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NO. 08-810

IN THE
Supreme Court of the United States

SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ, LAWRENCE M. BECKER AND XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN,
Petitioners,

v.

PAUL J. FROMMERT, ET AL.,
Respondents.

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

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Second Circuit erred in holding, in conflict with decisions of this Court and other Circuits, that a district court has no obligation to defer to an ERISA plan administrator's reasonable interpretation of the terms of the plan if the plan administrator arrived at its interpretation outside the context of an administrative claim for benefits.

2. Whether the Second Circuit erred in holding, in conflict with decisions of other Circuits, that a district court has "allowable discretion" to adopt any "reasonable" interpretation of the terms of an ERISA plan when the plan interpretation issue arises in the course of calculating additional benefits due under the plan as a result of an ERISA violation.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioners in this case are present or former Xerox Corporation Pension Plan Administrators Sally L. Conkright, Patricia M. Nazemetz, and Lawrence M. Becker, as well as the Xerox Corporation Retirement Income Guarantee Plan. None of the Petitioners is a corporation, and, therefore, no Petitioner has issued any stock that is owned by any publicly-traded company. Xerox Corporation, which is no longer a party to this case, is a publicly-held company.

The Respondents in this case are Paul J. Frommert, Alan H. Clair, Donald S. Foote, Thomas I. Barnes, Ronald J. Campbell, Frank D. Commesso, William F. Coons, James D. Gagnier, Brian L. Gaita, William J. Ladue, Gerald A. Leonardo Jr., Frank Mawdesley, Harold S. Mitchell, Walter J. Petroff, Richard C. Spring, Patricia M. Johnson, F. Patricia M. Tobin, Nancy A. Revella, Anatoli G. Puschkin, William R. Plummer, Michael J. McCoy, Larry J. Gallagher, Napoleon B. Barbosa, Alexandra Spearman Harrick, Janis A. Edelman, Patricia H. Johnston, Kenneth P. Parnett, Joyce D. Cathcart, Floyd Swaim, Julie A. McMillian, Dennis E. Baines, Ruby Jean Murphy, Matthew D. Alfieri, Kathy Fay Thompson, Mary Beth Allen, Craig R. Spencer, Linda S. Bourque, Thomas Michael Vasta, Frank C. Darling, Clark C. Dingman, Carol E. Gannon, Joseph E. Wright, David M. Rohan, David B. Ruddock, Charles Hobbs, Charles Zabinski, Charles J. Maddalozzo, Joyce M. Pruett, William A. Craven, Maureen A. Loughlin Jones, Kenneth W. Pietrowski,

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3 W. Fratcher, Scott on Trusts (4th ed. 1988).. *passim*

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BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the Second Circuit is reported at 535 F.3d 111. Pet App. 1a-21a. An earlier opinion of the Second Circuit is reported at 433 F.3d 254. *Id.* at 22a-60a. The opinion of the district court on summary judgment is reported at 328 F. Supp. 2d 420. *Id.* at 61a-98a. The district court's remedies opinion is reported at 472 F. Supp. 2d 452. *Id.* at 99a-128a.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 2008. *Id.* at 2a. The court of appeals had jurisdiction under 28 U.S.C. § 1291. The court of appeals denied a petition for rehearing on September 25, 2008. *Id.* at 129a-31a. In December 2008, Petitioners timely filed a petition for a writ of certiorari, which this Court granted on June 29, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 3, 402-05, 408-09 and 502-03 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1002, 1102-05, 1108-09, 1132-33, and Internal Revenue Code § 411, 26 U.S.C. § 411, are reprinted in the appendix to this brief. *See* App., *infra*, 1a - 9a.

INTRODUCTION

When an ERISA plan confers discretion on the plan administrator, the administrator's decisions are entitled to deference. The ERISA plan at issue in this case confers broad discretion on the Plan Administrator to interpret the terms of the Plan and to rectify defects, omissions, and inconsistencies in the Plan.

The court of appeals initially held that a provision of the Plan could not be applied to Respondents because it had not been properly added to the Plan. It remanded to the district court for a determination of the benefits due under the remaining terms of the Plan. On remand, the Plan Administrator submitted a considered, written interpretation of the remaining Plan terms. The court of appeals erroneously refused to defer to that interpretation on the ground that it is a "mere *opinion*" that was not part of the original benefits determination. Pet. App. 13a.

Contrary to the court of appeals' decision, deference to plan administrators is not restricted to initial claims determinations. A hair-trigger rule that strips plan administrators of deference based on a good-faith mistake in the administration of a plan is not supported by ERISA or this Court's decisions, and would thrust federal courts into the role of making difficult and discretionary decisions under ERISA plans.

Having erroneously refused to defer to the Plan Administrator, the court of appeals committed a second error by deferring to the *district court's* interpretation of the remaining plan terms. No

deference was due to the district court because courts apply a *de novo* standard of review to interpretations of written instruments, as well as to claims for benefits due under the terms of an ERISA plan.

This case illustrates the untoward consequences of shifting discretion from experienced and expert plan administrators to courts, whose exposure to an ERISA plan is, at best, episodic and occasional. The district court's interpretation does not take account of relevant Plan terms. It also ignores a fundamental economic principle – the time value of money. As a result, it confers a windfall on Plan participants who left Xerox and returned at a later stage in their careers. The Plan Administrator's interpretation, in contrast, is grounded in the terms of the Plan, appropriately recognizes the time value of money, and avoids irrational windfalls.

STATEMENT OF THE CASE

1. ERISA and Plan Administrators. ERISA is a "comprehensive and reticulated statute." *Nachman* v. *PBGC*, 446 U.S. 359, 361 (1980). It subjects pension plans to a wide array of regulatory provisions, including provisions that require or authorize the plan to assign certain key responsibilities to the plan's "administrator." *See, e.g.*, 29 U.S.C. §§ 1021-25. ERISA provides that a plan's "administrator" is the person specifically designated by the plan as its administrator. *Id.* § 1002(16)(A). If no administrator is designated and the plan is maintained by a single employer, the employer is deemed to be the plan administrator. *See id.* § 1002(16)(A)-(B).

ERISA also requires a plan to have "one or more named fiduciaries." 29 U.S.C. § 1102(a)(1). Only named fiduciaries may engage in activities such as allocation and delegation of fiduciary responsibilities, appointment and direction of the plan's trustee, and review of benefit claims appeals. *See id.* §§ 1102(c)(3), 1103(a), 1105(c), 1133(2). ERISA expressly permits employers who sponsor plans, as well as their employees and agents, to serve as plan fiduciaries. *Id.* § 1108(c)(3).

2. Floor-Offset Arrangements. ERISA divides pension plans into two categories: defined contribution plans and defined benefit plans. In a defined contribution plan, a participating employee's benefit is based on an allocation of the plan's assets to an individual account maintained for that employee. *See* 29 U.S.C. § 1002(34). Each participating employee is credited with contributions that the employer or the employee make to the plan. In addition, the employee's account is adjusted, upward or downward, to reflect investment gains or losses.

Participants in defined contribution plans are not assured a fixed benefit at retirement. Instead, their retirement benefits depend on the plan's investment experience. *See LaRue* v. *DeWolff, Boberg & Assocs., Inc.*, 128 S. Ct. 1020, 1022 n.1 (2008). Participants in defined contribution plans thus stand to gain if the plan's investment experience is positive, but they also stand to lose if the plan's investment experience is negative.

Defined benefit plans, in contrast, provide a guaranteed benefit payable at retirement age. *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 439-41 (1999); *see also* 29 U.S.C. § 1002(35). The benefit typically is a monthly retirement annuity calculated by reference to the participant's salary and years of service. Participants in defined benefit plans generally are not exposed to the risk of investment losses by the plan, but have no opportunity to benefit if the plan has a favorable investment experience. *See Hughes*, 525 U.S. at 439-41.

"Floor-offset" arrangements allow employers to provide their employees with both the security of a defined benefit plan and the opportunity for investment gains available under a defined contribution plan. Under a typical floor-offset arrangement, employees participate in both a defined benefit plan and a defined contribution plan. The defined benefit plan establishes a minimum "floor" benefit that the employee is guaranteed to receive upon retiring. If the value of the employee's defined contribution account exceeds this floor, then the defined contribution plan provides the employee's entire retirement benefit, and no benefit is paid by the defined benefit plan. If, however, the defined contribution account's value falls below the floor benefit, the defined benefit plan makes up any shortfall. *See generally Lunn* v. *Montgomery Ward & Co.,* 166 F.3d 880, 883 (7th Cir. 1999) ("The purpose of [a floor-offset arrangement] is to provide, in the [defined benefit] component, insurance against the vagaries of securities investments [in the defined contribution] component. . . ."); R. Jefferson, *Rethinking the Risk of Defined Contribution Plans*, 4

Fla. Tax Rev. 607, 669-70 (2000) (describing floor-offset arrangements).

Defined contribution plans express a participant's "accrued benefit" in the form of a single-sum account balance. *See* 26 U.S.C. § 411(a)(7)(A)(ii). Defined benefit plans, in contrast, usually express a participant's "accrued benefit" as an annuity beginning at the participant's normal retirement age – typically age 65. *See id*. § 411(a)(7)(A)(i). Thus, in order to offset a participant's accrued benefit in a defined benefit plan (expressed as an annuity beginning at normal retirement age) by the participant's accrued benefit in a corresponding defined contribution plan (expressed as an account balance), both benefits must be expressed in the same form (*i.e.*, both must be expressed either as retirement annuities or as account balances). *See* Pet. App. 148a-149a.

The Internal Revenue Service ("IRS") approved floor-offset arrangements more than 30 years ago. *See* Rev. Rul. 76-259, 1976-2 C.B. 111. Revenue Ruling 76-259 requires these arrangements to specify the "actuarial basis" that will be used to compare the account balance provided by the defined contribution component of the arrangement to the retirement annuity. *Id.* In addition, if a participant in a floor-offset arrangement receives a distribution from his or her defined contribution account before reaching retirement age, the Revenue Ruling requires the benefit payable at retirement age to be offset by the sum of (i) the annuity attributable to the employee's remaining account balance in the defined contribution account, plus (ii) the additional

annuity "that would have been provided by any prior distribution from the account balance." *Id.*

These requirements protect the integrity of floor-offset plans by ensuring that the value of an employee's retirement benefit will not vary depending upon whether the employee receives a distribution prior to retirement age. If pre-retirement distributions from an employee's defined contribution account were ignored or minimized in calculating the floor benefit provided by the defined benefit plan, an employee who received a prior distribution would have a smaller offset – and a correspondingly larger benefit – than a similarly situated employee who waited until retirement age to receive a distribution. *Cf. White* v. *Sundstrand Corp.*, 256 F.3d 580, 583-84 (7th Cir. 2001) (explaining that if early distributions are not properly taken into account, employees who leave before retirement age would "obtain a big advantage over those who stay," producing "a plan that treated workers staying through retirement age as suckers").

