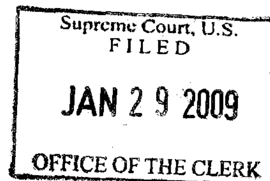
Supreme Court, U.S.
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No. 08-810

IN THE

Supreme Court of the United States

SALLY L. CONKRIGHT, ET AL.,

Petitioners,

v.

PAUL J. FROMMERT, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF APPENDICES . . . . -ii-

TABLE OF CITED AUTHORITIES . . . . -iii-

INTRODUCTION . . . . -1-

BACKGROUND OF THE CASE . . . . -2-

REASONS FOR DENYING THE WRIT . . . . . . -11-

I. THE ISSUES PRESENTED BY THE PETITIONERS MISCHARACTERIZE THE HISTORY OF THIS CASE . . . . . . -11-

II. THE PETITIONERS DISTORT THE OPINION OF THIS COURT IN *GLENN* . . . . -12-

III. THE DECISION IN *FROMMERT 2008* IS ENTIRELY CONSISTENT WITH THIS COURT'S DECISION IN *GLENN* . . . . -14-

IV. PETITIONERS IMPROPERLY IGNORE THE LAW OF THE CASE REGARDING THE TERMS OF THE PLAN . . . . -17-

CONCLUSION . . . . -24-

TABLE OF APPENDICES

Appendix A - Excerpts of the Summary Plan Description Describing the 1989 Restatement of the Xerox Retirement Income Guarantee Plan 1a

TABLE OF CITED AUTHORITIES

Cases

Administrative Committee of Wal-Mart Health & Welfare Plan v. Willard
393 F.3d 1119 (10th Cir. 2004) . . . . -19-

Bergt v. Ret. Plan for Pilots Employed by Mark Air
293 F.3d 1139 (9th Cir. 2003) . . . . -9-

Chiles v. Ceridian Corp.
95 F.3d 1505 (10th Cir. 1996) . . . . -9-

Edwards v. State Farm Mutual Automobile Ins. Co.
851 F.2d 134 (6th Cir. 1988) . . . . -9-

Firestone Tire & Rubber Co. v. Bruch
489 U.S. 101 (1989) . . . . -12-, -15-, -19-, -22-

Frommert v. Conkright
433 F.3d 254 (2d Cir. 2006) . . . . *passim*

Frommert v. Conkright
472 F.Supp.2d 452 (W.D.N.Y. 2007) . . . . *passim*

Frommert v. Conkright
535 F.3d 111 (2d Cir. 2008) . . . . *passim*

Glenn v. Metropolitan Life Ins. Co.
461 F.3d 660 (6th Cir. 2006) . . . . -16-

Hansen v. Continental Ins. Co.
940 F.2d 971 (5th Cir. 1991) . . . . -9-

Harte v. Bethlehem Steel Corp.
214 F.3d 446 (3d Cir. 2000) . . . . -20-

Hunter v. Caliber System, Inc.
220 F.3d 702 (6th Cir. 2000) . . . . -20-

Jensen v. SIPCO, Inc.
38 F.3d 945 (8th Cir. 1994) . . . . -9-

Layaou v. Xerox Corp.
238 F.3d 205 (2d Cir. 2001) . . . . -4-

Mathews v. Sears Pension Plan
144 F.3d 461 (7th Cir. 1998) . . . . -9-

McNight v. Southern Life & Heath Co.
758 F.2d 1566 (11th Cir. 1985) . . . . -10-

Metropolitan Life Ins. Co. v. Glenn
128 S.Ct. 2343 (2008) . . . . *passim*

Oliver v. Coca-Cola Co.
546 F.3d 1353 (11th Cir. 2008) . . . . -19-

Varity v. Howe
516 U.S. 489 (1996) . . . . -17-

Worthy v. New Orleans Steamship Association
342 F.3d 422 (5th Cir. 2003) . . . . -20-

Statutes

29 U.S.C. 1104(a) . . . . -3-

29 U.S.C. § 1054(h) . . . . -6-

29 U.S.C. § 1108(c)(3) . . . . -13-, -17-

29 U.S.C. § 1132(a)(1)(B) . . . . -13-

29 U.S.C. §1022 . . . . -4-

INTRODUCTION

The pending petition for certiorari hopefully constitutes the last chapter in the playbook of Petitioners-Appellants Sally L. Conkright, Patricia M. Nazemetz, Lawrence M. Becker, and Xerox Corporation Retirement Income Guarantee Plan (hereinafter sometimes referred to as "petitioners" or "Xerox") to manipulate the legal process to delay payment of retirement benefits rightly due under the Xerox pension plan to the Respondents-Appellees (hereinafter sometimes referred to as "the plaintiffs"). Since this case was filed nearly ten years ago, three decisions of the Second Circuit have conclusively established that Xerox cannot properly use a "phantom account," consisting of the hypothetical appreciated value of the distribution received by the rehired Xerox employee when previously separated from employment, to reduce the retirement benefits earned by employees who were rehired prior to the publication and distribution of the 1998 Summary Plan Description ("SPD") for such plan.

