United, which also lists United's contract/reference number that pertains to the Swagelok Plan.[8] Plan Doc. at Appendix A. Appendix A also states "*For a full description of the benefits, please read the Governing Documents." *Id*. Again, "Governing Documents" is defined as those that "contain the substantive provisions governing benefits." If one were unfamiliar with the industry and where the substantive provisions governing health benefits (including which medical providers' services are covered and what services are covered), the answer was contained right in the Plan Document and SPDs. In Article IV, Section 4.5 of the Plan Document titled "Benefits Contracts," it stated:

> Employer may * * * **contract with third parties or may adopt a written document to specify the nature and amount of benefits to be provided by one or more welfare programs. * * * Any such contract or contracts shall be as named in the attached Appendices of this Plan, and shall in their entirety be considered part of this Plan and**

[8] Swagelok makes reference to the "contract number" in Appendix A and the fact that the SPDs contain the same "contract number" to argue that this means the Plan Document incorporated the SPDs. However, this "contract number" is just a reference number assigned by United that is used to identify which health plan a document pertains to. Leslie Dep. 61:11-62:20. This referencing system is typical for an insurer the size of United that administers thousands of group benefit plans at any given time.

> **incorporated herein by reference. Employer's purchase of or participation in such a contract or contracts for stated benefits, and benefits and coverage for any individual Participant thereunder, shall be subject to all limitations and exclusions specified in the Benefits Contract** including, but not limited to, coverage of Dependents, amount of deductible or co-payment which remain the obligation of the Participant, limitations on the nature and amount of covered expenses, and exclusions of * * * specified expenses.

(Emphasis added) Plan Doc. at pp. 10-11.

Thus, in the Benefits Contract entered into by Swagelok and United, Swagelok would agree to adopt United's benefits and coverage or "schedule of benefits" as it is referred to in the industry and ERISA regulations (*e.g.*, 29 C.F.R. §§ 2520.102-3(j)(2), 2520.104b-3(d)(3)) which sets forth the providers that are contracted with United at the time such that they are in United's "network" and their covered services that were negotiated between United and its network providers. These United-provider agreements are where the substantive provisions governing the benefits are derived from at any given time, which makes up United's "benefits schedule" which constitutes the "Governing Documents." That was the source of the benefits that Swagelok adopted from United through a "Benefits Contract," and therefore the "Governing Documents" for the medical benefits of the Swagelok Plan at the time, which were summarized by the SPDs for the Swagelok Plan beneficiaries. The regulations pertaining to ERISA even acknowledge this typical arrangement. 29 C.F.R. § 2520.102-3(j)(2), which pertains to the content of SPDs, states, "In the case of a welfare plan providing extensive schedules of benefits (a group health plan, for example), only a general description of such benefits is required if reference is made to detailed schedules of benefits[.]"). The Swagelok SPDs also corroborated this typical arrangement and complied with 29 C.F.R. § 2520.102-3:

> You are eligible for the Network level of Benefits under this Plan when you receive Covered Health Services from Physicians and other health care professionals who have contracted with UnitedHealthcare to provide those services. * * * **Eligible Expenses are determined solely in accordance with [United's] reimbursement policy guidelines, as described** in the SPD. For Network Benefits, Eligible Expenses are based on the following: **When Covered Health Services are received from a Network provider, Eligible Expenses are [United's] contracted fee(s) with that provider.** * * * Swagelok and UnitedHealthcare arrange for health care providers to participate in a Network and pay Benefits. * * * **The amount and form of any final benefit you receive will depend on any Plan document or contract provisions affecting the Plan** and Company decisions.

(Emphasis added) SPD at pp. 6-7, 60, 62. Here, the SPDs refer to another "Plan document or contract" as containing the substantive medical benefits covered, which is yet another reason that they could not be considered "Governing Documents" under the Plan Document. That "contract" for benefits refers to the "Benefits Contract" between Swagelok and United referred to in the Plan Document in which Swagelok adopted United's benefits schedule for the Plan and its beneficiaries. Again, the SPDs state that they were only summaries and provided a summary of what medical benefits and services were covered.

The foregoing document terms were further corroborated by Swagelok's representative who testified that when Swagelok contracted with United, Swagelok adopted as part of that agreement United's benefit schedule, or what she referred to as United's "grid" or "template" of covered medical services and benefits which sets forth what health services are covered (i.e. the substantive provisions setting forth the benefits of the Swagelok Plan). Leslie Dep. 25:3-26:6; T.O. at P. 17; Patterson at ¶ 17. Again, this is standard industry practice. *See FMS Nephrology Partners North Central Indiana Dialysis Ctrs., LLC v. Meritain Health, Inc*., 144 N.E.3d 692, 696-697 (Ind. 2020) (Explaining the process of how plans receive access to a network of coverage and how benefits/coverage is determined); 29 C.F.R. § 2590.716-6.

Thus, contrary to Swagelok's claim in its Memo at P. 4, regardless of whether the SPDs existed, the medical services covered under the plan, as set forth in United's benefits schedule or benefits "grid" or "template" that Swagelok adopted on behalf of the Swagelok Plan through its Benefits Contract with United would still exist (misstatement of fact).[9] Otherwise, the SPDs would have nothing to summarize, and all the foregoing provisions in the Plan Document and SPDs that explain where benefits are derived from (United-provider contracts) would have to be ignored and deemed inaccurate, which would create a violation of 29 U.S.C. § 1022.

[9] Swagelok's argument also defies logic in that the SPDs do not set forth the reimbursement rates to the providers and do not contain any indication of agreement by any providers. Thus, if there was ever a dispute between United and a provider over whether the provider was correctly reimbursed for a service, by Swagelok's logic, the SPDs would govern over such a disagreement since they are the only documents which contain benefit/coverage provisions even though they are clearly not contracts and do not contain the reimbursement rates for covered medical services.

It is also disingenuous for Swagelok to claim in its Memo at pp. 13-15 that there are no other "Governing Documents" when Swagelok itself acknowledged the existence of other document(s) that would be considered "Governing Documents" under the Plan Document at the trial level, but refused to produce these documents on the basis that they were proprietary and irrelevant because they did not address S/R rights.[10] *Patterson* at ¶ 16 ("The Governing Documents for the medical benefits program were not provided to the trial court."); T.O. at P. 17. These averments directly contradict Swagelok's argument on appeal and to this Court that no other "Governing Documents" exist such that the SPDs must be the "Governing Documents" (misstatement of fact). Swagelok's argument contradicts the very argument that it used to convince the trial court that it did not have to produce these documents, *See* Order filed May 8, 2018 (granting Swagelok's motion to quash), and its own representative's testimony regarding United's benefits schedule or "grid"/"template" as she termed it.