3. The Xerox Plan. The Plan at issue in this case provides that a "Plan Administrator . . . shall be appointed by the chief executive officer of [Xerox]" and that the Plan Administrator "is the administrator and named fiduciary of the Plan." J.A. 32a. The Plan grants the Plan Administrator discretionary authority to "[c]onstrue the Plan" and "to take such action as may be necessary to correct [any] defect, rectify [any] omission or reconcile [any] inconsistency" in the Plan. *Id.* at 33a.

The Plan is a floor-offset arrangement that includes both a defined contribution component and a defined benefit component. The defined contribution component provides each participant with an account in a profit sharing plan funded by Xerox. These accounts were known as Retirement Accounts until 1989; as part of a 1989 Plan Restatement, they were renamed Transitional Retirement Accounts ("TRAs"). *See* Pet. App. 83a-84a.[1]

The defined benefit component of the Plan provides participants with a floor benefit in the form of a retirement annuity equal to the larger of the annuities provided by two defined benefit formulas. Pet. App. 25a. One of these two formulas, the Highest Average Pay (or "HAP") formula, provides a monthly retirement annuity based on a participant's five highest years of salary and his or her years of service to Xerox. *Id.*[2]

As required by Revenue Ruling 76-259, the Plan identifies the actuarial basis used to offset the account balance provided by the defined contribution

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[1] Under the 1989 Plan Restatement, a participant's Retirement Account was converted into a Transitional Retirement Account effective January 1, 1990. Pet. App. 26a-27a; J.A. 33; *see also* 83a-86a (Plan references to prior distributions from TRAs apply to prior distributions from Retirement Accounts).

[2] The other defined benefit formula, known as the "CBRA" formula, is a "cash balance" formula. The CBRA formula provides a retirement annuity that is the actuarial equivalent of the balance in a hypothetical account maintained on behalf of each participant. Pet. App. 26a.

component of the Plan in determining the floor benefit provided by the defined benefit component. For these purposes, a participant's account balance is converted into an annuity "using annuity rates established by the [Pension Benefit Guaranty Corporation ("PBGC")]." J.A. 31a (Plan Section 4.3(e)). If the annuity attributable to the account balance equals or exceeds the guaranteed floor benefit, the participant's retirement benefit will consist solely of the balance in his or her defined contribution account. If, however, the annuity attributable to the account balance is *less* than the floor benefit, the participant will receive, in addition to his or her account balance, a top-up benefit from the defined benefit component of the Plan. The combination of the defined contribution account balance and the top-up benefit (if any) provides the total benefit to which the participant is entitled. *See Miller* v. *Xerox Corp. Ret. Income Guar. Plan*, 464 F.3d 871, 872-73 (9th Cir. 2006) (describing the operation of the Xerox Plan).

4. The Plan's Treatment of Rehired Employees. Respondents are current or former employees of Xerox who worked for Xerox for a period of time, left Xerox's employment, and later were rehired by Xerox. Pet. App. 25a. When their first period of employment with Xerox ended, Respondents received a retirement benefit consisting of a lump sum distribution of the balance in their defined contribution accounts. *Id.* at 84a.

Upon their rehire, Respondents' floor benefit under the HAP defined benefit formula was based on *all* of their service to Xerox, including service

rendered during their initial period of employment. Pet. App. 26a, 100a. If the Plan provided these employees with a floor benefit based on all of their service to the company, but failed to take account of the retirement benefits provided after their initial period of employment, the employees would receive double credit for their initial service to Xerox. *Id.* The Plan therefore reduces the floor benefit guaranteed to rehired employees to account for any retirement benefits they already have received. *Id.*

Two Plan provisions address this reduction: a "non-duplication of benefits" provision, and a provision requiring the use of a reconstructed account methodology (which the decisions below referred to as the "phantom account" methodology).

The non-duplication of benefits provision states that the pension benefit of an employee who has already received a distribution "shall be offset by the *accrued benefit attributable to such distribution*." J.A. 32a (Plan Section 9.6) (emphasis added). The Plan defines the term "accrued benefit" as a monthly annuity beginning at the employee's normal retirement date. *Id.* at 6a-7a. (Section 1.1), 29a-31a (Section 4.3). The non-duplication of benefits provision thus requires that the benefits payable to a rehired employee be offset by the monthly annuity "attributable to" the prior distribution received by the employee.

The reconstructed account methodology calculates the annuity attributable to a prior distribution in a particular way. Under this methodology, the prior distribution is brought forward to the present as if it

had remained invested in the participant's defined contribution account and had grown (or shrunk) in value based on the account's intervening investment experience. Pet. App. 71-72. This "reconstructed" present-day account balance is then converted into its annuity equivalent which, in turn, is credited toward the participant's minimum guaranteed benefit under the defined benefit component of the Plan.

The Plan Administrator has consistently applied the reconstructed account methodology since the early 1980s. Pet. App. 83a-85a; *see* J.A. 19a. Effective April 1990, the Plan language requiring this methodology provided as follows:

> Where a [participant] has received a distribution from his [TRA defined contribution account] prior to the relevant time, it shall be assumed that his actual [TRA] balance at the relevant time includes an amount equal to the sum so distributed as it would have increased or decreased during the period from the time of the distribution to the relevant time. . . .

Pet. App. 66a-67a.[3] Before 1990, the Plan included similar reconstructed account language pertaining to the accounts that were renamed TRA accounts in the

[3] The language added by the April 1990 amendment was inadvertently omitted from the definition of the TRA in the 1989 Restatement. *See* Pet. App. 84a.

1989 Plan Restatement. Pet. App. 83a-85a; *see* J.A. 33a.

5. *Frommert I.* Respondent Paul Frommert left Xerox in 1986 and received a lump sum distribution of his retirement benefits. Pet. App. 72a. In 1996, following his rehire by Xerox, he wrote to the Plan Administrator to question his projected retirement benefit, which had been reduced to take account of his prior distribution. *Id.* at 74a. The Plan Administrator treated this inquiry as a request for additional benefits, which it denied on the ground that Frommert's projected benefit had been correctly calculated under the reconstructed account methodology. *See id.*

In November 1999, Frommert and a number of other rehired employees filed the instant lawsuit, seeking relief from the reconstructed account methodology. Pet. App. 74a-75a. In July 2004, the district court upheld the Plan's use of the methodology and granted summary judgment for Petitioners. *Id.* at 98a. The district court reasoned that the Plan Administrator's "consistent application" of the methodology was neither arbitrary nor capricious "[g]iven the history of the Plan." *Id.* at 85a.

In January 2006, the Second Circuit issued a decision ("*Frommert I*") reversing the district court in part. The Second Circuit concluded that the reconstructed account methodology had not been adequately disclosed to participants – and therefore did not properly become a part of the Plan – until the distribution of the 1998 Summary Plan Description

(“SPD”). Pet. App. 37a-40a, 51a.[4] In the court’s view, “the 1998 SPD amended the text of the Plan” by validating the pre-existing Plan language relating to the reconstructed account methodology. *Id.* at 51a. On this basis, the court upheld application of the reconstructed account methodology to employees rehired after the 1998 SPD was issued, but prohibited its application to Respondents because they were rehired before 1998. *Id.* at 37a-40a; 51a.

The Second Circuit remanded to the district court for a determination of the benefits due to Respondents under the “pre-amendment” terms of the Plan, *i.e.*, the terms of the Plan as they existed before 1998. The court of appeals also determined that, on remand, “the necessary remedies can be fully provided under [29 U.S.C. § 1132](a)(1)(B).” Pet. App. 53a. The court explained that “[t]he relief that [Respondents] seek, recalculation of their benefits consistent with the terms of the Plan, falls comfortably within the scope of [§ 1132 (a)(1)(B)], which allows a plan participant to recover benefits due to him under the terms of his plan.” Pet. App. 53a. Accordingly, the court of appeals dismissed Respondents’ claim for equitable relief under 29 U.S.C. § 1132(a)(3). Pet. App. 53a-55a.

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[4] Although the pre-1998 SPD disclosed the existence of an offset for prior distributions for rehired employees, *see* Pet. App. 68a, and although other communications to participants provided additional detail regarding the offset, *see id.* at 30a-31a; J.A. 60, the Second Circuit concluded that these disclosures were inadequate.

6. Proceedings On Remand. On remand, the parties agreed that, "to avoid duplication of benefits, some sort of offset against current benefits is necessary to reflect the employee's receipt of monies at the time of the prior separation from employment." Pet. App. 100a. The district court invited submissions from the parties on how this offset should be calculated.

Respondents argued on remand that a rehired employee's benefit should be offset only by the *nominal* value of a prior distribution, without any adjustment to account for the time value of money. An example illustrates this approach:

Respondent Alan Clair worked for Xerox from 1970 until 1985, at which time he left the company and received a lump sum distribution of approximately $63,000 from the Plan. J.A. 106a. Mr. Clair returned to Xerox in 1987 and continued to be employed there as of 2006. *Id.* at 107a. If Mr. Clair had retired in 2006, the Plan would have guaranteed him a floor benefit of about $5,000 per month for the remainder of his life, subject to an offset for his 1985 distribution. *See id.* at 109a-10a. This monthly annuity had a present value of approximately $880,000 in 2006. *Id.*

Under Respondents' "nominal offset" approach (sometimes referred to below as the "Jaffe" or "*Layaou*" approach), the $880,000 present value of Mr. Clair's floor benefit in 2006 would be reduced by only $63,000 – the nominal amount of the distribution Mr. Clair received in 1985. J.A. 109a-10a. No adjustment would be made to account for the

fact that a $63,000 payment made in 1985 is worth approximately twice as much as a $63,000 payment made in 2006. *Id.* Thus, under the nominal offset approach, if Mr. Clair had stayed with Xerox for his entire career rather than working elsewhere from 1985 to 1987, the real value of his retirement benefits would have been substantially *lower*. *Id.*

Expert actuaries retained by both sides testified about the nominal offset approach in the district court. Petitioners' actuary explained that, "by disregarding the time value of money," a nominal offset approach creates "a privileged class of employees who, as a result of reemployment, would receive greater benefits than otherwise similar employees who did not receive [prior] distributions." J.A. 110a. Respondents' actuary likewise testified that a nominal offset would not be "an equitable solution" because "there is some intrinsic time value of money" that a nominal offset ignores. *Id.* at 127a. Respondents' actuary also agreed that, "in fairness, to account for [the time value of money], you would have to do some actuarial equivalence of th[e] lump sum to account for its value . . . today." *Id.* at 130a.

The Plan Administrator offered a different interpretation of the "pre-amendment" Plan terms that accounts for the time value of money. In the Plan Administrator's view, in the absence of the reconstructed account methodology, a prior distribution to a rehired employee should be taken into account by (i) converting the distribution into an actuarially equivalent annuity using annuity rates established by the PBGC, and then (ii) offsetting that

annuity against the annuity floor benefit guaranteed by the HAP formula. Pet. App. 150a-153a.