The issues raised in Xerox's petition do not actually relate to the recent holding of the Second Circuit – which simply upheld the trial court's exercise of discretion specifically remanded to it – and are entirely without merit.[1]

On the other hand, during the course of such remand, Xerox raised an entirely new issue, claiming that a general release document signed by some plaintiffs who retired during this litigation, though not mentioning this case, waived the claims those plaintiffs were litigating. The recent Second Circuit decision sided with Xerox on that claim. The cross-

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[1]On or about October 20, 2008, this Court denied Xerox's request for a stay of judgment pending a decision on the instant petition for certiorari.

petition for certiorari filed by those plaintiffs who are affected raises important and broad issues that should be addressed by this Court.

BACKGROUND OF THE CASE

In 1989, Xerox Corporation implemented a comprehensive redesign of its retirement program to be effective January 1, 1990. *Frommert v. Conkright*, 433 F.3d 254, 258 (2d Cir. 2006) ("*Frommert 2006*"). Among key changes made, Xerox ceased making contributions to the Xerox Profit Sharing Plan, a defined contribution plan which had been the source of distributions made to rehired Xerox employees when they were previously separated from employment. *Id.* If the rehired employee had any balance left in his Profit Sharing account as of January 1, 1990, it was transferred to a new account established by the redesigned Plan as the Transitional Retirement Account ("TRA"). *Id.* Subsequent to January 1, 1990, this account would increase (or theoretically decrease) based on the investment results of funds in which the employee's Profit Sharing account had been invested. *Id.* at 257.

The redesigned Plan added an alternative benefit known as the Cash Balance Retirement Account ("CBRA"), which also was established by the transfer of the balance the rehired Xerox employee had in his Profit Sharing account, if any, as of January 1, 1990. *Id.* Thereafter, the balance of the CBRA would increase each year by five percent of the employee's salary, and the overall CBRA balance would be credited for interest at a rate of one percent above the one year Treasury Bill rate. *Id.* at 257.

Critically, the basic Xerox retirement plan formula ("hereinafter the RIGP Plan formula") was established in the redesigned Plan to be calculated by multiplying years of service, up to thirty, by 1.4 percent (it was 1.67 percent before January 1, 1990) of the

highest-average yearly pay, a figure arrived at by calculating the average of the employee's five highest-paying calendar years with Xerox. *Id.* As found by the Second Circuit in its comprehensive analysis of the redesigned plan: "For employees rehired by Xerox, the number of years of service includes the total time the employee worked for Xerox, not just the period of employment following rehire." *Id.*

In an SPD captioned "Planning For A Secure Retirement," excerpts of which are included in Appendix A to this brief, Xerox represented that the pension benefit promised Xerox employees who qualify as plan participants "can never be less than that specified by the RIGP formula -- a real advantage, particularly to long service employees, because the formula is very sensitive to years of service." Page 1a.

Having made this representation and similar statements in 1990 personal annual statements with the knowledge that Xerox employees, both newly hired and rehired, would likely rely upon such representations in contemplating and planning a "secure retirement," petitioners — the very persons charged under ERISA Section 404(a), 29 U.S.C. § 1104(a), with a duty of loyalty to the plaintiffs — surreptitiously launched a campaign to deny rehired Xerox employees the pension promised based in part on length of service through the devious device of the "phantom account offset."

The SPDs and annual reports sent to plan participants describing the alternative retirement benefit programs contained in the redesigned Plan (sometimes described as the pre-amendment Plan by the Second Circuit in its opinions) also made reference to a deduction in aggregate benefits for participants who had received prior distributions. As found by the Second Circuit in a related case: "The only relevant language in Xerox's SPD states that '[T]he amount you receive may also be reduced if you previously left the Company and

received a distribution at that time.'" *Layaou v. Xerox Corp.*, 238 F.3d 205, 210 (2d Cir. 2001) ("*Layaou 2001*").

The foregoing disclosure was the only information regarding a potential offset that was provided by the petitioners prior to the publication and distribution of the September 1998 SPD. Xerox's interpretation of Plan terms to allow for implementation of the phantom account offset was found to be unreasonable due to nondisclosure. As set forth by the Second Circuit in *Layaou 2001*:

> The SPD [available to plaintiff John Layaou] does not mention the term "phantom account," describe the "phantom account concept, or even indicate that the choice among the three methods of calculating future benefits will be made by first adding on, and then later offsetting, not the amount of the prior distributions but instead an appreciated value of the prior lump sum distributions. Nor does the SPD offer any example of how to calculate benefits for individuals who had received prior lump -sum distributions.

Id.