Swagelok also argues, at P. 7 of its Memo, that because its representative testified that she "interpreted" the documents in a manner that coincides with Swagelok's illogical interpretations, that the lower courts erred. Fortunately for contracting parties, one party to a contract is not bound by whatever "interpretation" the other contracting party may come up with. Again, courts interpret ERISA contracts as they do other contracts, by giving terms therein their plain and ordinary meaning. Patterson was not bound by Swagelok's "interpretation" anymore than Swagelok would be bound by Patterson's "interpretation" that [insert any portion of the Plan Document] means that Swagelok has to pay her $1,000,000 every week, or any other illogical self-serving "interpretation" she may come up with.

[10] For instance, in a motion to quash and for a protective order filed by Swagelok in response to a subpoena duces tecum issued to it which requested the production of such "Benefits Contracts" and "Governing Documents," Swagelok acknowledged that the documents existed but that they were proprietary and irrelevant to the claims at issue, inferring that they were silent as to Swagelok's contractual S/R claims. This was reiterated by Swagelok's counsel during a hearing before the trial court held on March 23, 2018 regarding a motion for a protective order that was filed by Swagelok in response to the notice of deposition duces tecum of Swagelok which also requested the production of such documents.

At P. 11 of its Memo, Swagelok also argues for the first time in this case that employer-administrator contracts or "administrative service agreements" ("ASAs") cannot be plan documents because they do not contain the substantive terms, and cites to a line of cases for this proposition. First, this new argument assumes that the Swagelok-United Benefits Contract is the same as an "ASA." Second, those cases were fact specific and do not stand for the general proposition that such a contract can never be part of a plan document and are inapposite to this case since they did not incorporate such contracts and/or such contracts did not adopt the substantive benefits coverage. *Compare, e.g., Mario v. P & C Food Markets, Inc*., 313 F.3d 758 (2d Cir.2002) (holding "ASA" was a plan document where it was referenced as one in an SPD). Also, here, as the lower courts pointed out, and as previously explained, Swagelok refused to produce any Swagelok-United agreements, Benefits Contracts, ASAs, or the like such that it could not be confirmed whether such documents contained or incorporated United's benefits schedule that contained the substantive benefit provisions. However, these documents were not necessary since the terms in the Plan Document, SPDs, and testimony of Swagelok's benefits coordinator, all stated that Swagelok adopted United's benefits schedule, such evidence being uncontroverted by any other evidence. Swagelok's own motions and oral representations made to the court in support of their objections to the production of these documents acknowledged their existence. Courts have acknowledged that such benefit/price schedules, not any SPD, is what determines benefits. *Griffin v. TeamCare*, 909 F.3d 842, 847 (7th Cir.2018) (holding plan administrator was required to produce its fee schedules that were "the basis of [ ] benefits determinization" and contained the "pricing methodology" which were part of the plan, and rejecting the administrator's argument that they only had to turn over the SPD and plan document); *Gorini v. AMP Inc*., 94 Fed.Appx. 913, 918 (3d Cir.2004) (noting employer was "free to design its [ ] plan as it wished" and was required to produce separate schedules that it incorporated as part of its plan document structure). Even ERISA states that "instruments under which the plan was established or operated" may include a "contract," "bargaining agreement," or "trust agreement." 29 U.S.C. § 1024(b)(2), (4). Thus, the United-Swagelok "Benefits

Contract" was certainly capable of, and was in fact incorporated for adopting the substantive benefits by the Plan Document.

Acceptance of Swagelok's Proposition of Law No. 2 would also create additional contradictions amongst the terms in the Plan Document and SPDs if accepted. For example, the Plan Documents and SPDs state that if there is any difference between the terms contained in the two types of documents, the Plan Document that the Pattersons agreed to shall control. If the SPDs were considered "Governing Documents," then this would conflict with the Plan Document-SPD conflict provisions because the Plan Document states that if there is any "conflict between the provisions of this Plan and the Governing Documents, the provisions of the Governing Documents will prevail." Because the Plan Document cannot control over the SPDs while the SPDs also control over the Plan Document, the SPDs could not be considered "Governing Documents."

The lower courts' decisions were not only supported by all the evidence, but also the portions of ERISA that applied to the documents at issue.

To protect plan beneficiaries, ERISA sets forth standards that fiduciaries of plans must follow, including written reporting and disclosure requirements. *Ralyon* at 88.

Two of the types of documents required under ERISA are at issue here. The first, required by 29 U.S.C. § 1102, requires that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument." The § 1102 "written instrument" document is also referred to as the "Plan Document" by 29 U.S.C. § 1021(k)(1)(A).

> It is one of 'ERISA's core functional requirements' that each "employee benefit plan shall be established and maintained *pursuant to a written instrument*." * * * This "reliance on the face of written plan documents" serves the purpose of "enabling beneficiaries to learn their rights and obligations at any time." It also lends certainty and predictability to employee benefit plans, serving the interests of both employers and their employees.

(Emphasis in original.) *Wilson v. Bridge Overlay Systems, Inc*., 129 F.Supp.3d 560, 567 (S.D.Ohio Sept. 15, 2015), quoting *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83, 115 S.Ct. 1223, 131 L.Ed.2d 94 (1995) and *Sprague v. Gen. Motors Corp*., 133 F.3d 388, 402 (6th

Cir.1998); *McCutchen* at 101 ("The plan, in short, is at the center of ERISA."). The content requirements of a Plan Document are set forth in 29 U.S.C. § 1102(b). *Patterson* at ¶ 20; *Swinney v. General Motors Corp*., 46 F.3d 512, 521 (6th Cir.1995) (observing that § 1102(b)(3) "insures against the possibility that the employee's expectation of the benefit would be defeated by an unanticipated amendment of a welfare benefit plan whose benefits employees have come to take for granted.").

The other type of document, a "Summary Plan Description" ("SPD"), is required by 29 U.S.C. § 1022. ERISA requires the administrator of a plan to periodically provide beneficiaries of the plan with SPDs that are to describe and summarize their rights, obligations, and benefits using language that an average beneficiary can understand. 29 U.S.C. §§ 1021, 1022, 1024(b); 29 C.F.R. § 2520.102-3; *Amara* at 435-438.