The non-duplication of benefits provision in Section 9.6 of the Plan requires a rehired employee's "accrued benefit" under the HAP formula to be offset by the "accrued benefit attributable to" any prior distribution to the employee. Pet. App. 141a. As the Plan Administrator observed, such an offset requires the prior distribution to be converted into an annuity payable at age 65, because the HAP formula expresses a participant's accrued benefit as an age-65 annuity. *Id.* at 152a; *see also id.* at 149a. The Plan Administrator also observed that the Plan uses PBGC annuity rates (*i.e.*, the "Statutory Assumptions") to convert defined contribution account balances into annuities. *Id.* at 150a (citing Plan Section 4.3(e)); *see also id.* at 141a (Plan Section 4.3(e)).[5] The Plan Administrator thus concluded that a prior distribution should be "converted into an age 65 annuity *as of the time of the prior distribution*" using PBGC annuity rates and then offset against participant's HAP benefit. *Id.* at 152a-153a (¶¶ 17-19).

The Plan Administrator noted that the Treasury Department had endorsed this approach in its safe harbor regulation applicable to floor-offset arrangements. Pet. App. 148a-49a, 152a. Under the safe harbor, the "accrued benefit" otherwise payable to an employee under the defined benefit component

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[5] Section 4.3(f) requires a similar calculation for converting a CBRA account into an annuity. Pet. App. 150a.

of the arrangement is reduced by the actuarial equivalent of any prior distributions from the defined contribution component. *Id.* at 148a (citing 26 C.F.R. § 1.401(a)(4)-8(d)(1)(i)). The Plan Administrator concluded that the Treasury Department's endorsement of this approach to calculating offsets demonstrates its reasonableness. Pet. App. 152a.

Petitioners argued that the district court should resolve the disagreement between the parties regarding the proper interpretation of the Plan on remand by deferring to the Plan Administrator.[6] Rather than deferring to the Plan Administrator, however, the district court resolved the disagreement "in favor of the employee[s]" by adopting Respondents' nominal offset approach. Pet. App. 107a.

7. *Frommert II*. The Second Circuit affirmed the district court's holding in pertinent part ("*Frommert II*"). The Second Circuit recognized that where, as here, a plan administrator is given "discretionary authority to 'construe the terms of the plan,'" the administrator's interpretation of plan language ordinarily is entitled to deference. Pet. App. 12a-13a. The Second Circuit also acknowledged that the Plan Administrator's interpretation had been thoroughly presented to the district court in "briefs and at oral argument, in a sworn affidavit from the plan administrator, and in a written report and

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[6] *See* Defendants' Pre-Hearing Brief Addressed To Remedies, at 5-8; Defendants' Pre-Hearing Reply Brief Addressing Remedies, at 2, 4.

accompanying testimony from an independent actuary." *Id.* at 11a. In the Second Circuit's view, the Plan Administrator's interpretation had been presented to the district court so thoroughly that "nothing . . . might have been gained by the District Court's remanding the matter to the plan administrator." *Id.* at 11a.[7]

The Second Circuit nonetheless rejected Petitioners' argument that the Plan Administrator's interpretation of the "ambiguous non-duplication of benefits provision" is entitled to deference. Pet. App. 8a, 12a-13a. Instead, the Second Circuit dismissed the Plan Administrator's interpretation as a "mere *opinion*" to which no deference is due:

> [Petitioners] argue that the District Court erred in failing to adopt the plan administrator's proposed approach, or at least consider it under a deferential standard of review. . . . However, the District Court here *had no decision to review because the plan administrator never rendered any decision other than the original benefit determinations*, all of which were premised on the now-impermissible "[reconstructed] account" offset mechanism. *See* [*Nichols* v.

[7] The Second Circuit found that Petitioners waived any argument that the case should have been remanded to the Plan Administrator after *Frommert I*, but not the argument that the district court should have deferred to the proposed remedy that the Plan Administrator presented to the district court. Pet. App. 10a-11a.

> *Prudential Ins. Co. of Am.*, 406 F.3d 98, 108 (2d Cir. 2005)] ("[W]e may give deferential review only to actual exercises of discretion."). [Petitioners] have identified no authority in support of the proposition that a district court must afford deference to the mere *opinion* of the plan administrator in a case, such as this, where the administrator had previously construed the same terms and we found such a construction to have violated ERISA.

Pet. App. 12a-13a (emphasis of "opinion" in original).

Having declined to defer to the Plan Administrator's interpretation, the Second Circuit held that the *district court's* interpretation was entitled to deference from the court of appeals. Pet. App. 8a. Rather than applying a *de novo* standard of review to the district court's determination of the "proper level of pension benefits" due under the terms of the Plan, the Second Circuit reviewed the district court's interpretation only "for an excess of allowable discretion." *Id.* at 8a; 13a.

The Second Circuit recognized that the district court's decision "apparently" fails to make "any . . . adjustment to reflect the inflation-adjusted values of the prior distributions." Pet. App. 9a. It nevertheless affirmed the district court's interpretation under a deferential standard of review, describing that interpretation as "one reasonable approach among several reasonable alternatives." *Id.* at 13a-14a.

SUMMARY OF ARGUMENT

1. a. When an ERISA plan gives the plan administrator "discretionary authority to determine eligibility for benefits or to construe the terms of the plan," courts apply a deferential standard of review to the plan administrator's determinations. *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 115 (1989). This deferential standard of review is not subject to "special procedural or evidentiary rules," and it applies even when the plan administrator is operating under a conflict of interest. *Metropolitan Life Ins. Co.* v. *Glenn*, 128 S. Ct. 2343, 2351 (2008).

Firestone deference furthers important objectives of ERISA. It allows employers to assign primary responsibility for interpreting ERISA plans to those with the best understanding of the plan and the greatest expertise in complying with the complex rules that govern ERISA plans. Deferential review also promotes uniformity of plan administration by reducing the potential for different courts to arrive at different interpretations of the same plan language. In addition, deferential review protects plans from unanticipated interpretations of plan terms that could result in large, unfunded plan liabilities.

b. The ERISA plan at issue in this case grants broad discretion to the Plan Administrator to interpret the terms of the Plan. After the court of appeals ruled that a particular Plan methodology was not properly included in the Plan, the Plan Administrator offered a considered interpretation of the remaining Plan terms. The court of appeals refused to defer to the Plan Administrator on the

ground that he had offered a "mere *opinion*" that was not part of the "original benefit determination[]." Pet. App. 13a.

The court of appeals' refusal to defer is contrary to *Firestone* and *Glenn*. Those decisions looked to the terms of the plan to determine the nature and scope of the discretion conferred on plan administrators. Here, the Plan grants the Plan Administrator broad discretion to construe the Plan as well as discretion to correct defects, rectify omissions, and reconcile inconsistencies in the Plan. Pet. App. 142a. *Firestone* and *Glenn* also looked to trust law, which does not confine a trustee's discretionary authority to interpret the terms of a trust to interpretations offered in the context of an "original benefit determination." The court of appeals' decision is also inconsistent with *Central States, Southeast and Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 568 (1985), which gave "significant weight" to an interpretation of the plan first offered by the plan trustee in litigation.

Because plan administrators are called upon to interpret ERISA plans in numerous contexts, the court of appeals' approach creates a far-reaching exception to *Firestone* deference. There is no persuasive justification for such an exception. To the contrary, the court of appeals did what this Court prohibited in *Glenn*: it invented an arbitrary test for stripping away *Firestone* deference that is not supported by the terms of the Plan, the law of trusts, or this Court's decisions.

c. In its first decision in this case, the court of appeals held that the Plan Administrator had erred by computing benefits in accordance with a Plan methodology that had not been adequately disclosed. That error did not justify stripping the Plan Administrator of discretion to construe the remaining terms of the Plan on remand. Trust law distinguishes between a trustee's good-faith, but erroneous, exercise of discretion, and bad-faith, fraudulent or dishonest conduct. As this Court observed more than a century ago, where "there is no *mala fides*, . . . the court will not take upon itself" to exercise "the discretion of trustees." *Colton* v. *Colton*, 127 U.S. 300, 320-21 (1888).

There was no *mala fides* in this case. The Plan Administrator applied the same methodology consistently throughout the history of the Plan. The district court initially upheld the use of the methodology, and the Second Circuit held that it was permissible once it was properly disclosed. As a result, there was no basis for concluding that the Plan Administrator would not be capable of exercising his discretion fairly and honestly going forward.

A hair-trigger rule that strips plan administrators of discretionary authority based on run-of-the-mill mistakes would undermine important purposes of ERISA. It would thrust courts into the role of administering pension plans with alarming frequency and increase the prospect of inconsistent interpretations and unanticipated liabilities. Employers faced with such risks would be more reluctant to sponsor employee benefit plans. For

these reasons, several courts of appeals have correctly held that a denial of benefits, even if arbitrary and capricious, does not strip the plan administrator of the discretion conferred by the plan. A different rule would "encourage the dumping of difficult and discretionary decisions into the laps of courts." *Vizcaino* v. *Microsoft Corp.*, 120 F.3d 1006, 1013-14 (9th Cir. 1997) (en banc).

d. The government incorrectly suggests that deference should be denied because the Plan Administrator merely offered a different interpretation of the "same" Plan terms on remand from *Frommert I*. The Plan Administrator did not interpret the "same" Plan terms; he interpreted the *remaining* Plan terms, after setting aside the terms that the court of appeals held were not properly included in the Plan. Moreover, there is no basis in ERISA or trust law for drawing a distinction between good-faith mistakes that involve the "same" terms of the plan and other good-faith mistakes.

The government's suggestion that deference should be denied because the Plan is "silent" regarding the offset for prior distributions is also incorrect. The Plan includes a non-duplication of benefits provision stating that the pension benefits of rehired employees must be offset "by the accrued benefit attributable to [prior] distribution[s]." Pet. App. 141a. "Accrued benefit" is a defined term under the Plan, and the definition cross-references another Plan provision that calls for the use of PBGC annuity rates to convert a participant's account balance into an "accrued benefit."

2. a. Having erroneously refused to defer to the Plan Administrator's interpretation of the Plan, the court of appeals committed a second error by deferring to the *district court's* interpretation. The court of appeals instructed the district court on remand to determine the benefits due under "the pre-amendment terms of the Plan describ[ing] how prior distributions were to be treated." Pet. App. 51a. The court of appeals reviewed the district court's interpretation of these pre-amendment Plan terms only for "an excess of allowable discretion," *id.* at 11a, and upheld the district court's interpretation as "one reasonable approach among several reasonable alternatives," *id.* at 13a-14a.

The court of appeals should have reviewed the district court's decision under a *de novo* standard. District court interpretations of written documents generally are reviewed *de novo*. So too are claims for benefits due under the terms of an ERISA plan (absent a grant of discretionary authority to the plan administrator). *See Firestone*, 489 U.S. at 115. The fact that the district court was charged with fashioning a remedy for an ERISA violation does not change the applicable standard of review. District courts do not have discretion to make errors of law, and thus a *de novo* standard of review applies to the district court's determination of the benefits due under the terms of the Plan.