The Second Circuit thereafter concluded that the petitioners had violated ERISA Section 102, 29 U.S.C. §1022, stating as follows:

> Because we find that Xerox's SPD failed to provide adequate notice to Layaou that his retirement formula would be determined by adding to the CBRA and TRA an appreciated value of his prior distributions and then offsetting the outcome by that amount, we find that the

> plan administrator's interpretation of the SPD as permitting application of the "phantom account" offset to Layaou's benefits is unreasonable under either an arbitrary and capricious or *de novo* standard of review.

Id. at 211.

In *Frommert 2006*, the Second Circuit, consistent with the decision in *Layaou 2001*, determined that "[t]he prolonged absence of any mention of the phantom account from Plan documents, most notably SPDs, likely, and quite reasonably, led plan participants to believe that it was not a component of the Plan. Rather, rehired employees likely believed that their past distributions would only be factored into their benefits calculations by taking into account the amounts they had actually received." *Frommert 2006*, 433 F.3d at 267.

The Second Circuit thereafter held:

> It is clear that the application of the phantom account reduced the amount of benefits on which the employees had justifiably relied. The district court's conclusion that the phantom account serves only to allow a comparison between the TRA and CBRA accounts and the RIGP benefit, while perhaps correct in a hyper-technical sense, overlooks the ultimate effect of that comparison. By including a large amount of hypothetical growth in a nonexistent account, the comparison among the three accounts is skewed in favor of selecting either the TRA or CBRA over the RIGP as the basis for payment. However, once either the TRA or CBRA is selected as providing the highest amount of benefits,

> the phantom account value is taken out, leaving a benefit amount significantly less than what the RIGP [Plan formula] would provide. Thus, although the application of the phantom account does not directly deplete an employee's pension account, by altering the comparative process, it imposes a condition on the payment of benefits that leads just as surely to a decrease.

Id. at 268 (citations omitted).

The Second Circuit thereafter found that the "petitioners' reduction of justified expectations of benefits took the form of a retroactive cut-back in violation of [ERISA Section 204(g), 29 U.S.C. 1054(g)]." *Id.* Having previously found that the petitioners had violated ERISA Section 204(h), 29 U.S.C. § 1054(h), which "clearly required the plan administrators to provide fifteen days advance notice of any amendment creating 'a significant reduction in the rate of future benefit accrual,'" *id.* at 266, the Second Circuit then directed the District Court to craft a remedy:

> On remand, the remedy crafted by the district court for those employees rehired prior to 1998 should utilize an appropriate pre-amendment calculation to determine their benefits. We recognize the difficulty that this task poses because of the ambiguous manner in which the pre-amendment terms of the Plan described how prior distributions were to be treated. As guidance for the district court, we suggest that it may wish to employ equitable principles when determining the appropriate calculation and fashioning the appropriate remedy.

Id. at 268.

Having fully considered the direction of the Second Circuit excerpted above, the trial court began its analysis of how to craft a remedy for the statutory violations of the petitioners as follows:

> This Court's task on remand is made easier in many respects by the breadth of the Second Circuit decision. The Circuit resolved many issues and has clearly established the law of the case in many respects. For example, it can no longer be disputed that employees were not given proper notice in either the Plan or the relevant SPD as to the nature of the phantom account and its operation. Utilization of this phantom account or anything similar to it has been soundly rejected by the Court of Appeals in this case as well as a previous case involving the same Plan, *Layaou v. Xerox Corporation, 238 F.3d 205 (2d Cir. 2001).* Other courts have reached the same conclusion. *Miller v. Xerox Corp. Ret. Income Guarantee Plan, 464 F.3d 871 (9th Cir. 2006); Berger v. Xerox Corp. Ret. Income Guarantee Plan, 338 F.3d 755 (7th Cir. 2003).*[2] It is clear, then, that Xerox may not lawfully use the phantom account mechanism, as to either the named plaintiffs in this lawsuit, or anyone else who was rehired by Xerox prior to 1998, after having previously received a distribution of pension benefits. The Second Circuit has

[2] In *Berger v. Xerox Ret. Inc. Guar. Plan*, 338 F.3d 755 (7th Cir. 2003), the Seventh Circuit held that the Xerox RIGP Plan violated ERISA substantive benefit accrual and vesting requirements with respect to the way that the Plan determined lump sum benefits payable in connection with the CBRA.

> addressed this issue more than once, and Xerox may not continue to utilize this rejected formula.

Frommert v. Conkright, 472 F.Supp.2d 452, 456-457 (W.D.N.Y. 2007) ("*Frommert 2007*").

The trial court then commented on the directions it received from the Second Circuit, stating that "Describing the procedure to be utilized prior to the 1998 amendments as 'ambiguous' is generous. In fact, virtually nothing is set forth in either the Plan or the SPD as to the precise mechanism for taking into account a prior distribution in calculating an employee's present benefits after a rehire." *Id.* at 457.

