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No. 08-810

IN THE
Supreme Court of the United States

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

Petitioners,

v.

PAUL J. FROMMERT, ET AL.,

Respondents.

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

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

Page

I. THE PLAN ADMINISTRATOR'S INTERPRETATION OF THE PRE-AMENDMENT PLAN TERMS IS ENTITLED TO DEFERENCE. 1

A. The Plan Administrator Did Not Interpret The Same Plan Terms On Remand. 2

B. Respondents' Proposed "Same Plan Terms" Exception To *Firestone* Deference Lacks Merit. 5

1. Trust Law Supports *Firestone* Deference. 6

2. ERISA's Objectives Support *Firestone* Deference. 9

C. Respondents' Proposed "Litigation Position" Exception To *Firestone* Deference Lacks Merit. 12

II. ABSENT DEFERENCE TO THE PLAN ADMINISTRATOR, THE DISTRICT COURT'S DECISION SHOULD HAVE BEEN REVIEWED *DE NOVO*. 14

A. The Court Of Appeals Should Not Have Deferred To The District Court's Plan Interpretation. 15

B. The District Court Did Not Rely On Extrinsic Evidence In Interpreting The Plan. 19

C. The District Court's Interpretation Of The Plan Cannot Be Sustained Under *De Novo* Review 20

III. THE PLAN ADMINISTRATOR'S INTERPRETATION IS CONSISTENT WITH ERISA'S DISCLOSURE REQUIREMENTS. 25

A. The "Actuarial Equivalence" Offset Is Significantly Different From The Reconstructed Account Methodology. 26

B. Disclosure Issues Do Not Support Affirmance. 28

CONCLUSION 31

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Alessi v. *Raybestos-Manhattan, Inc.*,
451 U.S. 504 (1981) 26

Auer v. *Robbins*,
519 U.S. 452 (1997) 13

Berry v. *Ciba-Geigy Corp.*,
761 F.2d 1003 (4th Cir. 1985) 9

Blessing v. *Freestone*,
520 U.S. 329 (1997) 25

Carrabba v. *Randalls Food Markets, Inc.*,
145 F. Supp. 2d 763 (N.D. Tex. 2000)............ 17

Central States, Southeast & Southwest Areas Pension Fund v. *Central Transport, Inc.*, 472 U.S. 559 (1985)................. 1

City of Clinton v. *Moffitt*,
812 F.2d 341 (7th Cir. 1987) 18

Colton v. *Colton*
127 U.S. 300 (1888) 7

Eaton v. *Eaton*,
132 A. 10 (1926)... 6, 8

Firestone Tire & Rubber Co. v. *Bruch*,
489 U.S. 101 (1989) .... *passim*

Gridley v. *Cleveland Pneumatic Co.*,
924 F.2d 1310 (3d Cir. 1991) 25

Herrmann v. *Cencom Cable Associates, Inc.*, 978 F.2d 978 (7th Cir. 1992) 29

Jensen v. *SIPCO, Inc.*,
38 F.3d 945 (8th Cir. 1994) 28-29

Kress v. *Food Employers Labor Relations Association*, 391 F.3d 563 (4th Cir. 2004) 29

Marrs v. *Motorola, Inc.*,
577 F.3d 783 (7th Cir. 2009) 11

McCarthy v. *Dun & Bradstreet Corp.*,
482 F.3d 184 (2d Cir. 2007) 29

Mello v. *Sara Lee Corp.*,
431 F.3d 440 (5th Cir. 2005) 25

Mers v. *Marriott International Group Accidental Death & Dismemberment Plan*, 144 F.3d 1014 (7th Cir. 1998) 28

Metropolitan Life Insurance Co. v. *Glenn*
128 S. Ct. 2343, 2351 (2008) .... *passim*

Otten v. *Stonewall Insurance Co.*,
511 F.2d 143 (8th Cir. 1975) 18

Pompano v. *Michael Schiavone & Sons, Inc.*, 680 F.2d 911 (2d Cir. 1982) 29-30

Ross v. *Rail Car America Group Disability Income Plan*, 285 F.3d 735 (8th Cir. 2002)....... 17

Smiley v. *Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996) 13

Stahl v. *Tony's Building Materials, Inc.*, 875 F.2d 1404 (9th Cir. 1989) 29

Stamper v. *Total Petroleum, Inc. Retirement Plan*, 188 F.3d 1233 (10th Cir. 1999) 29, 30

White v. *Sundstrand Corp.*, 256 F.3d 580 (7th Cir. 2001) 24

STATE CASES

Bodine v. *Webb*, 992 S.W.2d 672 (Tex. App. 1999) 17

Gardner v. *O'Loughlin*, 84 A. 935 (N.H. 1912) 8

Schofield v. *Commerce Trust Co.*, 319 S.W.2d 275 (Mo. Ct. App. 1958) 8

Stallard v. *Johnson*, 116 P.2d 965 (Okla. 1941) 8

State v. *Rubion*, 308 S.W.2d 4 (Tex. 1958) 7

Woodward v. *Dain* 85 A. 660 (Me. 1913) 8

FEDERAL STATUTES AND REGULATIONS

29 U.S.C. 1104(a)(1) 11

29 U.S.C. § 1002(23) 21-22

29 U.S.C. § 1022 25

29 U.S.C. § 1054(c)(3) 25

29 U.S.C. § 1132(a)(1)(B) 16, 17

29 U.S.C. § 1132(a)(3) 17

29 U.S.C. § 1132(e)(1) 17

26 C.F.R. § 1.401(a)(4)-8(d)(1)(i) 27

29 C.F.R. § 2520.102-3(*l*) 29-30

MISCELLANEOUS

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Ascher on Trusts (5th ed. 2007) 6, 7, 8