The Second Circuit's application of deference to the district court's interpretation undermines ERISA's goal of uniform plan interpretation by exposing ERISA plans to the prospect that different district courts may adopt different or even

inconsistent interpretations of the same ERISA plan, and that courts of appeals will be required to affirm such divergent interpretations as long as each of them falls within the range of a district court's "allowable discretion."

b. Under a *de novo* standard of review, the district court's interpretation should be rejected. That interpretation ignores the time value of money – the fundamental economic principle that a sum of money today is worth more than the same sum of money many years from now. By ignoring this principle, the district court conferred a windfall on participants who left Xerox and later were rehired, providing them with benefits worth significantly more than those provided to otherwise-equivalent participants whose service to Xerox was uninterrupted. The district court's interpretation also fails to take account of Plan terms (i) specifying that the benefit provided to a rehired employee "shall be offset by the accrued benefit attributable to such distribution," (ii) defining "accrued benefit" as an annuity payable at age 65, and (iii) directing the use of "annuity rates established by the PBGC" to calculate such an annuity. Pet. App. 134a, 141a, 148a, 150a.

The Plan Administrator's interpretation, in contrast, takes account of these Plan terms, appropriately accounts for the time value of money, avoids conferring windfalls on rehired employees, and conforms to IRS guidance designed to maintain the integrity of floor-offset plans. The Plan Administrator's interpretation is therefore superior to the district court's interpretation.

ARGUMENT

I. A PLAN ADMINISTRATOR'S EXERCISE OF DISCRETIONARY POWERS CONFERRED BY AN ERISA PLAN IS SUBJECT TO A DEFERENTIAL STANDARD OF REVIEW.

A. This Court's Decisions Apply A Deferential Standard of Review To Discretionary Interpretations By A Plan Administrator.

In *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989), this Court held that "a denial of benefits challenged under [29 U.S.C.] § 1132(a)(1)(B)" is subject to a deferential standard of review if "the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Id.* at 115. The Court drew on principles of trust law, which "make a deferential standard of review appropriate when a trustee exercises discretionary powers." *Id.* at 111. Applying these principles, the Court concluded that "[a] trustee may be given power to construe disputed or doubtful terms, and in such circumstances the trustee's interpretation will not be disturbed if reasonable." *Id.*

In *Metropolitan Life Insurance Co.* v. *Glenn*, 128 S. Ct. 2343 (2008), the Court reaffirmed *Firestone*'s adoption of a deferential standard of review under § 1132(a)(1)(B). *Glenn* elucidated the Court's statement in *Firestone* that "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict

must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.'" *Firestone*, 489 U.S. at 115 (quoting Restatement (Second) of Trusts § 187, cmt. *d* (1957)). The Court concluded that a conflict of interest exists where an employer "both funds the plan and evaluates the claims." 128 S. Ct. at 2348. The Court rejected the idea, however, that such a conflict results in "a change in the *standard* of review, say, from deferential to *de novo*." *Id.* at 2350. The Court was unwilling to "overturn *Firestone* by adopting a rule that in practice could bring near universal review by judges *de novo* – *i.e.*, without deference – of the lion's share of ERISA plan claims denials." *Id.* The Court also observed that "[t]rust law continues to apply a deferential standard of review to the discretionary decisionmaking of a conflicted trustee." *Id.* (citation omitted).

The Court expressly declined "to create special burden-of-proof rules, or other special procedural or evidentiary rules" to strip away deference. *Id.* at 2351. Instead it directed courts to proceed by "taking account of several different, often case-specific, factors, reaching a result by weighing all together." *Id.* (citations omitted). The Court observed that a conflict of interest "should prove more important (perhaps of great importance) where circumstances suggest a higher likelihood that it affected the benefits decision," and "should prove less important (perhaps to the vanishing point) where the administrator has taken active steps to reduce potential bias and to promote accuracy." *Id.*

Firestone and *Glenn* thus affirm that courts apply a deferential standard of review to the discretionary

determinations of ERISA plan administrators. *See also Cent. States, Se. & Sw. Areas Pension Fund* v. *Cent. Transp., Inc.*, 472 U.S. 559, 568 (1985) (according "significant weight" to an ERISA trustee's interpretation of a plan in a case in which "the trust agreement explicitly provide[d] that 'any construction [of the agreement's provisions] adopted by the Trustees in good faith shall be binding").

B. A Deferential Standard Of Review Furthers Important Objectives Of ERISA.

Deferential review of a plan administrator's discretionary determinations serves important objectives of ERISA. In enacting ERISA, Congress sought to "promote a renewed expansion of private retirement plans and increase the number of participants receiving private retirement benefits." H.R. Rep. No. 93-533 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4640. To achieve that goal, Congress did not "mandate what kind of benefits employers must provide if they choose to have [a retirement] plan." *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 887 (1996). Instead, Congress allowed employers to make those choices. *See* H.R. Rep. No. 93-533, 1974 U.S.C.C.A.N. at 4647 ("flexibility in the design and operation of . . . pension programs" is "vital" to the willingness of employers to provide such plans).

Firestone deference promotes the goal of increased availability of private pension benefits in several ways. First, *Firestone* deference allows employers to assign primary responsibility for

interpreting ERISA plans to "those whose experience [with such plans] is daily and continual, not with judges whose exposure is episodic and occasional." *Berry* v. *Ciba-Geigy Corp.*, 761 F.2d 1003, 1006 (4th Cir. 1985). The text of ERISA requires every plan to have "one or more named fiduciaries" with "authority to control and manage the operation and administration of the plan" and allows an employer to appoint an officer, employee or agent of the employer to serve as a fiduciary. 29 U.S.C. §§ 1102(a)(1) & 1108(c)(3).[8] Only a named fiduciary is empowered to resolve benefit appeals. *Id.* § 1133(2).

When the plan documents authorize a plan administrator who is a named fiduciary to interpret the plan in his or her discretion, deferential review of the exercise of this discretion allows the plan to take advantage of

[8] Congress deliberately allowed plan fiduciaries to resolve benefit payment disputes and chose not to mandate resolution by an outside party. Early versions of the Senate bill gave this responsibility to the Department of Labor; later versions gave it to an arbitrator. *See* S. 1179, 93d Cong. § 602 (1973), *reprinted in* I Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess. Legislative History ("Leg. Hist.") 780, 988-90 (Dep't of Labor); S. Rep. No. 93-383, at 116-117 (1973), *reprinted in* I Leg. Hist. 1063, 1184-1186 (same); H.R. 2, 93d Cong. § 691 (1974), 120 Cong. Rec. 5001 (1973), *reprinted in* III Leg. Hist. 3599, 3813-3814 (arbitrator). The Senate arbitration provisions were rejected by the ERISA conference committee, however, on the ground that they could be too costly to plans and stimulate frivolous disputes. 120 Cong. Rec. 29,941 (1974), *reprinted in* III Leg. Hist. at 4769 (Sen. Javits).

> the plan administrator's greater experience and familiarity with plan terms and provisions; the enhanced prospects of achieving consistent application of those terms and provisions that results; the desire of those who establish ERISA plans to preserve at least some role in their administration; and the importance of ensuring that funds which are not unlimited go to those who, according to the terms of the plan, are truly deserving.

Evans v. *Eaton Corp. Long Term Disability Plan*, 514 F.3d 315, 323 (4th Cir. 2008). In addition, because ERISA plans are subject to numerous and often highly technical requirements, plan administrators are in the best position to interpret a plan in a manner that satisfies the many rules imposed on these plans.

Second, *Firestone* deference promotes uniformity of plan interpretation and administration. *See Raymond B. Yates, M.D., P.C. Profit Sharing Plan* v. *Hendon*, 541 U.S. 1, 17 (2004) ("ERISA's goal . . . is uniform national treatment of pension benefits." (citations and quotation marks omitted)). ERISA imposes a fiduciary duty on plan administrators to act "in accordance with the documents and instruments governing the plan." 29 U.S.C. § 1104(a)(1)(D). As this Court recently observed, this statutory duty "lets employers establish a uniform administrative scheme, with a set of standard procedures to guide processing of claims and

disbursement of benefits." *Kennedy* v. *Plan Adm'r for DuPont Sav. and Inv. Plan*, 129 S. Ct. 865, 875 (2009) (internal quotation marks and brackets omitted). A deferential standard of review reduces the risk that different courts will interpret plan documents in contradictory ways, thereby imposing irreconcilable fiduciary obligations on plan administrators. *See generally Moench* v. *Robertson*, 62 F.3d 553 (3d Cir. 1995) (holding that the courts must defer to a fiduciary's reasonable plan interpretation in a case alleging breach of fiduciary duty).

Third, *Firestone* deference protects plans from unanticipated interpretations of plan terms that may result in large unfunded liabilities. It is important that ERISA plans have "predictable financial consequences, both for the employer who pays the bill and for the employee who gets the benefit." *AT&T Corp.* v. *Hulteen*, 129 S. Ct. 1962, 1973 (2009); *accord Glenn*, 128 S. Ct. at 2354 (Roberts, C.J., concurring in part and concurring in the judgment) (noting that "certainty and predictability are important criteria under ERISA"). This is in part because, as Congress recognized, employers will be reluctant to sponsor ERISA plans if they are forced to pay higher levels of benefits than they intended to provide. H.R. Rep. No. 93-807 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4682. *Firestone* deference provides an important safeguard against unanticipated interpretations of plan language that

could subject plan sponsors to potentially enormous liabilities.[9]

For each of these reasons, *Firestone* deference fosters the purposes and goals of ERISA.

C. *Firestone* Deference Is Not Restricted To Formal "Decisions" On Benefits Claims.

The Second Circuit's decision carves out a broad exception to *Firestone*'s rule of deference to the discretionary determinations of plan administrators. In the Second Circuit's view, such deference extends only to formal "decisions" made by a plan administrator, such as decisions made on "original benefit determinations." Pet. App. 13a. The court thus dismissed the Plan Administrator's interpretation of the pre-amendment Plan terms on remand as a "mere *opinion*" not deserving of deference. *Id*. The distinction drawn by the Second Circuit between a formal "decision" on a benefit claim and a mere "opinion" offered outside the context of an original claims determination has no basis in ERISA, this Court's decisions, or the law of trusts.

Whether deference is due to a plan administrator depends in the first instance on the discretion conferred on the administrator by the terms of the

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[9] *See, e.g.*, *Young* v. *Verizon's Bell Atl. Cash Balance Plan*, 575 F. Supp. 2d 892, 909, 912 (N.D. Ill. 2008) ("hundreds of millions of dollars"); *Thomas* v. *SmithKline Beecham Corp.*, 297 F. Supp. 2d 773, 793 (E.D. Pa. 2003) ("millions of dollars"); *Adams* v. *Thiokol Corp.*, 231 F.3d 837, 843 (11th Cir. 2000) (same).

plan documents. *See Firestone,* 489 U.S. at 111 ("Whether 'the exercise of a power is permissive or mandatory depends upon the terms of the trust.'" (quoting 3 W. Fratcher, Scott on Trusts § 187, at 14 (4th ed. 1988))). Here, nothing in the text of the Plan limits the Plan Administrator's interpretive authority to a particular context such as an original benefits determination. To the contrary, the text of the Plan grants the Plan Administrator broad authority to "[c]onstrue the Plan" and "empower[s]" the Plan Administrator "to take such action as may be necessary to correct [any] defect, rectify [any] omission or reconcile [any] inconsistency" in the Plan. Pet. App. 142a.