The trial court then referenced the fact that it had reviewed testimony concerning the appropriate methods of treating prior distributions and reached the following conclusion:

> [T]he best course is to do what I did previously in *Layaou* involving a similar remand from the Court of Appeals. *Layaou v. Xerox Corporation, 330 F.Supp.2d 297 (W.D.N.Y. 2004)* ["*Layaou 2004*"]. In *Layaou,* I directed the administrator "to recalculate plaintiff's retirement benefit, ... and to pay plaintiff a lump sum in the amount of the difference between the amount of benefits that plaintiff has received, and the amount of the recalculated benefit, without any consideration of a 'phantom account.'" *Id. at 305* (footnote omitted). I added that "[i]t would not be unreasonable ... for the administrator to subtract out the amount of the prior distribution," in order to avoid giving the plaintiff a windfall, but left it to the Plan administrator to perform the actual

> calculation of the plaintiff's benefits in the first instance, stating that "[i]f plaintiff believes that the administrator's calculation is erroneous, and the matter cannot be resolved between the parties, he can seek further relief in this Court." *Id. at 304.*
>
> The same process should apply here. This process is straightforward; it adequately prevents employees from receiving a windfall, and I believe it most clearly reflects what a reasonable employee would have anticipated based on the not-very-clear language in the Plan and SPD.

Id. at 458. The methodology outlined by the trial court in *Frommert 2007* hereinafter will be referred to as "the *Layaou 2004* methodology." Indeed, the *Layaou 2004* methodology is the very method described in the 1989 SPD "Planning For A Secure Retirement"as constituting the manner by which a retiring employee can calculate his pension entitlement. *See infra* at pp. 3a-4a. Accordingly, the decision of the trial court in *Frommert 2007* is totally consistent with the concept which permeates *Frommert 2006*: namely, that in the event of any conflict between the SPD and the terms of the plan or the plan administrator's interpretation of the plan, the SPD controls. *Frommert 2006*, 433 F.3d at 265.[3]

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[3] The concept that the SPD controls in the event of a conflict has been consistently applied outside the Second Circuit. S*ee Hansen v. Continental Ins. Co.*, 940 F.2d 971, 981-83 (5th Cir. 1991); *Edwards v. State Farm Mutual Automobile Ins. Co.*, 851 F.2d 134, 136 (6th Cir. 1988); *Mathews v. Sears Pension Plan*, 144 F.3d 461, 466 (7th Cir. 1998); *Jensen v. SIPCO, Inc.*, 38 F.3d 945, 952 (8th Cir. 1994); *Bergt v. Ret. Plan for Pilots Employed by Mark Air*, 293 F.3d 1139 (9th Cir. 2003); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1518-19 (10th

The district court rendered judgment on two points: (1) that the *Layaou 2004* methodology should be the appropriate relief for the statutory violations of the petitioners/appellants and (2) that the execution of the Xerox general release form in consideration of the receipt of severance pay was unenforceable as a bar to the ERISA claims of the respondents/appellees. Xerox appealed these rulings to the Second Circuit.[4]

More than a year after the decision in *Frommert 2007*, on July 24, 2008, the Second Circuit held that a decision of the District Court determining that the *Layaou 2004* methodology was the appropriate method to calculate the retirement benefits of Xerox employees rehired prior to the September 1998 SPD was within scope of the District Court's discretion.[5]

Cir. 1996); *McNight v. Southern Life & Heath Co.*, 758 F.2d 1566 (11th Cir. 1985).

[4] It is very important to note that the petitioners did not challenge the Second Circuit's direction in *Frommert 2006* to the trial court that it should craft appropriate relief employing equitable principles, if necessary. Moreover, they submitted to an evaluation whereby the trial court was presented with and considered alternative methodologies, including the *Layaou 2004* methodology, the new hire methodology, and the plan administrator's approach. Only when the trial court rendered its decision in favor of the *Layaou 2004* methodology did Xerox too late decide to challenge the decision of the Second Circuit to have the trial court craft a remedy for Xerox's statutory violations.

[5]Notwithstanding the fact that the petitioners had been found to be serial violators of ERISA statutes designed to protect pensioners, the Second Circuit vacated the ruling of the trial court that the Xerox general release form was unenforceable due its ambiguous content and the failure of the plan administrators to demonstrate that the severance payments received were in excess of the ERISA claims deemed

Frommert v. Conkright, 535 F.3d 111, 119 (2d Cir. 2008) ("*Frommert 2008*").

REASONS FOR DENYING THE WRIT

I. THE ISSUES PRESENTED BY THE PETITIONERS MISCHARACTERIZE THE HISTORY OF THIS CASE

The two challenges presented by Xerox have little or no relevance to the decision (i.e., *Frommert 2008*) being appealed. Petitioners mischaracterize the remand as if the District Court had been directed to interpret and apply the Plan. It was not, but rather was directed to exercise equitable powers in crafting an appropriate remedy after Xerox's position regarding the interpretation of the plan (including the related SPD) had been soundly rejected. Xerox effectively asks this Court to negate the law of the case, as established in earlier Second Circuit holdings.

