No. __-___

In the Supreme Court of the United States

METLIFE (METROPOLITAN LIFE INSURANCE COMPANY) AND LONG TERM DISABILITY PLAN FOR ASSOCIATES OF SEARS, ROEBUCK AND COMPANY, PETITIONERS

v.

WANDA GLENN

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit erred in holding, in conflict with two other Circuits, that the fact that a claim administrator of an ERISA plan also funds the plan benefits, without more, constitutes a "conflict of interest" which must be weighed in a judicial review of the administrator's benefit determination under *Firestone Tire & Rubber* v. *Bruch*, 489 U.S. 101 (1989)?

2. Whether the Sixth Circuit erred in holding, in conflict with six other Circuits, that an ERISA claim administrator must consider and refute in its written disability determination a decision, without the underlying record, of a Social Security Administration administrative law judge?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings at the Sixth Circuit are the Petitioner-Defendants, Metropolitan Life Insurance Company, the Long Term Disability Plan for Associates of Sears, Roebuck and Company and the Respondent-Plaintiff, Wanda Glenn. There are no other parties.

RULE 29.6 STATEMENT

Petitioner, Metropolitan Life Insurance Company, is a wholly owned subsidiary of MetLife, Inc., which is a publicly traded company. No publicly held entity owns 10% or more of MetLife's stock.

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INTRODUCTION

Petitioners, MetLife (Metropolitan Life Insurance Company) and Long Term Disability Plan for Associates of Sears, Roebuck and Company, respectfully petition for a writ of certiorari to review the September 1, 2006 decision of the United States Court of Appeals for the Sixth Circuit. That decision, following prior Sixth Circuit precedent, held that (1) the fact that a claim administrator who decides whether an employee is eligible for benefits is also obligated to pay those benefits, without more, constitutes a conflict of interest which must be weighed on judicial review of the claim administrator's benefit determination, and (2) a bare opinion by an administrative law judge of the Social Security Administration, without any of the underlying testimony or exhibits, must be considered and specifically rebutted in the determination of the ERISA claim administrator. Each of these holdings conflicts with decisions in other circuits, contravenes Congress' purposes in enacting ERISA, and otherwise merits this Court's review.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit reversing the decision of the United States District Court for the Southern District of Ohio is reported at 461 F. 3d 660 and is reproduced in the Petitioners' Appendix. Pet. App. 1. The opinion of the District Court is not reported and is reproduced in the Appendix. Pet. App. 2. The opinion of the administrative law judge of the Social Security Administration regarding respondent's claim for Social Security disability benefits is reproduced in the Appendix. Pet. App. 3.

JURISDICTION

The judgment of the Court of Appeals was entered on September 1, 2006 and the time for filing this petition was extended by Justice Stevens to January 2, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The Employee Retirement Income Security Act of 1974, as amended ("ERISA") provides in pertinent part:

> 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).

29 U.S.C. § 1102(c)

> Nothing in section 1106 of this title shall be construed to prohibit any fiduciary from - . . .
>
> (3) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.

29 U.S.C. § 1108(c)

STATEMENT

On June 20, 2000, respondent Wanda Glenn applied for and received disability benefits under an ERISA-regulated plan provided by her employer, Sears Roebuck & Company. (JA 288-290[1]) MetLife approved respondent's claim for benefits under the plan's definition of disability for the first twenty-four months. Subsequently, respondent applied for Social Security disability benefits and an administrative law judge of the Social Security Administration held that she was totally disabled and entitled to Social Security benefits. (JA 322-326, 331-336) In July 2002, MetLife notified her that her benefits would be reevaluated under the plan's definition of disability applicable to claims after the first twenty-four months of benefits. (JA 170-172) Respondent submitted the Social Security administrative law judge's determination of total disability in support of her claim but failed to submit

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[1] References to the Joint Appendix to the Sixth Circuit are preceded by "JA".

the underlying medical opinions and testimony. (JA 170-172) MetLife reviewed the entire record, including the medical reports, and determined that respondent was not "completely and continuously unable to perform the duties of any gainful work." (JA 198-201) Petitioners thus terminated her long-term disability benefits.

Respondent appealed the denial of her long-term disability benefits by filing a Complaint in the United States District Court for the Southern District of Ohio pursuant to 29 U.S.C. § 1132(A). (JA 4-6) The District Court denied respondent's Motion for Judgment on the Administrative Record and granted Petitioners' Cross Motion for Judgment on the ground that Petitioners' determination was not arbitrary and capricious. (JA 104-122)

A panel of the Sixth Circuit reversed. Purporting to apply this Court's decision in *Firestone Tire & Rubber* v. *Bruch*, 489 U.S. 101 (1989), the panel first found that "we are entitled to take into account the existence of a conflict of interest that results when, as in this case, the claim administrator who decides whether an employee is eligible for benefits is also obligated to pay those benefits and to factor in the claim administrator's failure to give consideration to the Social Security Administration's determination that Glenn was totally disabled." Pet. App. 2a. The panel noted that the district court, consistent with Sixth Circuit precedent, "identified this conflict of interest as a relevant factor in determining whether an abuse of discretion had taken place." *Id.* at 10a. However, the panel faulted the district court for failing to "include any discussion of the role that MetLife's conflict of interest may have played in its decision nor appear to give that conflict any weight." *Ibid.* Accordingly, the panel found that "this factor did not receive appropriate consideration by the district court." *Ibid.*

The panel also faulted the district court (and MetLife) for failing to give what it considered appropriate weight to the

Social Security Administration's ("SSA") prior decision in respondent's favor. According to the panel: "That MetLife apparently failed to consider the Social Security Administration's finding of disability in reaching its own determination of disability does not render the decision arbitrary per se, but it is obviously a significant factor to be considered upon review." *Id.* at 15a.