Nor does trust law limit a trustee's discretionary authority to decisions made in the course of an "original benefit determination." Indeed, under the law of trusts, there is no analogue to the administrative claims process in which ERISA benefits are originally determined. If a trust beneficiary disagrees with the trustee's interpretation of the trust instrument, the beneficiary must challenge that interpretation in court, where the trustee's reasonable interpretation will receive deference. *See generally Firestone*, 489 U.S. at 110-11. Thus, the Second Circuit's distinction between the formal "decisions" and the mere "opinions" of a plan administrator is inconsistent with the law of trusts.

The Second Circuit's decision also conflicts with this Court's decision in *Central States*, which deferred to a trustee's interpretation of a pension plan outside the context of a benefit claims

proceeding. In *Central States*, the trustees of a multiemployer pension plan governed by ERISA brought a lawsuit seeking to compel participating employers to permit the trustees to conduct an audit. *See* 472 U.S. at 568. The trustees contended that a provision of the trust agreement granted them the authority to conduct the audit. Pointing to a provision of the trust document that authorized the trustees to provide binding interpretations of the plan, the Court accorded the trustees' interpretation "significant weight." *Id.* The Court accorded this deference to the trustees' interpretation even though it was offered for the first time in litigation. *See id.* at 563-64. *Central States* thus forecloses any argument that deference to a plan administrator's interpretation is unwarranted when offered outside the narrow confines of an original benefit determination.

The Second Circuit's approach would create a far-reaching exception to *Firestone* deference. As this Court recognized in *Glenn*, plan administrators are called upon to interpret ERISA plans in "many contexts," 128 S. Ct. at 2351, including numerous contexts far removed from administrative claims for benefits. For example:

- Plan administrators often interpret plan provisions for the first time in lawsuits seeking additional benefits under 29 U.S.C. § 1132(a)(1)(B). *See, e.g.*, *Pakovich* v. *Broadspire Servs., Inc.*, 535 F.3d 601, 606 (7th Cir. 2008) (observing that a court must seek the views of the plan administrator if an interpretive issue "did not ripen into an 'apple' ready to be bitten" until

after an initial court ruling); *Gallo* v. *Amoco Corp.*, 102 F.3d 918, 923 (7th Cir. 1996) (observing that if, during litigation, a plan administrator's interpretation of a plan term requires additional explanation, a court must seek that explanation from the administrator and may not substitute its own interpretation).

- Plan administrators frequently offer plan interpretations in lawsuits seeking to enforce a plan's reimbursement and subrogation provisions. *See, e.g.*, *Admin. Comm. of the Wal-Mart Assocs. Health & Welfare Plan* v. *Willard*, 393 F.3d 1119, 1122-23 (10th Cir. 2004) (according *Firestone* deference to plan administrator's interpretation of plan's subrogation provision).

- Plan administrators also offer plan interpretations in the course of lawsuits alleging that they breached their fiduciary duties by failing to follow the terms of the plan. *See, e.g., Worthy* v. *New Orleans S.S. Ass'n/Int'l Longshoremen's Ass'n, ALF-CIO Pension Plan*, 342 F.3d 422, 427-28 (5th Cir. 2003) (deferring to ERISA trustee administrators' interpretation of trust language in a suit alleging that trust administrators violated their fiduciary duties).[10]

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[10] Plan administrators are called upon to interpret plan terms in the course of exercising fiduciary duties in myriad contexts, including selecting an insurance underwriter for the plan, *see McDonald* v. *Provident Indem. Life Ins. Co.*, 60 F.3d 234, 237 (5th Cir. 1995); determining the composition of a board of trustees, *see Worthy*, 342 F.3d at 426-27; determining the proper valuation date for employer stock, *see Izzarelli* v. *Rexene Prods. Co.*, 24 F.3d 1506, 1521-22 (5th Cir. 1994); determining

> In such cases, a rule withdrawing *Firestone* deference would subject plan fiduciaries to personal liability in the event that a court disagrees with their reasonable interpretation of the plan, *see* 29 U.S.C. § 1109, and could create conflicting fiduciary obligations should two different courts interpret ambiguous plan language differently.

There is no valid reason to deny *Firestone* deference to a plan administrator's discretionary determinations in any of these contexts. Where the terms of the plan confer discretion on the plan administrator, this Court's prior decisions, as well as principles of trust law, support a deferential standard of review regardless of the forum in which the administrator exercises his or her discretion.

D. A Conflict Of Interest Does Not Change The Standard Of Review.

Glenn holds that a conflict of interest is not a sufficient reason to reject *Firestone*'s deferential standard of review. Thus, the fact that the Plan Administrator's interpretation was offered in the context of litigation is not a sufficient reason to deny *Firestone* deference.

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the identity of a beneficiary, *see Kmatz* v. *Metro. Life Ins. Co.*, 232 Fed. Appx. 451, 455 (6th Cir. 2007); determining when and how it is appropriate to suspend benefits, *see Hunter* v. *Caliber Sys., Inc.*, 220 F. 3d 702, 712 (6th Cir. 2000); and determining whether plan terms require investment of plan assets exclusively in employer stock, *see Moench*, 62 F.3d at 556, 565-66.

Prior to *Glenn*, courts of appeals devised a variety of tests for determining when a conflict of interest required a court to deny *Firestone* deference to a plan administrator's interpretation of an ERISA plan. *Glenn* rejected these tests as unjustified departures from *Firestone*. *See Glenn*, 128 S. Ct. at 2350. The Court concluded that it was neither "necessary [n]or desirable for courts to create . . . special procedural or evidentiary rules," because such rules would only "create further complexity." *Id*. at 2351. Observing that "[b]enefits decisions arise in too many contexts" and "concern too many circumstances" to justify a "special procedural rule[]" for conflicted administrators, the Court held that a conflict of interest does not support a change in the standard of review "from deferential to *de novo*," but instead is simply a "factor" that courts should consider in determining whether a plan administrator has abused its *Firestone* discretion. *Id*. at 2350-51.

Here, the court of appeals did exactly what this Court prohibited in *Glenn*: it invented an arbitrary test for stripping away *Firestone* deference that had no basis in the terms of the Plan or the law of trusts. Given *Glenn*'s holding that a conflict of interest is merely a "factor" to consider in determining whether a plan administrator has abused its *Firestone* discretion, it follows that the particular forum in which the Plan Administrator offers his interpretation of the plan is at most a factor to

consider, and not a basis for denying deference altogether.[11]

E. Absent A Finding Of Bad Faith, A Mistake Does Not Strip The Plan Administrator Of Discretionary Authority Conferred By The Plan.

As explained above, the Plan Administrator initially construed the Plan to require the use of a reconstructed account methodology that had been applied consistently throughout the history of the Plan. The Second Circuit, however, subsequently held that this methodology was not properly included in the Plan until 1998. The Plan Administrator's good faith mistake in applying an inadequately disclosed methodology does not justify stripping the Plan Administrator of the discretionary authority to interpret the remaining Plan terms. To the contrary, principles of trust law and the purposes of ERISA both support the conclusion that the Plan Administrator's interpretation of the remaining Plan terms is entitled to *Firestone* deference.

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[11] In *Glenn*, the plan administrator adopted "seemingly inconsistent positions [that] were both financially advantageous," emphasized a single favorable medical report while deemphasizing unfavorable reports, and failed to provide its independent experts with all of the relevant evidence. 128 S. Ct. at 2352. Here, in contrast, the Plan Administrator's interpretation is supported by the Plan language, fundamental economic principles, and tax law. *See* Part II.B, *infra*.

1. Absent Bad Faith Or Similar Misconduct, Trust Law Does Not Strip A Trustee Of Discretion Based Upon A Mistake.

Trust law distinguishes between a trustee's good-faith but erroneous exercise of discretion and more troubling conduct, such as fraud, bad faith, or dishonesty. *See, e.g.*, 3 W. Fratcher, Scott on Trusts § 187.1, at 27-31 (4th ed. 1988). Where a trustee has abused his discretion by failing to pay a proper amount to the beneficiary "due to a mistake as to [the trustee's] duties or powers" and "there is no reason to believe that [the trustee] will not fairly exercise the discretion conferred upon him after the court has determined the extent of his duties and powers," a court will "direct the trustee to pay a reasonable amount." *Id.* § 187.1, at 30. Only "[w]here the trustee's failure to pay a reasonable amount was due to a failure to exercise his discretion honestly and fairly" may the court "itself fix the amount." *Id.* § 187.1, at 28.[12]

As the Scott treatise observes, this Court recognized that principle more than a century ago in *Colton* v. *Colton*, 127 U.S. 300 (1888). *Colton* states

[12] The most recent edition of the Scott treatise states the same principle, although the discussion is more abbreviated. 3 W. Fratcher & M. Ascher, Scott and Ascher on Trusts § 18.2.1, at 1348-49 (5th ed. 2007) (where trustee's failure to pay a reasonable amount "is due to a mistake" rather than "a failure to exercise the discretion honestly and fairly," "the court ordinarily will not fix the amount but will instead direct the trustee to make reasonable provision").

that "where the manner of executing a trust is left to the discretion of trustees, and they are willing to act, and there is no *mala fides*, the court will not ordinarily control their discretion as to the way in which they exercise the power." *Id.* at 320-21. In contrast, "the court will interfere whenever the exercise of the discretion by the trustees is infected with fraud or misbehavior, or they decline to undertake the duty of exercising the discretion, or generally where the discretion is mischievously and erroneously exercised." *Id.* at 321; *see also* Scott on Trusts § 187.1, at 29 (discussing *Colton*); *cf. Cent. States*, 472 U.S. at 568 (giving trustees' interpretation "significant weight" in the absence of "bad-faith motive").

Similarly, in *Eaton* v. *Eaton*, 132 A. 10 (N.H. 1926), a trustee "refused to make any payments for [the beneficiary's] support" based on an erroneous construction of the trust instrument. *Id.* at 11. The New Hampshire Supreme Court held that it was error for the trial court to determine the amount that should be paid to the beneficiary of the trust:

> The question was whether the trustee had acted reasonably. If it was found he had not, the appropriate order was to require him to do so. *His failure to administer the fund properly did not entitle the court to act as a substitute trustee.*

Id. (emphasis added). The court noted that, "in passing on the reasonableness of the trustee's action," the trial court "may find the least amount

that a reasonable judgment would allow," and "may also find the most that would be thus allowed." *Id.* But "*within the limits of reasonableness the trustee may alone exercise discretion, since that is what the will requires*." *Id.* (emphasis added); *see also* Scott on Trusts § 187.1, at 30-31 (discussing *Eaton*); *Hanford* v. *Clancy*, 183 A. 271, 272-73 (N.H. 1936) (holding that if the trustee acts unreasonably, "the court should take appropriate action to curb the trustee, but he may not exercise discretion for him"; "[i]f more than one reasonable disposition could be made, then the trustee must make the choice").