Xerox's first issue asserts that the Second Circuit erred by holding that the District Court had "no obligation to defer to an ERISA plan administrator's reasonable interpretation of the terms of [a pension] plan if the plan administrator arrived at its interpretation outside the context of an administrative claim for benefits." The *Frommert 2008* decision simply did not involve a review of an interpretation of the plan, but rather upheld the trial court's choice of the *Layaou 2004* methodology as a means of allowing Xerox some equitable credit for prior payments from its Profit Sharing Plan, where prior decisions had determined

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to be waived. This ruling is the subject of a separate petition for certiorari by the plaintiffs which we believe merits being granted by this court.

that applicable plan and SPD terms did not provide for an offset.

Xerox's second assertion, that the Court of Appeals should have looked at the matter *de novo*, again ignores the history and law of the case. Where the Court of Appeals had specifically remanded the case to the District Court to "craft" an appropriate remedy, it is absurd to claim that the Second Circuit should then brush that remand aside and craft such remedy itself *de novo*. Again, *Frommert 2008* was not about determining the meaning of a plan, but rather the equitable determination of a proper final remedy.

In *Frommert 2008*, the Second Circuit in fact held that the *Layaou 2004* methodology did not exceed the District Court's allowable discretion since the prior opinion of the Second Circuit "presumed that the District Court would craft the remedy itself." *Frommert 2008*, 535 F.3d at 118. Accordingly, this Court should forthwith reject the petition for certiorari filed by petitioners as raising issues not relevant to the analysis and ruling of the court below.

II. THE PETITIONERS DISTORT THE OPINION OF THIS COURT IN *GLENN*

The petitioners cite *Metropolitan Life Ins. Co. v. Glenn*, 128 S.Ct. 2343 (2008), as holding that when a pension plan grants a plan administrator the authority to interpret its terms, the administrator's interpretation of the plan language is entitled to deference. Petitioners' brief at 12. In fact, in *Glenn* this Court did not amplify the deference that should be given to an interpretation of plan documents by a plan administrator. Rather, it expanded the "fourth principle" under *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101 (1989) ("*Bruch*"), which holds that a plan administrator's conflict of interest with plan beneficiaries is a factor that should be considered in

judicial review of a benefits determination by a fiduciary or administrator under 29 U.S.C. § 1132(a)(1)(B). *See infra* at pp. 19-20 for further discussion of the four principles referenced in *Glenn*.

The first question posed by the Sixth Circuit decision in *Glenn* was whether the fact that a plan administrator both evaluates claims for benefits and also pays those same claims creates the kind of conflict of interest where this fourth principle should apply. The answer given in *Glenn* is that where, as here, the employer both funds the plan and evaluates the claims, it creates the type of clear conflict of interest that judges must take into account as a factor when they review the discretionary acts of a plan administrator. *Glenn*, 128 S.Ct. at 2343.

In response to MetLife's contention that, among other things, ERISA Section 408(c)(3), 29 U.S.C. § 1108(c)(3), specifically allows employers to administer their own ERISA plans, this Court held that this statutory provision was outweighed by "Congress' decision to offer employees enhanced protection for their benefits." *Id.* Turning to the question of how a conflict such as the one identified in *Glenn*, which parallels the conflict of interest circumstances in the instant case, should be taken into account on judicial review of a discretionary benefits determination, this Court held that such conflict should be "weighed as a factor in determining whether there is an abuse of discretion." *Id.* It then cautioned that conflicts of interest are but one factor among many that a reviewing judge must take into account. *Id.*

If this case actually involved interpretation of terms of the applicable plan, the now long history of litigation over Xerox's plan would need to be taken into account. Despite repeated losses in the Courts of Appeals, Xerox stubbornly fights on. There could hardly be a clearer case to apply the principles set forth in *Glenn* so as to

preclude any deference to Xerox's latest interpretations.

However, it is simply unnecessary to reach any *Glenn* factors. As discussed above, the holding in *Frommert 2008* affirming the trial court's choice of the *Layaou 2004* methodology to allow Xerox some offset is the culmination of holdings reached in several prior decisions constituting the law of this case. This choice was based on many facts and equitable factors, including key holdings that the SPD violated ERISA Section 102.

The petitioners' contention that deference should be given to the decision of the Xerox Plan Administrators to utilize the phantom account offset or a different equivalent approach can be described as *chutzpah in extremis.* The creative attempt by the petitioners to turn this case into one raising the question of whether the Second Circuit failed to give appropriate deference to the opinion of the Xerox Plan Administrators outside the context of a benefits determination must be denied and their petition for certiorari rejected.