The panel then reversed the District Court, holding that "MetLife's decision to deny long-term benefits in this case was not the product of a principled and deliberative reasoning process, MetLife acted under a conflict of interest and also in unacknowledged conflict with the determination of disability by the Social Security Administration." *Id.* at 24a.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's decision is the latest manifestation of a mature, deep and acknowledged conflict among the circuits on two important questions in ERISA law. The first is whether an ERISA claim administrator that also funds the plan benefits has a "conflict of interest" that must be considered on judicial review of the administrator's benefit determination under this Court's decision in *Firestone*. There the Court stated 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.'" 489 U.S. at 115 (citation omitted). Interpreting that statement, the Sixth Circuit holds, along with the Fourth, Fifth, Eighth, Ninth and Eleventh Circuits that such a possible[2] conflict

[2] Courts have variously labeled the relationships, in which an ERISA administrator is also a funder of the plan, as a possible, a potential, an inherent, an apparent, a standard, an actual and a structural conflict of interest. The Court used the term "possible conflict" in *Firestone Tire & Rubber Co.* v. *Bruch* 489 U.S. 101, 115 (1989) and this petition follows that convention.

must be considered and weighed by the court.[3] The First and Seventh Circuits, by contrast, hold that such a possible conflict, without more, is not something that a court must weigh in determining whether the administrator's decision was arbitrary.

The second question is whether a bare decision, without the underlying testimony and exhibits, of an administrative law judge of the Social Security Administration must be specifically considered and refuted in an ERISA administrator's benefit determination. Here again the circuit courts are divided in an entrenched split of authority. The Sixth Circuit holds, along with the First and Second Circuits, that such a bare decision must be considered by the ERISA administrator. The Seventh, Eighth, Ninth, and District of Columbia Circuits hold that such a bare decision need not be considered and refuted in the ERISA administrator's determination.

Each of these questions demands this Court's resolution, and this case provides an excellent vehicle with which to do so.

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[3] This possible conflict is applied in a number of ways. Some circuits find that it changes the standard of review. *E.g. Carolina Care Plan Inc.* v *McKenzie* 467 F.3d 383, 386 (4th Cir. 2006). Other circuits find that it changes the burden of proof. E.g. *Fought* v. *UNUM Life Ins. Co. of Am.*, 379 F.3d 997, 1006-7 (10th Cir. 2004). Still other circuits, as in this case, hold that it is evidence of an abuse of discretion by the ERISA administrator. E.g. *Darland* v. *Fortis Benefits Ins. Co.,* 317 F.3d 516, 527 (6th Cir. 2003), *overruled in part by Black & Decker Disability Plan* v. *Nord*, 538 U.S. 822, 834, 123 S. Ct. 1965, 155 L.Ed.2d 1034 (2003). The question presented in this petition is not what effect a possible conflict should have but whether a possible conflict of interest should have any effect at all.

I. This Court Should Review And Reverse The Sixth Circuit's Holding That The Fact That An ERISA Claims Administrator Also Funds the Benefits, Without More, Creates a Conflict That Must Be Considered and Weighed on Judicial Review.

As noted, the Sixth Circuit holds that there is an actual conflict of interest when an insurance company both decides whether an employee is eligible for benefits and pays those benefits and that this conflict should be taken into account as a "factor in determining whether the decision was arbitrary and capricious." *Darland* v. *Fortis Benefits Ins. Co.,* 317 F.3d 516, 527 (6th Cir. 2003), *overruled in part by Black & Decker Disability Plan* v. *Nord*, 538 U.S. 822, 834 (2003); *Calvert* v. *Firstar Finance Co.,* 409 F.3d 286, 292-3 (6th Cir 2004); *Peruzzi* v. *Summa Med. Plan,* 137 F.3d 431, 433 (6th Cir. 1998). Following those precedents in this case, the Sixth Circuit found that it was "entitled to take into account the existence of a conflict of interest that results when as in this case, the claim administrator who decides whether an employee is eligible for benefits is also obligated to pay those benefits." Pet. App. 10a. The court thus held that this fact, standing alone, creates a conflict of interest that must be considered and weighed on judicial review.

A. The Sixth Circuit's Rule Squarely Conflicts with Decisions in Two Other Circuits.

There is a clear split among the circuits on this question. The First and Seventh Circuits hold that the fact that an administrator who decides whether an employee is eligible for benefits is also obligated to pay those benefits, without more, does not create a conflict that must be "weighed" as part of the judicial review described in *Firestone*. As the First Circuit has explained, the natural potential for a conflict of interest in that situation is countered by other market forces (employers' desires to please their employees) which offset the risk that the insurer will be "overly tight-fisted."