Following the disclosure of the Plan Document,[11] to support its argument that the Plan Document incorporated the subsequently created SPDs, Swagelok relied on the same inapposite decisions it does in its Memo for the proposition that an SPD can still serve as a plan document without violating *Amara*. In addition to these cases being distinguishable to the present case, this argument also requires the ignoring of the plain language in these documents, which controls. The lower courts took the time to weed through the red herring case law thrown at them by Swagelok and explained why they were inapposite to the present case in making the correct decision. While it is true that other documents are typically incorporated into or considered a plan document, such as insurers' benefit schedules as discussed *supra*, and that SPDs can be a plan document in certain circumstances, since the U.S. Supreme Court's decision in *Amara*, **no court in this Country has ever held, and Swagelok has failed to provide one, where a plan had a separate document that satisfied its § 1102 requirement and separate documents that**

[11] In making its initial argument—that the SPDs simultaneously served to satisfy the requirements of §§ 1022 and 1102—Swagelok apparently anticipated that nobody would notice that the SPDs did not satisfy the requirements set forth in § 1102(b), in addition to not appearing to be written like a typical § 1102 written instrument, but instead a typical § 1022 SPD. The SPDs even contained the model ERISA disclosure contained in 29 C.F.R. § 2520.102-3(t)(2). SPD at P. 72.

satisfied its §§ 1022 & 1024 requirements, and where the Plan Document did not expressly incorporate the SPD(s) or where the documents expressly disclaim the SPD(s) as being controlling (such as here), that the SPD(s) were nonetheless contractually enforceable over the Plan Document that was agreed to by the beneficiaries. That is the bright line rule that complimented the terms contained in the documents themselves and further corroborated the lower courts' decisions. A finding to the contrary would violate *Amara*.

As the lower courts observed, on two recent occasions the U.S. Supreme Court has reiterated the relationship between these two documents: "We have made clear that the statements in a summary plan description 'communicat[e] with beneficiaries *about* the plan, but … do not themselves constitute the *terms* of the plan.' " (Emphasis in original) *McCutchen* at 92, fn. 1, citing *Amara* at 1878. As the Ninth District correctly held, Swagelok's argument was addressed and rejected by the U.S. Supreme Court in *Amara*, which clarified the role of these statutory required documents and the role of the plan sponsor and administrator with regard to these documents. *Patterson* at ¶ 18. Like in *Amara*, the Swagelok Plan had a traditional document structure with a separate § 1102 Plan Document and separate, subsequently created SPDs that satisfied the Plan's obligations under §§ 1022, 1024, and 29 C.F.R. § 2520.102-3.

While Swagelok continues to cite inapposite cases consisting of unusual document structures containing different terms, it also continues to ignore *Amara* and the cases actually on point to the facts of this case, many of which actually discuss the cases relied on by Swagelok. *See, e.g., Cottillion v. United Refining Co.*, 781 F.3d 47, 59-60 (3d Cir.2015) (rejecting argument that terms in SPD were enforceable where conflict provision existed and Plan Documents did not contain the terms contained in the SPDs that Defendant sought to enforce); *Prichard v. Metropolitan Life Ins. Co.*, 783 F.3d 116 (9th Cir.2015); *Harris-Frye v. United of Omaha Life Ins. Co.*, E.D.Tenn. No. 1:14-CV-72, 2015 WL 5562196, *8-9 (Sept. 21, 2015) (Where similar plan document structure to here, rejecting argument that SPD controlled and distinguishing *Bd. of Trustees v. Moore*—relied on by Swagelok in its Memo at P. 12); *Zino v. Whirlpool Corp*., 141 F.Supp.3d 762, 768 (N.D.Ohio Oct. 30, 2015), *rev'd other grounds*, 763 Fed.Appx. 470

(also distinguishing *Moore* and holding, "[i]n the matter before the Court, however, there were actual, collectively-bargained welfare plans that governed the healthcare benefits * * * the welfare plans did not incorporate the SPDs or GIPs."); *U.S. Airways, Inc. v. McCutchen,* W.D.Penn No. 2:08cv1593, 2016 WL 1156778 (Mar. 16, 2016) (rejecting argument that SPDs were enforceable or controlling over Plan Document where similar document structure as here, and distinguishing *Caesars Ent. Op. Co. v. Johnson*—relied on in Swagelok's Memo at P. 13 fn. 3);[12] *Apollo Education Group Inc. v. Henry*, 150 F.Supp.3d 1078 (D.Ariz. 2015); *Maher v. Aetna Life Insurance Co.,* 186 F.Supp.3d 1117 (W.D. Wash.2016); *Brand Tarzana Surgical Institute, Inc. v. Aetna Life Ins. Co*., C.D.Cal. No. CV 18-9434, 2019 WL 12381185 (May 13, 2019); *Compare Mull for Mull v. Motion Picture Industry Health Plan*, 865 F.3d 1207, 1210 (9th Cir.2017) ("[A]n SPD **may** constitute a formal plan document, consistent with *Amara*, **so long as the SPD neither adds to nor contradicts the terms of existing Plan documents**.") (Emphasis added.) (relied on by Swagelok in its Memo at P. 12).

These cases, unlike the ones relied on by Swagelok, involved the same/similar document structure with same/similar terms as here. The lower courts' decisions accurately applied the plain language in the documents and the testimony of Swagelok's representative, all of which gelled with the applicable ERISA regulations as well as *Amara* and its progeny. Their decisions also conformed to the basic principle that, whether in the context of an ERISA plan or otherwise, a person cannot be bound by terms that he/she did not agree to or even had a chance to agree to. Acceptance of Swagelok's Proposition of Law No. 2 would conflict with these basic principles. That does not create a general public interest or any error.

CONDITIONAL CROSS-PROPOSITIONS OF LAW

In the event this Court accepts any of Swagelok's propositions of law, Patterson submits the following conditional cross-propositions of law for consideration.

[12] This case was decided after the U.S. Supreme Court remanded the case following its decision in *McCutchen*, and after the discovery of the plan's Plan Document.

Conditional Cross-Proposition of Law No. 1. The defense of complete preemption under 29 U.S.C. § 1132(a) is a waiverable defense, and such a defense is waived when it is not raised as an affirmative defense or when it is raised for the first time on appeal.

Conditional Cross-Proposition of Law No. 2. The only available remedy for a state claim being completely preempted by 29 U.S.C. § 1132(a), as opposed to conflict preempted by 29 U.S.C. § 1144, is removal to federal court, not dismissal of the claim.