Citing *Eaton*, the Nebraska Supreme Court held that the trustee had erred by refusing to provide support and maintenance to the wife and child of the named beneficiary. *In re Sullivan's Will*, 12 N.W.2d 148 (Neb. 1943). The court held that, despite the trustee's mistake, the trial court "was without authority to determine the amount of support to which plaintiff was entitled from the trust fund." *Id.* at 151. The court explained that "[t]he settlor of the trust prescribed that this was to be a duty of the trustees, and clearly the court has no authority to substitute its judgment for that of the trustees." *Id.* Although the court can "compel the trustees to carry out the terms of the trust," it "cannot act for the trustee or do anything other than prescribe the minimum or maximum limits within which the trustees must act and compel such action within such limits." *Id.*

In *Manning* v. *Sheehan*, 133 N.Y.S. 1006 (N.Y. Sup. Ct. 1911), the trustee "failed to make suitable provision" for the beneficiary due to his mistaken

doubt as to "his legal right to make payments out of the principal." *Id.* at 1008-09. The court held that its power "to compel the trustee to exercise in a reasonable manner the discretion vested in him by the will . . . does not substitute the judgment of the court for the judgment of the trustee when honestly exercised." *Id.* at 1008. Only "[i]f there is a culpable failure to exercise that discretion in a reasonable manner" may "the court give specific directions as to the amounts to be paid." *Id.* (citations omitted). Because the trustee "ha[d] not been acting in bad faith," the court directed the trustee to pay an amount sufficient to "afford the [beneficiary] a reasonable support and maintenance," but did not fix the amount. *Id.* at 1009; *see also* Scott on Trusts § 187.1, at 31 (discussing *Manning*).

Other cases recognize and apply these principles. *See In re Brown*, 29 A.2d 52, 54-55 (Pa. 1942) (rejecting "the meaning ascribed to [the instrument] by the trustees," but holding that on remand "the amount to be allowed" must "be submitted to the trustees for the proper exercise of their judgment"); *In re Estate of Marre*, 114 P.2d 586, 590-91 (Cal. 1941) (holding that it was improper for a judge to "specify the exact amount of the payments to be made to the beneficiary" on remand, since the trust instrument gave the trustees "discretion" to determine that amount); *Old Colony Trust Co.* v. *Rodd*, 254 N.E.2d 886 (Mass. 1970) (declining to set the amounts to be paid after a trustee had made unreasonably low payments to a beneficiary); *Finch* v. *Wachovia Bank & Trust Co., N.A.*, 577 S.E.2d 306, 309-10 (N.C. Ct. App. 2003) (trustee that abused its discretion by failing to consider gift requests retained

discretion to act on those requests); *see also Collister* v. *Fassitt*, 57 N.E. 490, 493-94 (N.Y. 1900) (where trustee "failed to honestly and fairly exercise the discretion vested in her, it was competent for a court in equity to ascertain the amount and decree its payment"); *Elward* v. *Elward*, 232 P. 240, 240-41 (Kan. 1925) (where the trustee's provision for the beneficiary "so inadequate as to show bad faith or its equivalent," court may order trustee to pay a specific amount each month).[13]

The Restatement (Second) of Trusts reflects this case law. Section 187 states: "Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion." Restatement (Second) of Trusts § 187. As the comments and illustrations to Section 187 demonstrate, in the absence of "dishonesty" or "improper motive," *see id.* § 187 cmts. *f* & *g*, "control by the court" consists of directing the trustee to exercise discretion in a reasonable manner, rather than exercising discretion on the trustee's behalf, *see id.* § 187 cmt. *h*. For example, if

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[13] In a pension case decided before Congress enacted ERISA, the D.C. Circuit, sitting *en banc*, concluded that the pension plan trustees' determination concerning eligibility requirements was unreasonable, but nevertheless held that "the Trustees are to be accorded the opportunity to fashion valid eligibility standards" and that the district court had erred in failing to defer to the reasonable eligibility standard adopted by the trustees during the course of the litigation. *Pete* v. *United Mine Workers of Am. Welfare & Ret. Fund of 1950*, 517 F.2d 1275, 1281-83 (D.C. Cir. 1975) (en banc).

a trustee with discretion to make an appropriate payment to a beneficiary withholds payment "because of a mistaken view as to the extent of his powers or duties," the court should respond by "order[ing] [the trustee] to pay *a reasonable amount* to [the beneficiary]." *Id.* § 187 cmt. *h* & illus. 8 (emphasis added); *see also id.* § 187 cmt. *h*, illus. 7. In such cases, the court "controls the exercise of a power by the trustee," *id.* § 187 cmt. *b*, not by itself making the trustee's discretionary determination, but instead by requiring the trustee to select from the range of reasonable options under the correct interpretation of the trust instrument.[14] While a court may enjoin the trustee from abusing his discretion by making *unreasonably* high or low payments, it will not prevent the trustee from selecting among the permissible options. *See id.* § 187 cmt. *i*, illus. 11 ("court may order [payment of] $150 a month" where "evidence shows that $150 a month is the *minimum* amount reasonably necessary for [the beneficiary's] support" (emphasis added)); *id.* § 187 cmt. *i*, illus. 12 (court may enjoin trustee from paying "more than $4000" where "under the circumstances $4000 is the *maximum* amount which can reasonably be considered necessary for [the beneficiary's] support" (emphasis added)). In

[14] The Reporter's Notes to Section 50 of the Restatement (Third) of Trusts cite the California Supreme Court's decision in *Estate of Marre* (cited above) and state: "[A]lthough courts can correct trustees for mistakes of law or construction by compelling exercise in the manner intended, it was improper for the lower court to go beyond this by instructing the trustee concerning the amounts to be paid." Restatement (Third) of Trusts § 50, Reporter's Notes at 282 (2003).

contrast, where the trustee acts "dishonestly, or from some improper motive," the court will interpose its own judgment even if there is "no standard indicated by the terms of the trust by which the reasonableness of [the trustee's] conduct" can be judged. *Id.* § 187 cmt. *i*.

Petitioners recognize that, at times, courts have determined the specific amount to be paid to a beneficiary without an express finding that the trustee acted in bad faith. But these cases generally contain little in the way of reasoning, do not expressly reject cases such as *Eaton*, and may not be inconsistent with those cases.[15] Thus, the weight of authority and the better-reasoned authority holds that, "within the limits of reasonableness," and

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[15] *See, e.g., In re Estate of Manahan*, 125 N.W.2d 135, 137 (Iowa 1963) (where a trustee "failed to exercise but without inquiry rejected and resisted" claim, court was justified in deciding it); *Woodward* v. *Dain*, 85 A. 660 (Me. 1913) (ordering a payment of "not less than $20 a month, which sum is adjudged to be actually necessary for" beneficiary's support); *Schofield* v. *Commerce Trust Co.*, 319 S.W.2d 275 (Mo. 1958); *Emmert* v. *Old Nat'l Bank of Martinsburg*, 246 S.E.2d 236, 244-45 (W. Va. 1978) (remanding for a hearing to determine the frequency and amount of payments, and expressing the "hope" that in the event the beneficiary's needs change, "the trustee will voluntarily exercise its discretion to increase the distributions"); *In re Hafemann's Will*, 62 N.W.2d 561, 564 (Wis. 1954) (citing G. Bogert & G. Bogert, The Law of Trusts and Trustees § 560). The Bogert treatise includes a general statement that "[s]ometimes the court decides for the trustee how he should act," but also recognizes that a "court may order a new decision to be made in the light of rules expounded by the court, rather than instruct him as to the specific action which he should take." Bogert § 560, at 222 (2d ed. rev. 1980).

absent bad faith or dishonesty, "the trustee alone may exercise discretion, [where] that is what the [trust instrument] requires." Scott on Trusts § 187.1, at 30-31 (quoting *Eaton*, 132 A. at 11).

Here, the district court should not have "take[n it] upon itself" to exercise "the discretion of trustees." *Colton*, 127 U.S. at 320-21. The court of appeals recognized that the district court's interpretation of the pre-1998 Plan was but one "among *several* reasonable alternatives," Pet. App. 13a-14a (emphasis added), and did *not* hold that the interpretation offered by the Plan Administrator was *un*reasonable. Nor was there any finding that the Plan Administrator acted in bad faith in applying the reconstructed account methodology.[16] Accordingly, the courts below should have deferred to the Plan Administrator's reasonable interpretation of the pre-amendment Plan terms.

[16] Nor could such a finding have been made here. The reconstructed account formula had been applied consistently throughout the history of the Plan. The district court initially agreed that the methodology could lawfully be applied to Respondents, and the Second Circuit agreed that it could be applied after it was adequately disclosed to plan participants. Pet. App. 51a, 85a. Under these circumstances, the Plan Administrator's mistake in applying the reconstructed account methodology to Respondents did not justify stripping the Plan Administrator of discretion to interpret the Plan in the absence of the reconstructed account provision.

2. Stripping A Plan Administrator's Discretion Absent Bad Faith Would Be Inconsistent With ERISA's Objectives.

In resolving questions that arise under ERISA, the Court looks to trust law as "a starting point, after which courts must go on to ask whether, or to what extent, the language of the statute, its structure, or its purposes require departing from common-law trust requirements." *Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996). Here, the language, structure, and purposes of ERISA reinforce the trust law basis for deferring to a plan administrator's views unless the administrator has acted in bad faith.

As this Court has observed, ERISA is "an enormously complex and detailed statute." *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 262 (1993). Given this complexity and the corresponding risk of mistakes in the administration of benefit plans, a hair-trigger rule requiring forfeiture of deference based on a mere mistake by a plan administrator would thrust courts into the role of administering pension plans with disturbing frequency. Moreover, because courts have less familiarity than plan administrators with plan terms and their tax implications, having them step into the shoes of plan administrators who commit run-of-the-mill errors would threaten plans with inconsistent interpretations and unexpected liabilities. *See supra* Part I.E (explaining how *Firestone* deference furthers the goals of ERISA).

A hair-trigger rule that invariably strips plan administrators of *Firestone* deference based on good-faith mistakes would also be inconsistent with *Glenn's* admonition that *Firestone* deference should not be subject to arbitrary limitations. The distinction between good-faith and bad-faith errors, by contrast, tracks *Glenn* quite well. Where a trustee has acted in bad faith, that may well be a "circumstance[] suggest[ing] a higher likelihood" that the benefits decision on remand is suspect, and courts should give such a "factor" appropriate weight. *Glenn*, 128 S. Ct. at 2351. But where there is no such reason for suspicion, the mistake "should prove less important," even "to the vanishing point." *Id.*; *see also Cent. States*, 472 U.S. at 568 (according "significant weight" to a trustee's views where "[t]here has been no evidence of a bad-faith motive behind the trustees' determination of the scope of their powers under the trust agreement").