Wright v. *R. R. Donnelley & Sons Co. Group Benefits Plan*, 402 F.3d 67, 74-5 & n. 5 (1st Cir. 2005) (recognizing and commenting on the conflict in the circuits).

Similarly, the Seventh Circuit held in *Mers* v. *Marriott International Group Accidental Death and Dismemberment Plan* 144 F.3d 1014, 1020, (7th Cir 1998), "We presume that a fiduciary is acting neutrally unless a claimant shows by providing specific evidence of actual bias that there is a significant conflict… The existence of a potential conflict is not enough…. Mers has not established an actual conflict or a significant one. In fact, she offers no evidence that a conflict exists other than her theory of an inherent [potential] conflict. This production is not enough to show an actual bias." (Citations omitted)

The Seventh Circuit reached the same result, on similar analysis, in *Chojnacki* v. *Georgia Pacific*, 108 F.3d 810 (7th Cir. 1997). Speaking of alleged "structural conflicts" arising from claims administrators that play dual roles, the Court observed:

> "We have rejected similar claims of conflict of interest. In *Chalmers* v. *Quaker Oats Co.*, for example, an unfunded ERISA plan was administered by a committee made up of the corporation's officers. 61 F.3d 1340, 1344 (7th Cir.1995). We found no conflict of interest, noting that ERISA endorses the idea that a corporate officer can also serve as a plan administrator. We explained that in such cases the 'impact on a company's welfare of granting or denying benefits under a plan will not be sufficiently significant as to threaten the administrator's partiality.' *Id.* In support, we pointed out that Quaker Oats' annual revenue was over $6 billion, so the company was unlikely to "flinch at paying out $240,000." *Id.* Finally, we noted that companies who develop reputations for being tight-fisted when it comes to paying benefit claims

> might have trouble attracting new talent and be forced to pay higher wages. *Id."*

Thus, in all three decisions – *Mers, Choimacki and Chalmers* -- the Seventh Circuit concluded that a merely structural conflict does *not* establish the kind of "conflict of interest" that must be weighed in the judicial review contemplated by *Firestone*.

These decisions, like the First Circuit's decision in *Wright*, obviously conflict with the Sixth Circuit's holding here that the possible conflict of a claims administrator who also funds plan benefits is enough to establish "the existence of a conflict of interest" for purposes of judicial review under *Firestone*. Pet. App. 10a. If the Sixth Circuit had followed the rulings of the First and Seventh Circuits, it could not have reversed the district court's decision based on its view that petitioner's "dual roles" established a conflict of interest.

B. Six Other Circuits Also Consider An ERISA Administrator's Dual Roles As Evidence Of A Conflict of Interest

The Sixth Circuit's holding is consistent with rulings in six other circuits, thereby establishing a 2-7 circuit split on this issue. Specifically, the Third, Fourth, Fifth, Eighth, Ninth and Eleventh Circuits hold that the fact that an ERISA administrator also funds the plan, without more, creates a conflict of interest that must be considered and weighed in a judicial review. For example, the Fourth Circuit in *Carolina Care Plan Inc.* v. *McKenzie* 467 F.3d 383, 386 (4th Cir. 2006) stated that "We have consistently reduced the deference afforded to administrators based on the "mere" fact that they also insure the plan and thus profit by denying claims." Thus, these circuits hold that the "mere" fact that the funding source is also the claim administrator is sufficient to require consideration and "weighing" of a conflict of interest on judicial review under *Firestone*. *Accord Pinto v. Reliance*

Standard Life Ins. Co., 214 F.3d 377, 393 (3rd Cir. 2000); *Wildbur* v. *ARCO Chem. Co.,* 974 F.2d 631, 638-42 (5th Cir. 1992); *Woo* v. *Deluxe Corp.*, 144 F.3d 1157, 1161 (8th Cir. 1998); *Abatie* v. *Alta Health & Life Ins. Co.* 458 F.3d 955, 968 (9th Cir. 2006); *Fought* v. *UNUM Life Ins. Co. of Am.*, 379 F.3d 997, 1006-7 (10th Cir. 2004); *Brown* v. *Blue Cross & Blue Shield of Ala., Inc.,* 898 F.2d 1556, 1566-67 (11th Cir. 1990)