In its answer to Pattersons' complaint and amended complaint, Swagelok did not raise an affirmative defense for either type of ERISA preemption, either § 1132(a) complete or § 1144 conflict. Neither did Swagelok raise or even argue the defense of complete preemption by § 1132(a)(3) at the trial level.

In its motion for summary judgment, Swagelok argued, in the alternative, conflict preemption by § 1144(a), which was not subject to its appeal to the Ninth District or this Court. Swagelok also argued in the alternative that Patterson's claim was not a claim pursuant to R.C. 2721, but was pled as an § 1132(a)(3) claim such that the trial court lacked jurisdiction (as opposed to Patterson's claim being a state claim [pursuant to R.C. 2721] that was completely preempted by § 1132(a)(3)). Further, even if Swagelok had argued complete preemption by § 1132(a), its only recourse was to seek removal to federal court as addressed in P. 7 *supra*, which it never did. Thus, absent removal, there can be no complete preemption or conversion of Patterson's state claim into a § 1132(a) federal law claim.

It was not until Swagelok appealed to the Ninth District that it argued that Patterson's claim was a state claim for declaratory judgment that was completely preempted by § 1132(a)(3) for the first time in this case. Nonetheless, the Ninth District held that the trial court erred in holding that Swagelok's preemption defense was waived for not being pled as an affirmative defense. However, the trial court only held that Swagelok waived its conflict preemption by § 1144(a) defense, and not any complete preemption by § 1132(a) defense since Swagelok only raised conflict preemption in its motion for summary judgment. T.O. at pp. 10-11.[13]

[13] This was not entirely the Ninth District's fault since it took Swagelok's assignments of error at face value, and such assignments of error indicated that it argued and the trial court ruled as waived Swagelok's complete preemption defense.

Because complete preemption effectively converts the state law claim into the federal law claim that completely preempts it, that being § 1132(a) here as Swagelok argues,[14] courts hold that complete preemption is a choice of law issue (state vs. federal), with that choice of law potentially leading to jurisdictional consequences, but not as a direct attack on a court's jurisdiction such that the defense is waived if not properly pled or raised at the trial level. *Wolf v. Reliance Standard Life Ins*. Co., 71 F.3d 444, 447-449 (1st Cir.1995); *Copling v. Container Store, Inc*., 174 F.3d 590, 595 fn. 9 (5th Cir.1999) (holding defense of complete preemption raised for the first time on appeal was waived where defendant only raised conflict preemption at the trial level, reasoning "[t]his legerdemain of parlaying an ordinary preemption argument into a new complete preemption argument does not suffice."); *Gilchrist v. Jim Slemons Imports, Inc*., 803 F.2d 1488, 1497 (9th Cir.1986), *Accord Betz v. Penske Truck Leasing Co., L.P*., 10th Dist. Franklin No. 11ap-982, 2012-Ohio-3472, ¶ 36; *Saks v. Franklin Covey Co*., 316 F.3d 337 (2d Cir.2003) (holding 1132 complete preemption affirmative defense raised by employer for first time in summary judgment was waived); *Sadowski v. Dell Computer Corp*., 268 F.Supp.2d 129, 133-134 (D.Conn.2003) (ERISA preemption defense waived where not raised as an affirmative defense); *East v. Long*, 785 F.Supp. 941, 944 (N.D.Ala. 1992) ("ERISA did not purport to destroy the concurrent jurisdiction of the state courts to try ERISA cases. In other words, unless removed from the state court in strict compliance with the statutes for effecting a removal, an ERISA case, if first filed in the state court, happily remains in the state court."); *Intern'l Ass'n of Entrepeneurs of America v. Angoff*, 58 F.3d 1266, 1270 (8th Cir.1995) ("[Defendant] passed up its chance to remove to federal court. Limitations on removal may or may not be jurisdictional; but either way, the limits must be strictly construed and enforced.").

Thus, even assuming a state claim could be completely preempted by subsection (3) of § 1132(a) but not subsection (1)(B), and Patterson's state claim could be completely preempted by § 1132(a)(3) but not § 1132(a)(1)(B), Swagelok was precluded from asserting its complete

[14] Again, courts have questioned whether it is possible that a state claim could be considered completely preempted by subsection (3) but not (1)(B) of § 1132(a).

preemption by § 1132(a)(3) defense for the first time on appeal, and even if it had raised that defense at the trial level, Swagelok was limited to seeking removal to federal court, not a dismissal of Patterson's claim.

> ***Conditional Cross-Proposition of Law No. 3.*** An appellate court lacks jurisdiction over an appeal that is not timely filed in accordance with App.R. 4(A)(2) as a result of the order being appealed becoming final and appealable during a prior interlocutory appeal.

Swagelok's appeal to the Ninth District below was its third appeal to that court of the trial court's September 25, 2018 order. 9th Dist. Case Nos. 18CA0092-M, 19CA0066-M, and 20CA0075-M. A red flag should go up when the appeal process to an order issued over three years ago is still ongoing, and for good reason here. Swagelok's two prior appeals were dismissed for being interlocutory. While Swagelok's first appeal was pending, the remaining defendants and all the claims involving those defendants were voluntarily dismissed pursuant to Civ.R. 41(A)(1)(a). The trial court's order that was the subject of Swagelok's appeal did not address or otherwise affect these other claims involving these other defendants, such that the trial court retained jurisdiction to permit those dismissals to be filed, which then rendered the trial court's order at issue final and appealable for there being no other outstanding claims when the last dismissal was filed on December 31, 2018, even though Swagelok's first interlocutory appeal was still pending at the time. *Denham v. New Carlisle*, 86 Ohio St.3d 594, 716 N.E.2d 184 (1999).

Pattersons filed a motion to dismiss Swagelok's latest appeal with the Ninth District on January 8, 2021, based on Swagelok's failure to appeal the trial court's order within the time proscribed by App.R. 4(A)(2), which was 30 days from December 31, 2018—the date that the order became final and appealable. Swagelok was therefore required to file a separate appeal to the order or amend its then pending interlocutory appeal to the order on or by January 31, 2018. The Ninth District did not address Pattersons' motion to dismiss in its decision in *Patterson*. To the extent this is considered an implicit denial of that motion, the Ninth District's denial was error and contrary to this Court's decision in *In re Kurtzhalz*, 141 Ohio St. 432, 48 N.E.2d 657 (1943) and its progeny which provides that a trial court retains jurisdiction over matters not

inconsistent with the appellate court's jurisdiction to reverse, modify, or affirm the judgment that is being appealed. *In re S.J.*, 106 Ohio St.3d 11, 2005-Ohio-3215, 829 N.E.2d 1207; *State, ex rel. Hunt v. Thompson*, 63 Ohio St.3d 182, 586 N.E.2d 107 (1992); *Yee v. Erie Cty. Sheriff's Dept.*, 51 Ohio St.3d 43, 553 N.E.2d 1354 (1990); *Doe v. Dayton Bd. of Edn.*, 2d Dist. Montgomery No. 28487, 2020-Ohio-5355; *See also,* Civ.R. 62(E) (recognizing a trial court's ability to proceed during the pendency of an appeal of a judgment in cases involving multiple parties); App.R. 10(D)-(E) (permitting the trial court to retain portions of the record necessary to proceed on issues over which it retains jurisdiction during the pendency of an appeal).