III. THE DECISION IN *FROMMERT 2008* IS ENTIRELY CONSISTENT WITH THIS COURT'S DECISION IN *GLENN*

Nothing in this case is at odds with this Court's recent pronouncement in *Glenn* or with its predecessor *Bruch.* In *Glenn,* "this Court warned against the use of 'talismanic' rules and formulas as a substitute for the art of judging." *Glenn,* 128 S. Ct. at 2353. In addressing how the trial court should take conflicts of interest into account, this Court in *Glenn* stated:

> Benefits decisions arise in too many contexts, concern too many circumstances, and can relate in too many different ways to conflicts – which

> themselves vary in kind and in degree of seriousness – for us to come up with a one-size-fits-all procedural system that is likely to promote fair and accurate review.

Id. at 2351.

The petitioners assert that the Second Circuit carved out a broad exception to the deference principle enunciated in *Bruch* and *Glenn* when it held that no deference is due to a plan administrator's interpretation of plan language when the administrator interprets the plan outside of the plan's administrative claims process. *See* Petition at 12. Elsewhere, the Petition cites *Frommert 2007* for the proposition that the deference due to a plan administrator applies only when a plan administrator offers its interpretation of the plan in the course of an administrative determination of a participant's benefit.

Contrary to the spin placed upon *Glenn* by the petitioners, the decision in *Glenn* did not expand the concept of deference due to a plan administrator, but rather expanded the concept of what constitutes a conflict of interest from a brief reference to this concept in *Bruch, 489 U.S. 101* (1989). As stated in *Glenn*:

> We here decide that this dual role [of being both the employer and payor of benefits of a pension plan] creates a conflict of interest; that a reviewing court should consider that conflict as a factor in determining whether the plan administrator has abused its discretion in denying benefits; and that the significance of the factor will depend upon the circumstances of the particular case. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

Glenn, 128 S. Ct. at 2346.

In accordance with the expanded concept of what constitutes a conflict, this Court affirmed the Sixth Circuit decision in *Glenn v. Metropolitan Life Ins. Co.*, 461 F.3d 660 (6th Cir. 2006), holding that where a plan administrator both evaluates and pays claims, he "operates under a conflict of interest when making discretionary benefit determinations." *Glenn*, 128 S. Ct. at 2347.

The opinion in *Glenn* goes on to state that the Solicitor General suggested that this Court also consider "how" any such conflict should be taken into account on judicial review of the discretionary benefit determination. This Court gave a four part response. First, it determined that a plan administrator holds a position analogous to a trustee of a common law trust and should consider a benefits determination to be a fiduciary act to which the administrator owes a special duty of loyalty to the plan beneficiaries. *Id.* at 2347. Second, this Court held that principles of trust law require courts to review a denial of trust benefits under a *de novo* standard unless the plan provides to the contrary. *Id.* at 2348. Third, where the plan provides the administrator discretionary authority to determine eligibility for benefits, trust principles make a deferential standard of review appropriate. *Id.* Fourth and last, this Court held that where a benefit plan gives discretion to an administrator operating under a conflict of interest, that conflict must be weighed as a factor in determining whether there is an abuse of discretion. *Id.* The *Glenn* decision then focused on the fourth principle and held there clearly is a conflict of interest "where [as here] it is the employer that both funds the plan and evaluates the claims." *Id.* "In such a circumstance, 'every dollar provided in benefits is a dollar spent by . . . the employer; and every dollar saved . . . is a dollar in [the

employer's] pocket." *Id.* (*citing Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 144 (3d Cir. 1987)).

This Court then further reviewed the heightened consideration that should be given to a plan administrator operating under a conflict of interest, finding that ERISA is consistent with trust law in circumstances where a court approves a trustee's conflict. These circumstances "[do] not change the legal need for a judge to take account of that conflict in reviewing the trustee's discretionary decision making. *Glenn*, 128 S. Ct. at 2349 (internal citations omitted).

In response, Metropolitan Life contended in *Glenn* that to find a conflict in a situation where the plan administrator has discretionary authority was inconsistent with an ERISA provision specifically allowing employers to administer their own plans. *See* 29 U.S.C. § 1108(c)(3). Continuing to cite trust principles where a court must approve a trustee's conflicted decision making, this Court found the statutory exception was outweighed by "Congress' desire to offer employees enhanced protection from the benefits." *Id.* (citing *Varity v. Howe*, 516 U.S. 489, 497 (1996) (discussing "competing congressional purposes" in enacting ERISA)).