To be sure, these circuits disagree among themselves as to the *effect* of such a conflict on the nature and scope of judicial review (a disagreement that is not the subject of the present petition). As noted, in the Fourth Circuit, such evidence simply "reduce[s] the deference afforded to administrators." 467 F.3d at 386. In the Tenth and Eleventh Circuits, by contrast, a possible conflict of interest shifts the burden to the claim administrator to prove that its decision was not affected. *Fought* v. *UNUM Life Ins. Co. of Am.*, 379 F.3d 997, 1006-7 (10th Cir. 2004) (holding that administrators acting under a possible conflict of interest have the burden of showing that their decision to deny disability benefits is supported by substantial evidence); *Brown* v. *Blue Cross & Blue Shield of Ala., Inc.,* 898 F.2d 1556, 1566-67 (11th Cir. 1990) (holding the decision of a plan administrator's with a possible conflict is presumptively void and shifting burden of proof to insurer). In the Third, Fifth and Eighth Circuits, the possible conflict triggers a sliding scale standard of review in which the possible conflict is considered as evidence of an abuse of discretion. *Pinto v. Reliance Standard Life Ins. Co.,* 214 F.3d 377, 393 (3rd Cir. 2000); *Wildbur* v. *ARCO Chem. Co.,* 974 F.2d 631, 638-42 (5th Cir. 1992); *Woo* v. *Deluxe Corp.*, 144 F. 3d 1157, 1161 (8th Cir. 1998). The Ninth Circuit, while rejecting the sliding scale analysis, requires the district court to consider the "inherent conflict" arising from an insurer's dual roles as a factor in determining how much deference to afford the administrator. *Abatie* v. *Alta Health & Life Ins. Co.,* 458 F.3d 955, 968 (9th Cir. 2006) ("A district court, when faced with all the facts and circumstances, must decide in

each case how much or how little to credit the plan administrator's reason for denying insurance coverage. An egregious conflict may weigh more heavily (that is, may cause the court to find an abuse of discretion more readily) than a minor, technical conflict might.") [4]

However, all of these circuits agree, contrary to the rulings of the First and Seventh Circuits discussed above, that the mere existence of these dual roles constitutes a conflict of interest that must be "weighed" when a court conducts the review required by *Firestone.* This conflict, which is ultimately a conflict over the proper interpretation of that decision, could hardly be more stark.

C. The Sixth Circuit's Holding is Incorrect.

As noted, the Sixth Circuit relied in part upon the petitioners' "dual function" to find that petitioners' disability denial was an abuse of discretion. That conclusion, however, and similar conclusions by the other six circuits that follow this approach, is incorrect for two fundamental reasons.

First, the Sixth Circuit's approach contravenes Congressional purposes in enacting the statute. Congress was aware of the widespread practice of appointing plan funders as claims administrators and nevertheless authorized employers to appoint claims administrators that are also funders of

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[4] The Second Circuit has gone both ways on this question. Compare, *e.g., Pagan* v. *NYNEX Pension Plan*, 52 F.3d 438, 443 (2d Cir. 1995), with *Jordan* v. *Retirement Committee of Renssalaer Polytechnic Inst.*, 46 F.3d 1264, 1274 (2d. Cir. 1995)..

If the Court ruled that the kind of potential conflict or structural conflict at issue in this case—and present in many others—is not a "conflict of interest" for purposes of a *Firestone* analysis, many of these cases could easily be resolved solely on that basis, without a court's having to reach the issue of what *effect* the alleged conflict may have on the court's review.

the plan. Indeed, ERISA specifically provides that "[a]ny 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)." 29 U.S.C. § 1102(c). Congress also explicitly provided in, 29 U.S.C. § 1108(c)(3), that 29 U.S.C. § 1106 (specifying prohibited transactions) shall not be construed so as "to prohibit any fiduciary . . . from serving as a fiduciary in addition to being an officer, employee agent, or other representative of a party in interest." ERISA thus envisions that a fiduciary "may 'wear two hats,' one of a trustee or fiduciary and one of a settlor." *Fought* v. *UNUM Life Ins. Co. of Am.*, 379 F.3d 997, 1005 (10th Cir. 2004), *cert. denied*, 544 U.S. 1026 (2005). As stated by the Court in *Pegram* v. *Herdrich,* 530 U.S. 211, 225 (2000), "…the analogy between ERISA fiduciary and common law trustee becomes problematic. This is so because the trustee at common law characteristically wears only his fiduciary hat when he takes action to affect a beneficiary, whereas the trustee under ERISA may wear different hats."

In spite of the language of ERISA, some circuits have attempted to discourage employers from appointing claims administrators that also fund the plan. As the Eleventh Circuit puts it, "one reason for limiting the deference when the fiduciary suffers a conflict of interest is to discourage arrangements where a conflict arises." *Brown* v. *Blue Cross & Blue Shield of Alabama, Inc.,* 898 F.2d 1556, 1565 (11th Cir. 1990). In other words, even though Congress specifically permitted employers to appoint ERISA claim administrators who are also funders of the benefit plan, some courts are using treating that practice as a "conflict of interest" in an effort to discourage employers from making those appointments.

Such efforts contravene Congress' purpose. ERISA was passed not only to protect the rights of beneficiaries but also

to encourage employers to create and maintain voluntary benefit plans, *see* H. R. Rep. No. 533, 93d Cong., 2nd Sess. 1, reprinted in 1974 U.S.C.C.A.N. 4639, *Varity Corp.* v. *Howe,* 516 U.S. 489, 497 (1996), and "to maintain the premium costs of [the ERISA] system at a reasonable level." 29 U.S.C. § 1001b(c)(5). This Court has emphasized both "the public interest in encouraging the formation of employee benefit plans" and "the need for prompt and fair claims settlement procedures." *Pilot Life Ins. Co.* v. *Dedeaux,* 481 U.S. 41, 54 (1987), overruled in part by *Ky. Ass'n of Health Plans, Inc.,* v. *Miller*, 538 U.S. 329 (2003). In *Varity Corp.*, 516 U.S. at 497, the Court pointed out that courts should take into account Congress's "desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans." Congress permitted employers to appoint claims administrators that also fund the plan benefits to encourage employers to adopt voluntary employee benefit plan. The Sixth Circuit rule penalizes employers merely for appointing a claim administrator that also funds the benefit plan even though the law specifically authorizes that appointment.