For those reasons, a number of Circuits have held that ERISA plan administrators are entitled to deference in determining benefits even after arbitrarily and capriciously denying benefits to a participant. *See, e.g.*, *Oliver* v. *Coca-Cola Co.*, 546 F.3d 1353, 1353-54 (11th Cir. 2008); *Pakovich*, 535 F.3d at 605-06; *Vizcaino*, 120 F.3d at 1013-14; *see also Pete* v. *United Mine Workers of Am. Welfare & Ret. Fund of 1950*, 517 F.2d 1275, 1286 (D.C. Cir. 1975) (en banc) (pre-ERISA pension plan). To rule otherwise would, as the Ninth Circuit recognized, improperly intrude upon the discretion conferred by the plan document and "encourage the dumping of

difficult and discretionary decisions into the laps of courts." *Vizcaino*, 120 F.3d at 1014.[17]

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[17] Though a distinct body of jurisprudence, administrative law provides a potential analogy to the Plan Administrator's exercise of discretion following judicial correction of his initial mistake. In *Negusie* v. *Holder*, 129 S. Ct. 1159 (2009), the administrative agency initially erred in construing a statutory provision, which it had thought was unambiguous. Rather than supply its own construction of the statute, this Court held that the mistaken agency should be given another chance to "exercise[] its *Chevron* discretion to interpret the statute in question." *Id.* at 1167. Under the "ordinary 'remand' rule," when an agency errs, "'the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'" *Id.* (quoting *Gonzales* v. *Thomas*, 547 U.S. 183, 186 (2006)). "This remand rule exists, in part, because 'ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion.'" *Id.* (quoting *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005)); *see also* 3 R. Pierce, Administrative Law Treatise § 18.1, at 1323-24 (4th ed. 2002) ("A reviewing court can order an agency to provide the relief it denied only in the unusual case where the court concludes that the underlying law and facts are such that the agency *has no discretion to act in any other manner*. . . ." (emphasis added)). Where an ERISA Plan expressly includes "delegations of authority to the [administrator] to fill the [plan] gap in reasonable fashion," and there is no reason to suspect that the administrator's initial mistake will infect future determinations, it is likewise inappropriate to strip the administrator of "[*Firestone*] discretion to interpret the [plan terms] in question." *Negusie*, 129 S. Ct. at 1167.

3. The Plan Administrator Did Not Interpret The "Same" Plan Terms On Remand.

Respondents and the government have argued that the Plan Administrator merely offered a different interpretation of the same Plan terms following the remand from *Frommert I* and that, at least in these circumstances, no deference is due to the Plan Administrator's interpretation of the Plan. This argument is incorrect.

First, the Plan terms interpreted on remand were not the same as those upon which the Plan Administrator based its original benefits determination. Since the early 1980s, the Plan Administrator has calculated the benefits of rehired employees pursuant to the reconstructed account methodology. *Id.* at 83a-84a. *Frommert I* held that this methodology could not be applied to employees rehired before 1998. *Id.* at 51a-52a. Thus, on remand, the Plan Administrator was faced with the *new* task of construing the non-duplication of benefits provision and the other pre-1998 Plan terms standing alone, without reference to the reconstructed account methodology.

The Second Circuit recognized that the interpretive issue triggered by its decision was a new one, observing that the task on remand would be "difficult[] . . . because of the ambiguous manner in which the pre-amendment terms of the Plan described how prior distributions were to be treated." Pet. App. 51a. Accordingly, the question whether a plan administrator is entitled to deference when it

interprets the "same plan terms" a second time is not presented here. Rather, the newly-framed question of how the offset should be applied based on the "pre-amendment plan terms" arose for the first time on remand.[18]

Second, as discussed above, trust law principles support deference to plan administrators who make good-faith mistakes in denying benefits. That rule draws no distinction between cases where the original mistake happens to involve the "same" plan terms and cases involving different plan terms. Indeed, in cases in which a trustee mistakenly denies support to a beneficiary altogether (*see supra* Part I.E.1), the "same" trust provision is generally at issue in determining the amount of support due the beneficiary. Accordingly, a "one-strike-and-you're-out" rule is inconsistent with the law of trusts as well as the goals of ERISA.

4. The Contention That The Plan Is "Silent" Is Incorrect And Inapposite.

The government has also argued that the Plan is "silent" regarding the offset for prior distributions and, accordingly, that the Plan Administrator's interpretation was not entitled to *Firestone* deference

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[18] This case thus falls into the category of cases holding that plan administrators are entitled to deference when an issue of plan interpretation "d[oes] not ripen into an 'apple' ready to be bitten" until after an initial court ruling. *Pakovich*, 535 F.3d at 606; *accord Gallo*, 102 F.3d at 923; *see also Oliver*, 546 F.3d at 1354; *Vizcaino,* 120 F.3d at 1014; *Pete*, 517 F.2d at 1283.

because there was nothing to interpret. This argument is also incorrect.

The Plan is not silent, as the Second Circuit recognized. Rather than holding that the pre-1998 Plan terms were "silent" regarding the offset, the court of appeals held that those Plan terms were "ambiguous." Pet. App. 51a. To be sure, the court also stated in passing that the pre-1998 Plan "did not *specify* how the Plan would account for the prior distributions," *id.* 28a-29a (emphasis added), but to "specify" means "[t]o state explicitly," Webster's II New College Dictionary (3rd ed. 2005). Failure to state something *explicitly* is entirely consistent with ambiguity. And ambiguity is not a grounds to deny deference but a predicate for deference.

Any assertion that the Plan is "silent" regarding the offset is foreclosed by the Plan's non-duplication of benefits provision and its definition of "accrued benefit." The non-duplication of benefits provision expressly directs that the pension benefits of rehired employees be offset "by the *accrued benefit* attributable to [prior] distribution[s]." *Id.* at 141a (emphasis added). As the Plan Administrator explained, this provision – together with the Plan's definition of the term "accrued benefit" – directs that rehired employees' benefits be offset based on the present-day economic value, or "actuarial equivalent," of their initial lump sum distributions. *See infra* Part II.B.

Even if the Plan *were* silent, moreover, that would not justify withholding deference from the Plan Administrator. As the Seventh Circuit has

recognized, it "is implicit in the idea of deferential review" that where "the plan document does not furnish the answer to [a] question, the answer given by the plan administrator . . . will ordinarily bind the court." *Gallo*, 102 F.3d at 922. Here, the Plan vests the Plan Administrator with the authority to "rectify [any] omission" in the Plan. Pet. App. 142a. Thus, even were the Plan silent, that fact would be a circumstance requiring deference, not a ground for withdrawing it.

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In sum, none of the reasons offered by the court of appeals, Respondents, or the government for carving out an exception to *Firestone* deference is persuasive. Consistent with this Court's decisions in *Firestone*, *Glenn*, and *Central States* and with ERISA's goals of uniform, predictable, and simple plan administration, the Plan Administrator's reasonable interpretation of the non-duplication of benefits provision should have been accorded deference.

II. ABSENT DEFERENCE TO THE PLAN ADMINISTRATOR, A CLAIM FOR BENEFITS DUE UNDER THE TERMS OF AN ERISA PLAN IS SUBJECT TO *DE NOVO* REVIEW.

The Second Circuit, after declining to defer to the Plan Administrator's interpretation of the Plan, erroneously deferred to the district court's interpretation. Under settled principles of appellate review, appellate courts do not defer to a district court's interpretation of a written instrument, including an ERISA plan. The Second Circuit

nonetheless reviewed the district court's interpretation of the pre-1998 Plan terms only for "an excess of allowable discretion." Pet. App. 11a. Applying this deferential standard of review, the Second Circuit upheld the district court's interpretation despite its observation that this interpretation "apparently" fails to make "any . . . adjustment to reflect the inflation-adjusted values of the prior distributions." *Id.* at 9a.

The Second Circuit should have reviewed the district court's interpretation of the Plan *de novo*. The district court's interpretation cannot be sustained under that standard: it ignores relevant Plan language, is economically irrational, and treats employees who left Xerox and then returned to the company better than similarly-situated employees whose service was uninterrupted.

A. The Court Of Appeals Erred By Applying A Deferential Standard Of Review To The District Court's Interpretation Of The Plan.

"[A]ppellate courts have untrammeled power to interpret written documents." *Eddy* v. *Prudence Bonds Corp.*, 165 F.2d 157, 163 (2d Cir. 1947) (L. Hand, J.). Absent *Firestone* deference to the plan administrator, this rule applies to the interpretation of ERISA plans. *See Brubaker* v. *Metro. Life Ins. Co.*, 482 F.3d 586, 589 (D.C. Cir. 2007) ("appellate courts interpret benefit plan documents de novo" (citing *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 210 (2004))); *Booth* v. *Wal-Mart Stores, Inc. Assocs. Health & Welfare Plan*, 201 F.3d 335, 340 (4th Cir.

2000) ("ERISA plans . . . are interpreted *de novo*."); *Dang* v. *UNUM Life Ins. Co. of Am.*, 175 F.3d 1186, 1189 (10th Cir. 1999) ("Interpretation of the plan . . . under ERISA" is "reviewed de novo.").

The district court's task on remand was to interpret the pre-1998 terms of the Plan. In *Frommert I*, the Second Circuit instructed the district court to "fashion[] the appropriate remedy" by interpreting "the pre-amendment terms of the Plan describ[ing] how prior distributions were to be treated." Pet. App. 51a. *Frommert I* also dismissed Respondents' claim for equitable relief pursuant to 29 U.S.C. § 1132(a)(3). Pet. App. 53a. The court of appeals did so because the relief Respondents sought – "recalculation of their benefits *consistent with the terms of the Plan*" – "falls comfortably within the scope of § [1132](a)(1)(B)." Pet App. 53a (emphasis added).

The Second Circuit nonetheless reviewed the district court's interpretation of the pre-1998 Plan terms only "for an excess of allowable discretion" and upheld the district court's interpretation as "one reasonable approach among several reasonable alternatives." Pet. App. 8a, 13a-14a. The Second Circuit should not have applied this deferential standard of review.

In *Firestone*, this Court held that, absent a grant of discretion to the plan administrator, "a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard." *Firestone*, 489 U.S. at 115. This standard of review does not change merely because the district court interprets the plan

in the course of fashioning a remedy. That is so because a district court's remedial discretion does not extend to the interpretation of written instruments. *See, e.g., Yolton* v. *El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 577-78 (6th Cir. 2006) (where district court granted preliminary injunction in favor of ERISA plan beneficiaries, review was *de novo* insofar as district court's decision was based on interpretation of ERISA plan because "[q]uestions of contract interpretation are generally considered questions of law subject to *de novo* review" (internal quotation marks omitted)).[19]

Larocca v. *Borden, Inc.*, 276 F.3d 22 (1st Cir. 2002), illustrates this principle. In *Larocca*, the parties agreed that the plaintiffs had been improperly terminated from their employer-

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[19] *See also Duthie* v. *Matria Healthcare, Inc.*, 540 F.3d 533, 537 (7th Cir. 2008) ("We ultimately review whether a district court should have granted a preliminary injunction for an abuse of discretion. The likelihood of the success on the merits in this case depends on the soundness of the district court's interpretation of the Agreement's language, however, and we review a district court's interpretations of the merger agreement de novo." (citations omitted)); *In re Estate of Trevino*, 886 N.E.2d 530, 533 (Ill. App. Ct. 2008) ("even though the order . . . is one imposing the equitable remedy of a constructive trust, our review is *de novo*" because the issue is "whether the marital settlement agreement provided a *legal basis* for the trial court's order" (citations omitted; emphasis in original)).