IV. PETITIONERS IMPROPERLY IGNORE THE LAW OF THE CASE REGARDING THE TERMS OF THE PLAN

As the District Court noted in *Frommert 2007*: "The Circuit resolved many issues and has clearly established the law of the case in many respects." *Frommert 2007*, 472 F.Supp.2d at 456. By the time this case had been remanded back to the District Court, it had already been determined that the applicable terms of the Plan itself did not provide for *any* offset of Plan benefits for prior distributions from the predecessor of the CBRA and the TRA. In

Frommert 2006, the Second Circuit determined that "under either an arbitrary or capricious standard or as a matter of law, that the Plan administrator's conclusion that the Plan always included the phantom account is unreasonable." *Frommert 2006*, 433 F.3d at 265-66. In *Frommert* 2006, the Second Circuit also rejected the contention that separate non-duplication terms (under Section 9.6 of the Plan) applied with respect to the prior distributions involved in this case, which had been made from Xerox's previous Profit Sharing Plan:

> As the defendants conceded at oral argument, as well as in their submission to the court, the 1989 Restatement did not specify how the Plan would account for the prior distributions of the newly created CBRA and TRA accounts, and, more significantly, made no mention of the phantom account offset or the fact that the hypothetical increased value of the prior distribution would be factored into the calculation of a rehired employee's benefits.

Id. at 258.

Having reached these conclusions, the Second Circuit remanded the case, pointing out "the ambiguous manner in which the pre-amendment terms of the Plan described prior distributions" and "suggest[ing] that [the District Court] may wish to employ equitable principles when determining the appropriate calculation and fashioning the appropriate remedy." *Id.* at 268.

The District Court then did exactly as it had been directed to do. It fashioned an equitable remedy with the stated goal of providing the plaintiffs only what they might reasonably have expected and thus avoiding an employee "windfall." The offset that was

allowed in this case — the actual amount of the distribution previously received — was not based on existing Plan terms at all, but on the court's inherent equitable authority (and the specific directions made on remand to that court). In other words, the fact that any offset was permitted did not result from applicable "terms of the plan" but from equitable notions that *limited* the recovery due to plaintiffs under literal terms of plan documents.

The second leg of Xerox's petition, asserting that the Court of Appeals should have reviewed the trial court's "interpretation of the plan" *de novo* ignores all of the foregoing history of this case. Moreover, nothing in *Bruch* and *Glenn* remotely suggests that the court's equitable authority should have been transferred to the Plan Administrator, and the Circuit Court cases cited in Xerox's Petition do not hold otherwise. For example, *Oliver v. Coca-Cola Co.*, 546 F.3d 1353 (11th Cir. 2008), involved a denial of long term disability benefits. When the Circuit Court determined that the plaintiff qualified for such benefits, no determination had been made about how those benefits should be calculated under the terms of the company's plan. Thus, the Circuit Court called for the case to be remanded to the plan administrator to make an initial application of the plan.

To briefly comment on the other cases cited by the petitioners, the decision in *Administrative Committee of Wal-Mart Health & Welfare Plan v. Willard*, 393 F.3d 1119 (10th Cir. 2004), dealt with a situation where the plan administrators filed suit for reimbursement of medical expenses from a tort settlement. In these circumstances, the deference given to the plan administrator was intimately related to the benefits paid for which reimbursement was sought. As such, the court gave deference to the plan administrator's interpretation of the plan's subrogation provision. This interpretation certainly was related to a previous administrative

determination that the participant was entitled to medical benefits under the plan.

In *Worthy v. New Orleans Steamship Association*, 342 F.3d 422 (5th Cir. 2003), the court determined whether a union local was entitled to a position on the Board of Trustees of a union association. Until the court reached a decision on that issue, no deference was given to the plaintiff union local. This is a far cry from the situation in this case, where the trial court, acting within the discretion granted to it by the Second Circuit, chose the methodology to be utilized to calculate a rehired Xerox employee's pension entitlement without implementation of the phantom account offset.

The petitioners also cite *Hunter v. Caliber System, Inc.*, 220 F.3d 702 (6th Cir. 2000), as an exception to the rule that deference should be paid to a plan administrator's benefit determination. However, the precise holding in *Hunter* is that "this case *is* about benefits, and *Firestone* [*Bruch*] requires application of the arbitrary and capricious standard if required by the language of the plan." *Hunter*, 220 F.3d at 711. Here, the Second Circuit concluded that, in the event of a conflict between an SPD and the plan or the plan administrator's interpretation of the plan, the SPD controls; the trial court was bound by that concept.

Finally, the decision in *Harte v. Bethlehem Steel Corp.*, 214 F.3d 446 (3d Cir. 2000), clearly deals with a denial of benefits where the opinion of the plan administrator ordinarily would be entitled to deference. As found by the *Harte* court, the plaintiff was "days short of being eligible for pensions which would provide greater benefits than the deferred vested pension to which he is currently entitled." *Harte*, 214 F.3d at 449. This holding is clearly inapposite to the essential holding here, where the Second Circuit found as a matter of law that the phantom account offset, the devious device employed

by Xerox to retroactively reduce the plaintiffs' pension entitlement, violated ERISA Section 204(g). *Frommert 2006*, 433 F.3d at 265-266 (observing that "[i]t is clear, under either an arbitrary or capricious standard or as a matter of law, that the Plan administrator's conclusion that the Plan always included the phantom account is unreasonable").