Second, the Sixth Circuit's approach–like that in the other circuits that also consider the mere presence of "two hats" as creating a conflict—ignores economic reality. For example, the benefit requested in this case compared to the annual income of MetLife is negligible. Recognizing this, a number of courts have rejected the categorical generalization that claim administrators will act in their own self-interest in making benefit decisions. As the Seventh Circuit put it in a case involving this petitioner:

> Although MetLife acts as both a claim administrator and a funder of the plan, that factor, standing alone, does not constitute a conflict of interest. *See Chalmers* v. *Quaker Oats Co.,* 61 F.3d 1340, 1344 (7th Cir. 1995). Indeed, it has

> not been demonstrated that MetLife has a direct stake, in terms of its own financial health, in the outcome of this issue of interpretation. *See Cuddington* v. *Northern Ind. Pub. Serv. Co.*, 33 F.3d 813, 816 (7th Cir. 1994) (refusing to find a conflict on a similar theory absent "specific evidence showing that the [claim administrator] had a conflict of interest").

Cozzie v. *Metropolitan Life Ins. Co.*, 140 F.3d 1104, 1108 (7th Cir. 1998).

By contrast, the Sixth Circuit's holding wrongly stereotypes claim administrators by assuming that they will inevitably place their own putative short-run interest over the interest of the plan beneficiary. The assets and annual revenues of most insurance companies and employers that serve as claim administrators exceed the amount potentially awarded in a benefit claim by a huge margin. There is no legitimate reason to make a categorical assumption that a claim administrator will deny a claim to make a contribution to the company's annual profits. In fact, the company may not have any self-interest. As the Seventh Circuit noted, an insurance company that serves as a claim administrator "may not have any stake in the decision. . . . For many large firms, health and disability insurance on their labor forces is retrospectively rated. This means that the employer agrees to reimburse the insurer for all outlays, plus a loading charge and administration fee." *Perlman* v. *Swiss Bank Corp. Comprehensive Disability Protection Plan*, 195 F.3d 975, 981 (7th Cir. 1999). For that reason, "[w]e have no reason to think that [the insurance company's] benefits staff is any more 'partial' against applicants than are federal judges when deciding income-tax cases." *Id.*

The Sixth Circuit was wrong to ignore these considerations in concluding that the mere fact that an ERISA administrator is statutorily permitted to "wear two hats" is enough

to establish a conflict of interest that must be weighed during judicial review of the administrator's benefit decision.

D. The Court's Resolution Of This Issue Is Vital And This Case Is An Ideal Vehicle For Resolving It.

This Court's resolution of the first question presented is vital for three reasons. First, it will enable the Court to achieve one of ERISA's "principal" goals, which is to "establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits." *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 148 (2001), quoting *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 9 (1987). When it enacted ERISA, Congress intended,

> [T]o ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflict directives . . . requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.

New York State Conference of Blue Cross & Blue Shield Plans v. *Travelers Ins. Co.*, 514 U.S. 645, 656-657 (1995), quoting *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 142 (1990).

Despite this Congressional purpose, the Sixth Circuit applies a conflict of interest rule directly contrary to the conflict of interest rule used by other circuit courts. "Uniformity is impossible" if different circuits subject decisions by administrators to different legal obligations. *Engelhoff*, 532 U.S. at 148. Because of the split in the circuits, an administrator of a national benefit plan may have a benefit decision accepted in the First or Seventh Circuits and have the same benefit decision under the same plan rejected by the Sixth Circuit. Only this Court can bring resolution to this issue.

Second, as acknowledged by the circuit courts, the issues are clear and well developed and the conflict is wide, exten-

sive and mature. *Wright* v. *R. R. Donnelley & Sons Co. Group Benefits Plan*, 402 F.3d 67, 75 (1st Cir. 2005); *Pinto* v. *Reliance Std. Life Ins. Co.*, 214 F.3d 377, 383 (3d Cir. 2000)

Third, there cannot be any doubt that this conflict in the circuits is desperately in need of resolution. During the past two decades, hundreds of judges have labored over whether an ERISA administrator's status as a plan funder taints the administrator's benefit decision. The lower courts have expressed a desire for further guidance. As stated in *Pinto* v. *Reliance Std. Life Ins. Co.*, 214 F.3d 377, 383 (3d Cir. 2000), "courts have struggled to … to determine both what constitutes a conflict of interest and how a conflict should affect the scrutiny of an administrator's decision to deny benefits." Indeed, the D.C. Circuit has recently commented in *SBC Pension Benefit Plan - Non Bargained Program*, 366 U.S. App. D.C. 1, 8 (D.C. Cir. 2005), that this Court's "opaque direction about how courts should review discretionary benefits denials by potentially conflicted [plan] fiduciaries 'in ERISA cases has' bedeviled the federal courts 'ever since.'" *Firestone* was decided. (citation omitted).