In the event this Court accepts review of any of Swagelok's propositions of law for review, it should first address whether Swagelok's latest appeal in 9th Dist. No. 20CA0075-M should have been dismissed for Swagelok's failure to timely file its appeal in accordance with App.R. 4(A)(2).

IV. CONCLUSION

Swagelok attempts to manufacture the appearance that the lower courts' decisions created a conflict or that there is a great general or public interest by relying on misstatements of the facts in this case, misstatements of the applicable law, ignoring of document terms, illogical interpretations of other plain language in documents, and misstatements of what the lower courts held. In reality, the lower courts' (and the one federal court's) decisions accurately applied the law regarding complete preemption by § 1132(a) of ERISA and construed the terms of the contract and other documents (SPDs) at issue, which also complimented the applicable document requirements set forth in ERISA. This Court already rejected Swagelok's Proposition of Law No. 1 earlier this year in another case that involved the same plan, same documents, and same declaratory judgment cause of action. This case has been ongoing for almost five years now and Swagelok fails to present any legitimate issue that warrants any further delay of its finalization.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 10th day of December, 2021, a copy of the foregoing Memorandum in Opposition of Jurisdiction and Conditional Cross-Propositions of Law was served electronically upon the following:

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EXHIBIT 1

IN THE SUPREME COURT OF OHIO

ERIC L. PATTERSON, et. al.	:	
	:	CASE No.
Plaintiffs/ Appellee	:	
	:	Appeal from the Ninth Appellate
v.	:	District of Ohio in Summit County
	:	Appellate Case Number 29715
NATIONWIDE TRUCK BROKERS Inc., et al.	:	
	:	
Defendants.	:	
	:	
SWAGELOK ASSOCIATES WELFARE BENEFITS PLAN	:	
	:	
Defendant/ Appellant	:	
	:	

APPELLANT SWAGELOK ASSOCIATES WELFARE BENEFITS PLAN'S MEMORANDUM IN SUPPORT OF JURISDICTION

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I. EXPLANATION OF PUBLIC AND GREAT GENERAL INTEREST

This case is of general public interest since the two issues on appeal both involve the subject matter jurisdiction of common pleas courts in Ohio. Generally speaking, Ohio courts of common pleas are entrusted with general equitable subject matter jurisdiction which includes auto accident tort claims. Ohio courts of common pleas may hear any tort claims where the amount sought exceeds the exclusive original jurisdiction of municipal or county courts. Courts of common pleas in Ohio enjoy broad subject matter jurisdiction; but not *unlimited* jurisdiction. This appeal involves two specific claims regarding limits on a court of common pleas' general subject matter jurisdiction.

The first limitation involves what, if any, subject matter jurisdiction can a court of common pleas exercise once it has decided a case and entered a final judgment. A routine practice in Ohio litigation involves counsel for the parties submitting a judgment entry agreed to by the attorneys when a case is settled. Generally, the entry has the case marked as settled and dismissed with prejudice and at whose costs. These entries are then signed by the judge for the common pleas court to conclude or terminate a case.

The general question with respect to the first issue for this appeal is as follows: Can a common pleas court which has signed such an unconditional dismissal entry, also signed by counsel for both parties, retain subject matter jurisdiction to impose Ohio Civil Rule 37 discovery sanctions, Ohio Civil Rule 11 sanctions or frivolous conduct sanctions under O.R.C. §2323.51 nearly two years post dismissal? As the court of appeals noted in its opinion, Ohio does allow for collateral proceedings to continue after a case has been voluntarily dismissed.

The court of appeals reversed the trial court's denial of subject matter jurisdiction and remanded it back to the common pleas court to explicitly state whether or not it believes these actions are "collateral proceedings."

Appellant Swagelok Assoc. Welfare Benefit Plan (hereinafter "Swagelok") asks this Court to clarify that a common pleas court does not have subject matter jurisdiction to entertain discovery and other sanctions nearly two years after the parties through counsel and by court judgment dismissed the entire case "with prejudice". This issue has wide implication as to when litigation actually ends by settlement. In this matter, the parties resolved this case at mediation with a dismissal entry on the docket as of July 19th, 2017. Yet, the parties are before this Court in the fall of 2020 still litigating. Appellees Eric and Laura Patterson filed for discovery and frivolous conduct sanctions nearly two years after agreeing to a settlement. The present case was dismissed with prejudice by agreement of the parties, the attorneys, and the trial court's approval.

A party may rightly ask: "When does litigation in Ohio actually end"? Appellant finds itself still embroiled in litigation which it settled more than three years ago. The weighty question for this Court is a basic one; "Can a party ever actually settle a case and end litigation" or "Can a litigant simply, years later, assert additional claims to recommence the original litigation?" Appellant Swagelok asks this Court to accept jurisdiction on this appeal to reaffirm that litigation, upon the execution of a stipulated dismissal order with prejudice by a common pleas judge, is over, final, and ended, and that parties may not, years after dismissal, re-litigate the case or matters arising from it.

The second issue for appeal involves limitations placed on the general jurisdiction of a common pleas court by federal statute. The federal statute involved in this situation is the Employee Retirement Income Security Act or "ERISA.". *See 29 U.S.C. §1001 et. Seq.* In 1974, Congress enacted ERISA to make employer sponsored health, retirement and welfare plans governed by federal law and statute. One of the primary goals was to provide for the uniform administration of benefits across state lines. This Court last addressed the impact of the ERISA statutes on the general jurisdiction of Ohio common pleas courts in 1987 in the case of *Richland Hospital, Inc. v. Ralyon, 33 Ohio St. 3d 87 (1987).* In *Ralyon*, this Court noted that "[a]ny action that is not included in subsection (a)(1)(B) [meaning 29 U.S.C. §1132] falls within the exclusive subject matter jurisdiction of the federal courts." *Id. pg. 90. Ralyon* involved a claim for payment of medical claims allegedly due but refused by the ERISA plan.