The portion of the *Frommert* 2008 decision addressed in Xerox's Petition involves Xerox's "challenge [to] the District Court's *remedy* for the ERISA violations [the Second Circuit] identified in [its] prior decision." *Frommert 2008*, 535 F. 3d at 117 (emphasis added). Accordingly, the question of whether the District Court was required to remand determinations to the Plan Administrator was resolved by the decision in *Frommert 2006* and was the law of the case by the time of the appeal in *Frommert* 2008. Although *Frommert 2006* "did not prohibit the District Court from remanding the case to the plan administrator, the language in [the Second Circuit's] prior opinion presumed that the District Court would craft the remedy itself." *Id.* at 118. Thus, in *Frommert* 2008, the Second Circuit declared that it "would review the District Court's decision to fashion a remedy itself instead of remanding to the plan administrator for an excess of allowable discretion." *Id.*

As determined by the Second Circuit in *Frommert 2008*, the trial court did not ignore the remedy suggested by the Plan Administrator, which has been designated as "the Plan Administrator's Approach." The Second Circuit noted that the District Court considered expert testimony regarding which of the various proposed remedies was most fair and equitable. Indeed, the Plan Administrator's Approach was deemed to be a potential alternative to the "new hire methodology" advocated by the petitioners on appeal as a substitute for the phantom account offset. It was not a determination by the Plan Administrator

to which deference should be given in accordance with the four principles stipulated in *Glenn.*

As cogently observed by the Second Circuit, the District Court "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 'phantom account' offset mechanism." *Frommert* 2008, 535 F.3d at 119. Notwithstanding, petitioners make the outrageous suggestion that deference should be given to the same administrator who violated the law when he recommends a remedy for his violation. To use an old saw, the petitioners seek not only to have the fox guard the chickens but also decide how to cook them.

Xerox's Petition cannot contend that the District Court should have remanded this case to the Plan Administrator for a new benefit determination after the case was remanded to the District Court. That claim would be inconsistent with the terms of the remand. Moreover, *Frommert 2008* points out that any such claim was waived, since it was not made at the level of the District Court. *Id.* at 118. The basis for the claims in Xerox's Petition instead is that *Bruch* and *Glenn* required the District Court to favor the litigation position of the Plan Administrator or Plan sponsor over that of plan participants when using equitable powers to craft a remedy. Of course, nothing in *Bruch* or *Glenn* suggests any such thing.

A basic tenet of Glenn is that the District Court must be able to consider factors relevant to the particular context in which the question arose. Thus, Xerox apparently is claiming that *Frommert* 2008 carved out a "broad exception" as a result of the conclusion expressed in the following single sentence of *Frommert* 2008:

> Defendants-Appellants 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.

Id. at 119.

That statement does not say that a trial court must adopt a "talismanic" refusal to consider deference in a "litigation context." It merely recognizes that an appropriate consideration of relevant factors, including conflicts that are indisputably here in this case, was left to the District Court to determine on remand. To reiterate, the District Court made an appropriate application of its equitable discretion as it was directed to do.

Moreover, the Second Circuit concluded (based on cited authorities) that it would have been futile to "remand" such a determination to plan administrators that not only were acting under a conflict but had obviously shown over a decade of litigation that they had dug in and were committed to defeating the claims of plan participants made in this case. As set forth in the "Background of the Case" portion of this brief, three separate decisions of the Courts of Appeal have determined – for three separate reasons – that the benefit determinations made by the Plan Administrator substantially shortchanged Plan Participants in the circumstances of the plaintiffs in this case.

When *Frommert* was remanded to the District Court, Xerox still insisted that Plan Participants' benefits should be reduced by the "phantom account." Indeed, such resistance continues today, as evidenced by the opinion in *Frommert 2008*. *See Frommert 2008*, 535 F.3d at 122 ("counsel for Defendants-Appellants

represented to this Court at oral argument that several of these Plaintiffs-Appellees had already received pension benefits, *albeit calculated under the 'phantom account' offset method'*) (emphasis added). This intransigence was certainly a factor which the District Court considered in exercising on remand the equitable authority given to it by the Second Circuit. The District Court undoubtedly understood that the prolongation of this litigation effectively denies benefits to Plan participants who are aging (and in some cases have died). Xerox's position on this appeal — that the District Court *must* always defer to the Plan Administrator (and thus to the plan sponsor) where, as here, a conflict of interest clearly exists and where petitioners have been found to have violated ERISA statutes designed to protect pensioners — is unsound and provides no reason for review by this Court.

CONCLUSION

Based on the foregoing, Respondents respectfully request that the Supreme Court decline to review the questions presented by the Petitioners.

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