Given the conflict among the circuits, the desire for further guidance, and the vast amount of time being spent on these issues by the circuit and district courts, there is no reason to let this issue remain unresolved any longer.

This case is also a compelling vehicle for resolution of the conflict. The Sixth Circuit's reasoning is clear, the relevant facts are well-developed and the issues clearly defined. Accordingly, this case provides an ideal vehicle by which the Court can choose among the various approaches and, in so doing, resolve the circuit conflict outlined above.

II. The Sixth Circuit's Holding That A Claim Administrator Must Specifically Consider In Its Determination A Bare Decision By The Social Security Administration Also Warrants Review.

The Sixth Circuit's holding that an ERISA administrator must give weight to a bare decision by an administrative law judge of the Social Security Administration independently merits this Court's review. In this case, the Sixth Circuit found that Petitioners failed to address "Social Security's contrary determination of Glenn's status." Pet. App. 12a. Yet, the only evidence before the Court or the administrator was the decision of the administrative law judge of the Social Security Administration. Pet. App. 3. Respondent did not provide the underlying testimony and exhibits of the Social Security hearing to the claim administrator.[5] Nevertheless, the Sixth Circuit overturned the ERISA administrator's benefits decision, holding that "… an ERISA plan administrator's failure to address the Social Security Administration's finding that the claimant was 'totally disabled' is yet another factor that can render the denial of further long-term disability benefits arbitrary and capricious." *Id.* at 669. In addition, the Circuit held that "MetLife obviously should have given appropriate weight to that deter-

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[5] There is no requirement that the claim administrator acquire Social Security Administration transcripts and exhibits. *Vega* v. *National Life Services,* 188 F. 3d 287, 298 (5th Cir 1999); *Donato* v. *Metropolitan Life Ins. Co.,* 19 F. 3d 375, 380 (7th Cir. 1994) (The ERISA administrator was aware of the SSA determination but did not have the underlying record. The Circuit held "…although MetLife was apprised of …[the SSA]… determination, the Social Security file was never before MetLife in making Ms. Donato's benefits determination; and MetLife was bound only to consider what evidence and information it had before it."), *disapproved of in part by Diaz* v. *Prudential Ins. Co. of America*, 424 F. 3d 635, 638-9 (7th Cir. 2005)

mination." *Id*. at 667 This holding follows other decisions of the Sixth Circuit holding that in denying a disability claim, the ERISA administrator must specifically consider in its decision a Social Security Administration disability determination. *Darland* v. *Fortis Benefits Ins. Co*., 317 F.3d 516, 530 (6th Cir. 2003); *Calvert* v. *Firstar Fin., Inc.*, 409 F.3d 286, 294 (6th Cir. 2005). [6]

A. The Sixth Circuit's Holding that A Bare Determination By The Social Security Administrator Of Total Disability is Evidence Which Must Be Considered by An ERISA Administrator Conflicts with Decisions in Four Other Circuits.

The Sixth Circuit's approach, however, conflicts with decisions in four other circuits. Specifically, the D.C., Seventh, Eighth, and Ninth Circuits hold that a bare decision by the Social Security Administration has *no* evidentiary weight.

For example, the D.C. Circuit in *Block* v. *Pitney Bowes, Inc.* 952 F.2d 1450, 1455-6 (D.C. Cir. 1992), refused to give any weight to a bare Social Security decision. In that case, the employee argued that the Social Security Administration's award of disability benefits to him demonstrated the arbitrariness of the ERISA administrator's final decision. But the D.C. Circuit stated that "[t]he Social Security award, however, rested at least in part on medical reports never submitted to the Committee. Courts review ERISA-plan benefit decisions on the evidence presented to the plan administrators, not on a record later made in another fo-

[6] However, another Sixth Circuit panel in a case decided after *Darland*, but before *Calvert* and before this case, relied on *Black & Decker Disability Plan v. Nord* to conclude that the rule in *Darland* is no longer viable because it relied on the "treating physician rule." *Whitaker* v. *Hartford Life & Accident Ins. Co.*, 404 F.3d 947, 949 (6th Cir. 2005).

rum. . . . We therefore accord no weight to the Social Security Administration's determination." *Ibid*.

Similarly, in the Seventh Circuit case of *Donato* v. *Metropolitan Life Ins. Co*., 19 F.3d 375, 380 (7th Cir. 1994), an ERISA administrator was given a decision of total disability from the Social Security Administration. The administrator found that the employee was not disabled and did not address the Social Security Administration determination in his decision. The Seventh Circuit rejected the notion that courts must treat bare decisions by the Social Security Administrator as evidence in an ERISA disability determination: "[a]lthough MetLife was apprised of [the Social Security Administration's] contrary [disability] determination, the Social Security file was never before MetLife in making Ms. Donato's benefits determination, and MetLife was bound only to consider what evidence and information it had before it." *Ibid.* Thus, neither the administrator nor the reviewing court was required to give any weight to the SSA's decision.