Since *Ralyon* in 1987, this Court has not clarified what limits ERISA places upon the general jurisdiction of a common pleas court. Recently, this Court granted jurisdiction to hear an appeal regarding ERISA limitations on jurisdiction in the case of *Meadows v. Jackson Ridge Rehabilitation and Care, Case # 2019-1197, entry Nov. 6th, 2019* to consider Proposition of Law No. 1 only. The question in that case dealt with the subject matter jurisdiction of Ohio state law courts to hear a claim under §1140 of ERISA. *See Meadows, brief of Appellant, filed Aug. 28th, 2019, pg. 6.* Unfortunately, the *Meadows* case was dismissed by this Court due to the Appellant's failure to timely file a brief. *See Entry Jan. 21st, 2020 dismissing appeal.* The *Meadows* case presented an opportunity to clarify ERISA's limitation on the jurisdiction of a common pleas court but due to no brief being file, this Court did not consider the matter.

Appellant raised the question of subject matter jurisdiction before the court of appeals in this case by way of motion. The court of appeals, by entry dated May 19th, 2020, stated it would consider the issue of ERISA and subject matter jurisdiction at final disposition. But the court of appeals did not address ERISA or what, if any, limitation regarding jurisdiction existed upon the trial court. The jurisdiction of the trial court is a fundamental legal issue as this case, and a related matter, have been in litigation for almost five years.

It has become commonplace for injured parties and their counsel to join ERISA plans in state court cases to prevent their subrogation rights based upon Ohio's recently enacted anti-subrogation statute. Appellees named the Appellant ERISA plan as a defendant in state court litigation to have the common pleas court bar the ERISA plan's right to recover should it not appear or to prevent such recovery based upon O.R.C. 2323.44, which is preempted by ERISA. This practice has gained popularity among attorneys in auto tort cases to force the ERISA health plan to expend money, time, and costs to litigate their claims in a common pleas court.

With the expansion of this practice, the Court needs to address whether there is subject matter jurisdiction for claims regarding ERISA plan terms, including subrogation and reimbursement, to be heard by a court of common pleas. Such litigation seeks to have a state law courts enjoin ERISA plan enforcement under 29 U.S. C. §1132(a)(3)(A) which fall within the exclusive jurisdiction of federal courts by statute. *See 29 U.S.C. §1132(e)* The Court should issue a ruling clearly preventing such suits from being heard by common pleas courts.

Appellant Swagelok asks this Court to accept jurisdiction of this appeal to hold that a case is terminated when dismissed "with prejudice" by agreement of the parties and the court. It also asks this Court to state that actions seeking to enjoin ERISA plan enforcement lack subject matter jurisdiction in state courts under ERISA.

II. STATEMENT OF THE CASE AND FACTS

Appellee Eric Patterson was injured in an auto accident that occurred on November 25th, 2014. Appellees filed a state court action against the responsible driver, the driver's employer, their own auto insurer, a medical provider, the insurer for an employer health plan and Appellant Swagelok as the actual plan. Appellees' suit against Appellant Swagelok was rooted in O.R.C. §2323.44 seeking to have the common pleas court prevent any enforcement of the ERISA plan's reimbursement or subrogation rights.

In this case, the parties attended court sponsored mediation of this case in Summit County Common Pleas Court on June 6th, 2017. The case was resolved by all parties by voluntary settlement at this mediation. On July 19th, 2017, the trial court signed and filed a "Stipulated Dismissal With Prejudice". The entry was electronically signed by the judge and by counsels for Appellees and Appellant. This entry specifically stated that "this case has been SETTLED AND DISMISSED, WITH PREJUDICE."

On March 7th 2019, nearly twenty months post dismissal, Appellees filed a "Motion for Sanctions and Relief" with the trial court seeking attorneys' fees and a $25,000.00 fine pursuant to Ohio R. Civ. P. 37, Ohio Rule of Civ. P. 11 and O.R.C. §2323.51. The trial court ruled that it lacked subject matter jurisdiction to hear any further matters in this case by entry of June 4th,

2019. Appellees initially appealed this ruling. In its first decision, the court of appeals remanded this case to the trial court saying it was unclear if United Healthcare was still in this case or not.

After United Healthcare filed a notice of voluntary dismissal as to any claim on March 18th, 2020, Appellees filed their second appeal on April 1st, 2020. The court of appeals in their decision reversed the trial court and remanded the case to the trial court on October 7th, 2020. In its ruling, the court of appeals held that the trial court erred by not considering whether or not the Appellees' claims for fees and a fine were collateral proceedings for which the court may have jurisdiction. The court of appeals never addressed the issue of subject matter jurisdiction despite it being argued by Swagelok on appeal. Appellant Swagelok now asks this Court to accept jurisdiction over this case to address the issue of when a case is settled/dismissed with prejudice what if any further subject matter jurisdiction remains. Appellant also urges the Court to accept this case to hold that common pleas courts lack jurisdiction to enjoin ERISA plan enforcement under 29 U.S.C. §1132(a)(3)(A) and (e).

III. ARGUMENTS IN SUPPORT OF THE PROPOSITIONS OF LAW

Proposition of Law No. 1. Does a court of common pleas have subject matter jurisdiction to consider collateral proceedings for Rule 37 discovery sanctions, Rule 11 sanctions and O.R.C. §2323.51 frivolous conduct claims once a case has been dismissed under Ohio Civ. Rule 41(A)(2) "with prejudice" by stipulation of counsel for the parties and signed by the trial judge?

Unlike voluntarily dismissed cases, this action is one where Appellees' counsel agreed and stipulated that the case for the Appellees against Swagelok was resolved and dismissed

"WITH PREJUDICE". Also, the trial court entered a judgment of unconditional dismissal on its docket based upon this stipulation in July 2017. Once this stipulation and entry were placed on the trial court's docket, the trial court no longer retained subject matter jurisdiction over this case for any "collateral" motions for sanctions against Appellant Swagelok.