Similarly, "to the extent the district court's selection of an equitable remedy involves an element of statutory interpretation, its conclusions are reviewed *de novo*." *CFTC* v. *Levy*, 541 F.3d 1102, 1110 (11th Cir. 2008); *accord Halbach* v. *Great-West Life & Annuity Ins. Co.*, 561 F.3d 872, 882-83 (8th Cir. 2009) (same).

sponsored medical plan, and so should be "constructively reinstated." In implementing this remedy, the district court ordered reimbursement for a deceased plaintiff's estate notwithstanding a plan provision that "prohibit[ed] benefit payments" in the circumstances of his case. *Id.* at 31. In reversing the district court's decision, the First Circuit explained that "once the district court mandated the plaintiff['s] constructive reinstatement" in the plan, his "claims were governed by the terms of the Plan." *Id.* at 29. Accordingly, "the proper scope of remedies due . . . is a legal issue that we review *de novo*." *Id.* at 26.

This Court's decisions support the same result. Even when a district court has discretion to fashion a remedy, the court "would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1990). In *Litton Finanical Printing Division* v. *NLRB*, 501 U.S. 190 (1991), moreover, the Court held that NLRB interpretations of collective bargaining agreements are subject to *de novo* review. The Court declined to apply a deferential standard of review even though the Board has "considerable authority to structure its remedial orders." *Id.* at 201-03.

The Second Circuit's application of a deferential standard of review in this case exposes ERISA plans to the troubling prospect that different district courts may adopt different interpretations of the very same ERISA plan. Under the Second Circuit's approach, if two district courts within the same circuit were to adopt inconsistent interpretations of the same

pension plan, the court of appeals would be required to affirm *both* interpretations so long as both were within the district courts' zone of "allowable discretion." Such a result would undermine ERISA's goal of ensuring uniform administration of ERISA plans throughout the country. *See Egelhoff* v. *Egelhoff*, 532 U.S. 141, 148 (2001) ("One of the principal goals of ERISA is to enable employers to establish a uniform administrative scheme." (internal quotation mark omitted)); *Berger* v. *AXA Network LLC*, 459 F.3d 804, 814 (7th Cir. 2006) ("uniformity of treatment" of plan participants is a "primary concern" of ERISA). The prospect of such discordant results would also discourage employers from offering ERISA plans in the first place. *See Varity*, 516 U.S. at 497.

In short, the Second Circuit's decision to substitute deferential review for *de novo* review is contrary to fundamental principles of appellate review and conflicts with important objectives of ERISA. The Second Circuit should not have deferred to the district court's interpretation of the Plan.

B. Under A *De Novo* Standard Of Review, The Plan Should Be Interpreted To Account For The Time Value Of Money In Calculating Respondents' Benefits Under The Plan.

The Second Circuit's opinion carefully avoids the conclusion that the district court's interpretation of the pre-1998 Plan terms is superior to the Plan Administrator's interpretation. *See, e.g.,* Pet. App.

13a-14a (the district court selected "one reasonable approach among several reasonable alternatives"). Nor would any such a conclusion be sustainable. The district court's interpretation fails to give effect to relevant Plan terms, ignores the time value of money, and confers windfalls on rehired employees. In contrast, the Plan Administrator's interpretation is consistent with the terms of the Plan and IRS guidance, accounts for the time value of money, and avoids undue windfalls.

1. The Plan's HAP defined benefit formula calculates benefits for rehired employees by taking account of all of the employees' service to Xerox, including service rendered before their rehire date. *Id.* at 25a-26a. Absent an appropriate offset to take account of the distributions that rehired employees received upon their initial departures, such employees would receive double credit for their initial period of service. *See id.* at 26a.

The Plan's non-duplication of benefits provision prohibits such "duplicative" payments. That provision requires that the HAP formula benefit of a rehired employee be "offset by the *accrued benefit* attributable to [the prior] distribution" to the rehired employee. *Id.* at 141a (emphasis added). The Plan defines the term "accrued benefit," in pertinent part, as "[t]he normal retirement benefit which a [participant] has earned up to any date, and which is payable at Normal Retirement Date" – *i.e.*, as an annuity payable (in most cases) at age 65. *Id.* at 134a; *see* J.A. 15a-16a.

As the Plan Administrator explained in the course of interpreting the Plan on remand, such an offset requires that the prior distribution be converted into an annuity because the HAP formula expresses a participant's accrued benefit as a monthly annuity. Pet. App. 152a; *see also id.* at 149a. The Plan, moreover, specifies that the calculation of the monthly annuity attributable to a defined contribution account balance must be made "using annuity rates established by the PBGC." *Id.* at 141a (Plan Section 4.3(e)); *see id.* at 150a. Accordingly, as the Plan Administrator concluded, Respondents' prior distributions from their defined contribution accounts should be "converted into an age 65 annuity as of the time of the prior distribution" using PBGC annuity rates and then offset against the annuity provided by the HAP formula. *Id.* at 152a-153a (¶¶ 17-19). This interpretation is amply supported by the terms of the pre-amendment Plan.

The district court's interpretation, in contrast, disregards the language of the Plan. It does not offset the final pension benefits by the "accrued benefit attributable to" the prior distribution. Instead, it offsets the final benefits only by the nominal amount of the prior distribution, without *any* adjustment at all for the time value of money.

2. Because the district court's nominal offset interpretation fails to account for the time value of money, it is economically irrational and unfair to Respondents' fellow employees. *See, e.g.*, *Lunn*, 166 F.3d at 882-83 (holding that an economically nonsensical interpretation of a plan that results in

windfalls is unreasonable as a matter of law if there is any other plausible interpretation of the plan).

Under the district court's interpretation, rehired employees will receive a level of benefits that is higher than the benefits available to otherwise similarly-situated Xerox employees. J.A. 127a-30a; *see id.* at 104a-16a; 131a-41a. Respondent Clair, for example, stands to receive substantially more money in real terms than an otherwise identical employee who had not departed Xerox for two years would have received. *Id.* at 109a-10a. Respondents' own expert recognized the inequity of this approach. *Id.* at 130a (agreeing that, "in fairness, to account for th[e time value of money], you would have to do some actuarial equivalence of th[e] lump sum to account for its value . . . today"). Indeed, even Mr. Clair acknowledged that he was "familiar with the time value of money concept" and that he did not expect to receive a benefit as large as that provided under the nominal offset approach. *Id.* at 118a; 122a-24a.

The undisputed purpose of the Plan's non-duplication of benefits provision was to prevent windfalls. Accordingly, the Plan should not be interpreted in a manner that requires them. *See Benefits Comm. of Saint-Gobain Corp.* v. *Key Trust Co. of Ohio, N.A.*, 313 F.3d 919, 932 (6th Cir. 2002) (purpose of ERISA is "not to obtain windfalls for the participants"); *Harms* v. *Cavenham Forest Indus., Inc.*, 984 F.2d 686, 693 (5th Cir. 1993) (unearned windfalls are "abhorred by ERISA").

Moreover, accounting for the time value of money is consistent with IRS guidance on floor-offset

arrangements. In Revenue Ruling 76-259, the IRS required such arrangements to take account of "the additional amount that would have been provided" by a prior distribution when calculating the floor benefit due under the defined benefit portion of the arrangement. *See* Rev. Rul. 1976-2 C.B. 111. The IRS also issued a safe harbor regulation for floor-offset plans under which the "accrued benefit" otherwise payable under a defined benefit plan is reduced by the "actuarial equivalent" of any prior distributions received from a defined contribution plan. *See* Pet. App. 148a-49a (citing 26 C.F.R. § 1.401(a)(4)-8(d)(1)(i)). Unlike the district court's interpretation of the Plan, Petitioners' interpretation tracks this regulatory guidance.

In sum, under a *de novo* standard of review, the pre-1998 Plan terms are best interpreted to require that Respondents' final pension benefits be offset by the actuarial equivalent of the prior lump sum distributions they received.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

RELEVANT STATUTORY PROVISIONS

Title 26 – Internal Revenue Code

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Sec. 411. Minimum vesting standards

(a) General rule

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(7) Accrued benefit

(A) In general

For purposes of this section, the term "accrued benefit" means

(i) in the case of a defined benefit plan, the employee's accrued benefit determined under the plan and, except as provided in subsection (c)(3), expressed in the form of an annual benefit commencing at normal retirement age, or

(ii) in the case of a plan which is not a defined benefit plan, the balance of the employee's account.

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Title 29 – Labor

Sec. 1002. Definitions

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(16)(A) The term “administrator” means--

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

(B) The term “plan sponsor” means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

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(34) The term “individual account plan” or “defined contribution plan” means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and

any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

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(35) The term “defined benefit plan” means a pension plan other than an individual account plan; except that a pension plan which is not an individual account plan and which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant--

(A) for the purposes of section 1052 of this title, shall be treated as an individual account plan, and

(B) for the purposes of paragraph (23) of this section and section 1054 of this title, shall be treated as an individual account plan to the extent benefits are based upon the separate account of a participant and as a defined benefit plan with respect to the remaining portion of benefits under the plan.

*****

Sec. 1102. Establishment of plan

(a) Named fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

(b) Requisite features of plan

Every employee benefit plan shall--

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105(c)(1) of this title),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

(c) Optional features of plan

Any employee benefit plan may provide--

(1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator);

(2) that a named fiduciary, or a fiduciary designated by a named fiduciary pursuant to a plan procedure described in section 1105(c)(1) of this title, may employ one or more persons to render advice with regard to any responsibility such fiduciary has under the plan; or

(3) that a person who is a named fiduciary with respect to control or management of the assets of the plan may appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan.

Sec. 1103. Establishment of trust

(a) Benefit plan assets to be held in trust; authority of trustees

Except as provided in subsection (b) of this section, all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 1102(a) of this title or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that--

(1) the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with

the terms of the plan and which are not contrary to this chapter, or

(2) authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers pursuant to section 1102(c)(3) of this title.

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Sec. 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

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(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

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Sec. 1105. Liability for breach of co-fiduciary

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(c) Allocation of fiduciary responsibility; designated persons to carry out fiduciary responsibilities

(1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

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Sec. 1108. Exemptions from prohibited transactions

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(c) Fiduciary benefits and compensation not prohibited by section 1106

Nothing in section 1106 of this title shall be construed to prohibit any fiduciary from--

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(3) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.

*****

Sec. 1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

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Sec. 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought--

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

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Sec. 1133. Claims procedure

In accordance with regulations of the Secretary, every employee benefit plan shall--

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.