The Eighth Circuit reached the same conclusion in *Conley* v. *Pitney-Bowes* 176 F.3d 1044, 1050 (8th Cir. 1999). There the court upheld a district court decision that an award of social security benefits "was not entitled to any particular weight in the overall consideration" of a disability claim." And the Eighth Circuit in fact gave that award no weight at all.

Similarly, the Ninth Circuit in *Madden* v. *ITT Long Term Disability Plan,* 914 F.2d 1279, 1285 (9th Cir. 1990), held that an ERISA administrator's failure to consider a determination of disability under the Social Security Administration was not arbitrary and capricious, where "all medical evidence submitted to [the plan administrator] and in the record" showed that the claimant was not "totally disabled" by standard employed in the plan. Again, the Ninth Circuit

did not require the administrator or the reviewing court to give any weight to the SSA's decision.

All of these decisions conflict with the Sixth Circuit's holding that a decision by the Social Security Administration, without more, is a fact that must be considered and weighed both by the administrator and the reviewing court. If the Sixth Circuit had followed the rulings of these other circuits, it could not have reversed the district court's decision on the basis of the administrator's failure to consider the SSA's finding of disability.

B. Two Other Circuits Hold, With The Court Below, that a Bare Determination by the Social Security Administration is Evidence Which the ERISA Administrator Must Consider in a Benefit Denial.

The Sixth Circuit's position is also supported by decisions in the First and Second Circuits, thereby creating a 4-3 split of authority on this issue. Specifically, the First and Second Circuits both squarely hold that a disability decision by the Social Security Administrator is evidence to be considered by the ERISA administrator.

For example, in *Pari-Fasano* v. *ITT Hartford Life & Accident Ins. Co.,* 230 F.3d 415, 420 (1st Cir. 2000), the First Circuit held that "…a Social Security benefits decision might be relevant to an insurer's eligibility determination, [although] it should not be given controlling weight…" Similarly, in *Paese* v. *Hartford Life and Accident Ins. Co.,* 449 F.3d 435, 442 (2nd Cir. 2006), the Second Circuit held that "[t]he court acted well within its discretion when it considered the SSA's findings as some evidence of total disability, even though they were not binding on the ERISA Plan, and even though the SSA's definition of disability may differ from that in the Sequa Plan."

C. The Sixth Circuit's Holding Contravenes Congressional Goals and is Otherwise Incorrect.

Like the Sixth Circuit's holding on the effect of an insurer's dual roles, the Circuit's requirement that ERISA administrators consider and refute bare disability determinations by the Social Security Administration is also wrong for several reasons.

1. First, the Sixth Circuit's approach contravenes Congress's goals in enacting ERISA. Decisions of the Social Security Administration are based upon different statutory law, administrative procedures and evidentiary rules that do not apply to ERISA administrators. That fact was recently recognized by this Court in deciding whether the Social Security Administration's treating physician rule should be transported into ERISA cases:

> The Social Security Act creates a nationwide benefits program funded by Federal Insurance Contributions Act payments … and superintended by the Commissioner of Social Security. To cope with the "more than 2.5 million claims for disability benefits [filed] each year," … the Commissioner has published detailed regulations governing benefits adjudications. …Presumptions employed in the Commissioner's regulations "grow out of the need to administer a large benefits system efficiently." …
>
> In contrast to the obligatory, nationwide Social Security program," nothing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan." … Rather, employers have large leeway to design disability and other welfare plans as they see fit. …

Black & Decker v. *Nord, supra,* 538 U.S. at 833 (2003). The Sixth Circuit's approach ignores the critical differences between these two systems.

In addition, a fiduciary, such as petitioner, owes a duty not just to the participant seeking benefits, but also to the plan as a whole. *Varity Corp* v. *Howe,* 516 U.S. 489, 513 (1996); 29 U.S. C. § 1104(a)(1)(A). Plan fiduciaries thus cannot pay all claims, because if they do, premiums or contributions will have to rise – increasing costs to all participants. ERISA was passed not only to protect the rights of beneficiaries but also to encourage employers to create and maintain voluntary benefit plans, see H.R Rep. No. 553, 93rd Cong., 2nd Sess. 1 reprinted in 1974 U.S.C.C.A.N. 4639; *Varity* v. *Howe,* 516 U.S. 489, 497 (1996) and to maintain premium cost of [the ERISA] system at a reasonable level." 29 USC. § 1001b (c)(5). Here again, the approach of the Sixth Circuit and its allies ignores this critical duty that the law imposes on plan administrators.

2. The Sixth Circuit's approach also ignores, not only "the public interest in encouraging the formation of employee benefit plans," but also "the need for prompt and fair claims settlement procedures." *Pilot Life Ins. Co.* v. *Dedeaux,* 481 U.S. 41, 54 (1987). For example, in *Varity Corp*., 516 U.S. at 497, the Court pointed out that courts should take into account Congress's "desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans."

In this case the administrator was aware of but did not comment on the disability determination of the administrative law judge. While the underlying testimony and evidence may have been of some value, the bare decision of the administrative law judge is meaningless considering the differences in the laws, procedures and evidentiary rules between the ERISA and Social Security regimes. And requiring claim administrators to address and refute Social Security Administration decisions in such circumstances would introduce additional costs and delay.