Ohio Supreme Court precedent has long established that a judgment, once entered, shall be presumed to be final. *See Infinite Sec. Solutions, L.L.C., Karam Property* II, 143 Ohio St. 3d 346 (2015); *Ohio Pryo, Inc. v. Ohio Department of Commerce,* 115 Ohio St. 3d 375 (2007); *Grava v. Parkman Township, 73 Ohio St. 3d 379 (1995); Gilbraith v. Hixson*, 32 Ohio St. 3d 127 (1987); *State ex rel National City Bank v. Court of Common Pleas*, 154 Ohio St. 74 (1950); *Coe v. Erb* 59 Ohio St. 259 (1898). "Implicit in the rule is the recognition that a judgment entered by consent, although predicated upon an agreement between the parties, is an adjudication as effective as if the merits had been litigated and remains, therefore, just as enforceable as any other validly entered judgment." *See Gilbraith v. Hixson*, 32 Ohio St. 3d 127, 129 (1987)

This Court affirmed a court of appeals granting a writ of prohibition to prevent a trial court from reopening a litigated case to consider a request for attorney fees and expenses. This Court created the general rule in Ohio as follows:

> We believe the general rule to be that where a judgment has become final and the term of court during which it became so has terminated, there is no jurisdiction of the court to reopen the proceedings to consider the matter of an allowance for expenses and attorney fees, particularly where no fund was created by the litigation from which such allowance could be made, where no such allowance was suggested before judgment, and where there was no reservation of jurisdiction by the court to make such allowance.

State ex rel National City Bank v. Court of Common Pleas, 154 Ohio St. 74, 77 (1950). Ohio traditionally has a storied tradition in honoring the finality of judgments entered by a trial court.

This Court reversed the lower courts who allowed a collateral attack by another aggrieved party to an agreed order that a separate court with the parties entered as a final judgment. *See Ohio Pryo, Inc. v. Ohio Department of Commerce,* 115 Ohio St. 3d 375 (2007). In *Ohio Pyro,* this Court noted that a judgment issued "pursuant to the agreement of the parties to that litigation, it is nonetheless a valid judgment of the court." Id. pg. 380 (citation omitted). The *Pyro* decision noted that a party could not use a new case to collaterally attack an agreed entry that ended prior litigation.

The court of appeals' decision in this case reversed the trial court. The appellate court said that the trial court needed to consider whether or not Appellees' "Motion for Sanctions" was a collateral proceeding such that it still had jurisdiction to proceed. The court of appeals' decision relies upon cases by it and other appellate courts in Ohio where a party's case was voluntarily dismissed and the motion for sanctions was timely filed. *See Ohio Civil Rights Comm'n. v. GMS Mgmt. Co.,* 2000 Ohio App. LEXIS 2827 (9th Dist. 2000); *Baker v. USS/Kobe Steel Co.,* 2000 Ohio App. LEXIS 6 (9th Dist 2000)(motion for sanctions was actually filed prior to voluntary dismissal for discovery violations); *Lewis v. Celina Fin. Corp.,* 101 Ohio App. 3d 464 (3rd Dist. 1995). Also, the Court of Appeals relied upon a case it decided where the sanctions motion was filed and denied at the same time the court dismissed the underlying case for lack of jurisdiction. *See Sunrise Coop., Inc. v. Joppeck,* 2017-Ohio-7654, 2017 Ohio App. LEXIS 3991 (9th Dist. 2017). None of the appellate court decisions cited address the situation in this case.

In contrast, the present litigation involves an agreed upon entry by Appellees and Appellant through counsel resolving all claims "WITH PREJUDICE". This entry was then signed for and adopted by the trial court judge as the final entry. The court of appeals failed to cite any case where collateral motions could take place after the parties and court agreed to a dismissal with prejudice. The cited cases address "sanctions" when a party exercises its right of voluntary dismissal to prevent another litigant or a trial court from protecting the legal process from unscrupulous behavior.

The court of appeals' decision also references two decisions from this Court to support the idea that "collateral motions" can still be heard. The first case of *State ex rel. Hummel v. Sadler,* 96 Ohio St. 3d 84 (2002), addressed a motion for sanctions filed before the case was actually dismissed. The other decision of *State ex rel. Corn v. Russo,* 90 Ohio St. 3d 551 (2001), addressed the ability of a trial court to continue with criminal contempt proceedings post dismissal of the underlying case. In *Corn*, this Court reinforced that a trial court loses jurisdiction over "civil contempt" after dismissal of a case. *Id. pg. 555, citing to, Gompers v. Bucks Stove & Range Co.,* 211 U.S. 418, 451-452 (1911). Both decisions reflect this Court's desire to protect a trial court and its process from abuse by a litigant despite the underlying case being dismissed.

Quite the opposite situation is present in this case. Appellants, Appellees, their counsel and the trial court all agreed to the dismissal "with prejudice" settling the entire case. Unlike *Hummel* or *Corn*, the trial court agreed to the dismissal of this case under Ohio Civ. R. 41(A)(2) "WITH PREJUDICE" to any future actions. None of the rational, purpose, or reasoning for a

collateral motion to survive exists when the court and the parties agree to settle all claims to prevent future litigation arising from this matter.

Despite such an agreement and nearly twenty months later, Appellees sought to re-open the litigation by seeking sanctions under Ohio Civ. R. 37, Ohio Civ. R. 11 and O.R.C. §2323.51. This Court should accept jurisdiction over this issue to clarify that when parties agree to settle a case "WITH PREJUDICE" and the trial court concurs, that claims for collateral motions are not available as a matter of law. Without such a ruling, Appellant will be forced to endure years more of litigation over a case it settled in 2017 with prejudice to future action. If this appeal is not granted, then each and every case marked "settled and dismissed with prejudice" in Ohio can be reopened at any time for a party to seek "collateral motions" relief. Leaving this to the trial court essentially undoes any finality in settled cases within Ohio.

> *Proposition of Law No. 2.* Does a court of common pleas have subject matter jurisdiction over a claim by an ERISA participant against the ERISA plan to enjoin recovery and enforcement of an ERISA plan provisions?

Subject matter jurisdiction is a "condition precedent to the court's ability to hear the case." *See Pratts v. Hurley, 102 Ohio St. 3d 81, 83, citing to Patton v. Diemer (1988), 35 Ohio St. 3d 68 "*A judgment rendered by a court lacking subject matter jurisdiction is void *ab initio*." *See Patton pg. 68 syllabus #3.* Subject matter jurisdiction addresses the court's statutory or constitutional ability to decide the merits of a case and not merely the type of cause of action. *See Pratts* pg. 83 (citation omitted).

A lack of subject matter jurisdiction cannot be waived and may be challenged at any time. *See Rosen v. Celebreeze (2008),* 117 Ohio St. 3d 241, 249*, citing to Pratt.* This Court has

noted that "jurisdictional issues not flagged by the parties may, and sometimes must, be raised by the reviewing tribunal sua sponte." *See Diley Ridge Med. Ctr. V. Fairfield County Bd. of Rev. (2014), 141 Ohio St. 3d 149, 154, citing to Fox v. Eaton Corp. (1976), 48 Ohio St. 2d 236, 238, overruled on other grounds, Manning v. Ohio Stat Library Bd., (1991), 62 Ohio St. 3d 24.*

Subject matter jurisdiction has been raised for even the first time in an appeal before the Ohio Supreme Court. *See Gates Mills Inv. Co. v. Parks,* 25 Ohio State 2d 16 pg. 19-20 (1971)*; Richland Hospital, Inc. v. Ralyon,* 33 Ohio St. 3d 87, 89 (1987). "Where the Court has no authority to take cognizance of the subject matter of the suit, the proceedings may be dismissed at any stage of the case, when the fact is made to appear*." Baltimore & O.R.Co. v. Hollenberger (1907), 76 Ohio St. 177, 185, citing to Thompson v. Steamboat (1853), 2 Ohio St. 28.* Where the ERISA statute vests exclusive jurisdiction to federal district courts over claims seeking to prevent, estop or bar practices in violation of the plan, a state trial court lacks jurisdiction to proceed to hear a declaratory judgment or injunction. *Consider, State ex. Rel Ohio Democratic Party v. Blackwell,* 111 Ohio St. 3d 246, 257 (2006).

Congress enacted the Employee Retirement Income Security Act or "ERISA" in 1974 to create benefits plans as "exclusively a federal concern." *See FMC Corp. v. Holliday,* 498 U.S. 52, 64 (1990). "The statute, instead, seeks to make the benefits promised by an employer more secure by mandating certain oversight systems and other standard procedures." *See Gobeille v. Liberty Mutual Ins. Co.,* 136 S. Ct. 936, 943-044 (2016). The United States Supreme Court has noted that "[w]e must enforce plain and unambiguous statute language" in ERISA, as in any statute, "according to its terms*." See Intel Corp. Inv. Policy Comm. v. Sulyma,* 140 S.Ct. 768. 776 (2020)*, citing to Hardt v. Reliance Standard Life Ins. Co.,* 560 U.S. 242, 251 (2010). This Court

previously noted that the federal ERISA statute "unequivocally" limits state court subject matter jurisdiction to hear claims. *See Manning v. Ohio State Library Bd.*, 62 Ohio St. 3d 24, 29 fn 9 (1991).

Ohio state law courts have limited subject matter jurisdiction when it comes to ERISA benefits plans. This Court last issued a decision on ERISA concurrent subject matter jurisdiction in the case of *Ralyon,* 33 Ohio St. 3d 87 (1987), involving an ERISA participant seeking reimbursement from the ERISA plan for medical treatment incurred. This Court held as follows:

> State courts have jurisdiction concurrent with that of the federal courts to award benefits due under the terms of a self-insured employee benefit plan adopted pursuant to the Employee Retirement Income Security Act (ERISA).

Id. pg. 87 syllabus #1 ERISA only allows state courts concurrent subject matter jurisdiction over limited, enumerated actions under 29 U.S.C. §1132(a)(1)(B). *Id. pg 89.* "Any action that is not included in subsection (a)(1)(B) falls within the exclusive subject matter jurisdiction of the federal courts." *Id pg. 90. (emphasis added).*

The amended complaint filed by Appellants does not allege any failure to pay medical claims incurred to trigger concurrent jurisdiction as stated in *Ralyon.* Instead, the Appellees' amended complaint asks the common pleas court to force the Appellant ERISA plan to appear in state court or have the court bar plan enforcement. Additionally, Appellee's amended complaint asked for the common pleas court to enjoin any exercise of the plan's rights based upon an Ohio state statute. *See Amended Complaint pg. 8.*

The question from Appellants instead addresses the fundamental question of "Does a common pleas court have subject matter jurisdiction to prevent enforcement of an ERISA plan provision or rights under state statute?" In *Ralyon,* this Court noted that a common pleas court can only hear actions under 29 U.S.C. §1132(a)(1)(B) of ERISA. All other actions must be brought in federal court.

ERISA does provide plan participants with the ability to prevent plan enforcement though an action brought under 29 U.S.C. §1132(a)(3)(A). Specifically, ERISA's civil enforcement section subsection (a)(3)(A) allows a plan participant to file suit to "enjoin any act or practice which violates any provision of this title or the terms of the plan". *See 29 U.S.C. §1132(a)(3)(A).* Clearly, ERISA allows Appellees to file suit to enjoin or bar enforcement of Appellant's subrogation and/or reimbursement rights. But ERISA and the precedent from this Court clearly state that such a claim has subject matter jurisdiction only in the federal district courts. A claim to prevent, bar or enjoin an ERISA plan from enforcing its terms does not have subject matter jurisdiction in the court of common pleas. Thus, Appellant asks this Court to accept jurisdiction to hold common pleas courts lack subject matter jurisdiction to hear actions seeking to enjoin ERISA plan enforcement.

IV. CONCLUSION

Appellant Swagelok asks this Court to accept jurisdiction over this appeal on both of the propositions of law outlined in this memorandum. The first proposition addresses if a trial court has subject matter jurisdiction to entertain motions for frivolous conduct or sanctions

once a case is dismissed by agreement of the parties "with prejudice" and signed by the court. Appellants contends that it should not. To hold otherwise, this Court would be subjecting every settled case in Ohio to be reopened at the whim of an unhappy party to restart litigation directly contradicting the settlement.

The second proposition addresses if the state trial court had subject matter jurisdiction over this matter from the outset. This matter involves an ERISA plan participant suing the Appellant plan asking the trial court to prevent enforcement of the plan and subject it to Ohio's anti-subrogation statute. As noted in *Ralyon*, the federal ERISA statutes limit and restrict the general jurisdiction of common pleas courts. As the amended complaint does not seek recovery under 29 U.S.C. §1132(a)(1)(B), the trial court lacked any subject matter jurisdiction to consider the claims between an ERISA plan participant and the plan. Moreover, the trial court could not use O.R.C. §2323.44 as a basis to keep the case or impose the state statue on the ERISA plan. Thus, Appellant asks this Court to accept this appeal on proposition number two to again revisit the limitations of ERISA on state court jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing pleading has been sent by email this 4th day of November 2020 to the following individuals:

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Attachments