This Court's decision in *Black & Decker* v. *Nord* rested, in part, on these very concerns. There the Court addressed the issue of whether the ERISA administrator must specifically consider in writing the opinion of the treating physician. The Court concluded that reviewing courts may not "impose on plan administrators a discrete burden of explanation when they credit reliable evidence that conflicts with a treating physician's evaluation." *Black & Decker* at 834. A bare determination by the Social Security Administration has less evidentiary value than a treating physician's opinion and therefore should not require specific consideration in the ERISA administrator's written opinion.

For all of these reasons, the Sixth Circuit's decision is wrong on the merits, and should be reviewed and reversed.

D. The Present Circuit Conflict is Intolerable and Should Be Resolved in This Case.

As with the first question presented, there are compelling reasons for this Court to resolve the confusion and conflict over the proper treatment of a Social Security Administration decision.

First, such a resolution will foster and protect the uniformity that is central to the entire ERISA scheme – uniformity that is currently absent because different circuits impose different standards on ERISA administrators. Indeed, at least two circuits have issued conflicting decisions as to whether petitioner MetLife, as a claims administrator for similar plans, must afford deference to the opinions of administrative law judges of the Social Security Administration. Compare *Donato* v. *Metropolitan Life Ins. Co.*, 19 F.3d 375, 380 (7th Cir. 1994) (in denying disability claim, MetLife was not required to accept as evidence, or explain its rejection of, SSA decision granting disability benefits) with *Glenn*, 461 F.3d 660 (6th Cir. 2006) (in denying disability

claim, MetLife abused its discretion by not considering and refuting a SSA decision granting disability benefits).

The Sears plan at issue in this case, like many other ERISA plans, is national in scope and MetLife must administer claims on a nationwide basis. Yet here too the current split of authority on the status of Social Security Administration decisions forces administrators of national plans to use different standards based upon the circuit court that has jurisdiction. This conflicts with the ERISA mandate for uniform plan administration. *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 383-84 (2002). As this Court has put it, "Uniformity is impossible … if plans are subject to different legal obligations in different states." *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 148 (2001).

Second, resolution of this question will remove an unfair and intolerable burden on ERISA administrators. As noted, the decision below requires administrators to accept or refute SSA decisions without the benefit of the underlying SSA record. The decision thereby assumes that all SSA disability cases are based on the same disability, the same definition of disability, and the same medical and vocational evidence that the claimant submitted to the ERISA claim administrator. But without the benefit of the underlying testimony and evidence presented at the SSA hearing, these assumptions may prove faulty.

Indeed, in this case, the administrative law judge did not have the benefit of the treating physician's March 13, 2002 report— in which he opined that the claimant was "able to work in a sedentary physical exertion level occupation"— because the administrative law judge's hearing on the SSA claim was held on the very same day that the report was issued. And, while the ERISA administrator was aware of the administrative law judge's decision, the administrator did not know what underlying testimony or medical records were presented in the SSA case.

Third, plenary review will enable the Court to remove the intolerable and senseless inconsistency between the treatment of SSA administrators and treating physicians. In deciding SSA disability claims, administrative law judges are required to give deference to the opinions of treating physicians. However, the Court has concluded that such deference is not required of administrators deciding ERISA based claims. *Black & Decker* v. *Nord, supra,* 538 U.S. at 833 (2003). Thus in the First, Second and Sixth Circuits, in spite of the ruling of this Court, the ERISA administrator is required to specifically refute a Social Security Administration decision based solely on a treating physician's opinion even though the administrator has no obligation to refute the treating physician's opinion itself.

The additional burdens imposed upon ERISA administrators by the decision below make it much more difficult for administrators to render consistent and streamlined claims administration throughout the United States. Under the Sixth Circuit's rule, if ERISA administrators are to make accurate and effective benefits decisions, they will have to undertake the burden of acquiring the underlying SSA record. This not only increases the time it will take to make benefits decisions, but it shifts the burden from the claimant – to provide all of the relevant evidence that supports her claim – to the ERISA administrator.[7]

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[7] This inconsistency, moreover, is not required by the pertinent regulations. ERISA and its Department of Labor ("DOL") regulations were written to provide a balance between plan flexibility and enrollee confidence in disability plans and efficiency in the disability insurance and labor markets. Yet there are no provisions in ERISA that require an ERISA administrator to accept or reject SSA decisions. ERISA regulations are written "…to preserve the greatest flexibility possible for designing and operating claims processing systems consistent with prudent administration of the plan." (Benefit Claims Procedure Regulation, Question B-4;

* * * * *

Employers do not have to provide employee disability plans. One purpose of ERISA was to encourage employers to adopt such plans. The rules imposed in this case cause inconsistent decisions from ERISA administrators and will discourage employers from establishing or maintaining long-term disability plans because of the added costs of administration and risks of reversal in court.

CONCLUSION

The petition should be granted.

Respectfully submitted

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http://www.dol.gov/ebsa/FAQs/faq_claims_proc_reg.html)
The DOL has the authority under ERISA to adopt regulations governing the administration of benefit claims for disability plans. While the DOL, as recently as 2001, issued numerous new and revised ERISA regulations, it has never required ERISA administrators to adopt, or explain their rejection of SSA decisions.