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the Law of Contracts (4th ed. 1999) 18

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and Trustees (2d ed. rev. 1980) 7

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reprinted in 1974 U.S.C.C.A.N. 5038 17

REPLY BRIEF OF PETITIONERS

The court of appeals erred by refusing to defer to the Plan Administrator's interpretation of the Plan on remand, and then erred again by deferring to the district court's interpretation. Under either *Firestone*'s deferential standard or a *de novo* standard of review, the Plan Administrator's interpretation is superior to the district court's interpretation because it better comports with the terms of the Plan, it recognizes the time value of money, and it avoids unfair windfalls. As the Government acknowledges, it is also the way ERISA plans typically calculate offsets.

I. THE PLAN ADMINISTRATOR'S INTERPRETATION OF THE PRE-AMENDMENT PLAN TERMS IS ENTITLED TO DEFERENCE.

The court of appeals held that the Plan Administrator's interpretation of the Plan does not deserve *Firestone* deference because it is a "mere opinion" rather than a formal "decision." Pet. App. 13a. Petitioners' opening brief explains that there is no basis for limiting *Firestone* deference in this way. *See* Pet. Br. 32-36. In *Firestone,* this Court looked to "the terms of the trust" as the basis for according deference to the plan administrator. *See Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 111 (1989); *see also Cent. States, Se. & Sw. Areas Pension Fund* v. *Cent. Transp., Inc.*, 472 U.S. 559, 568 (1985) (deferring based on plan terms). Here, the Plan confers broad interpretive authority on the Plan Administrator. *See* Pet. App. 142a. Restricting

Firestone deference despite such plan language would have far-reaching consequences, because plan administrators are called upon to interpret plans in a wide variety of contexts other than formal benefit determinations. *See* Pet. Br. 34-36.

Neither Respondents nor the Government argue that *Firestone* deference is limited to formal benefit determinations. Instead, they argue that *Firestone*'s deferential standard of review does not apply when a plan administrator re-interprets the "same" plan terms, or interprets a plan in the course of litigation. The arguments for these proposed exceptions to *Firestone* deference, like the proposed exception for conflicts of interest rejected in *Glenn*, are unpersuasive.

A. The Plan Administrator Did Not Interpret The Same Plan Terms On Remand.

Respondents and the Government argue that on remand from *Frommert I*, the Plan Administrator interpreted the same plan terms a second time. *See* U.S. Br. 24; Resp. Br. 46. That is not correct. The Plan Administrator construed different Plan terms on remand because the court of appeals rejected the Plan Administrator's original reliance on post-1989 amendments to the Plan.

The Plan Administrator originally calculated Respondents' benefits under the terms of the Plan in effect at the time Respondents retired, not the terms

in effect at the time they were re-hired.[1] As a result, Respondents' benefits were calculated under the 1996 and later versions of the Plan that included specific language requiring a reconstructed account offset – language that was absent from the 1989 version.[2]

Although the district court upheld the Plan Administrator's reliance on these post-1989 versions of the Plan, *see* Pet. App. 92a, the court of appeals reversed, reasoning that applying post-1989 Plan amendments to Respondents would violate ERISA's "anti-cutback" provision. *See id.* at 39a-40a, 50a. The court of appeals remanded for a recalculation of Respondents' benefits under "pre-amendment" Plan terms, *i.e.*, under the terms of the 1989 Plan. *Id.* at 51a. Thus, only on remand did the Plan Administrator interpret the 1989 Plan.

According to Respondents, Petitioners argued in *Frommert I* that the 1989 Plan terms standing alone required a reconstructed account offset. Resp. Br. 28. That is not what Petitioners argued. Petitioners acknowledged that the reconstructed account offset was accidentally omitted from the Plan in 1989, but

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[1] *See* J.A. 76a; Pet. App. 80a-82a; Pet. C.A. Br. in *Frommert I*, at 18-19.

[2] *Compare Frommert I* App. A-1354-55, A-1410 (relevant portions of the 1998 and 1999 Plan Restatements), *with* J.A. 6a-42a (1989 Restatement excerpts). *See also* J.A. 76a-77a (applying the 1998 Restatement); *Frommert I* App. A-1548-657 (applying 1996 and later versions of the Plan); Resp. Br. 27-28 (acknowledging Petitioners' reliance on the 1998 Restatement).

noted that it was quickly re-inserted by a 1990 amendment and otherwise was present throughout the Plan's entire history. *See* Pet. C.A. *Frommert I* Br. 29-31, 34-35. Petitioners therefore argued that the inadvertent omission of reconstructed account language for a four-month period in 1990 did not require the Plan Administrator to calculate Respondents' benefits under the terms of the 1989 Plan. *See* Pet. App. 42a.[3] As the court of appeals recognized, this argument expressly relied on the 1990 amendment that re-inserted reconstructed account language into the Plan. *See id.* (Petitioners argued that the absence of a reconstructed account offset from the 1989 Plan "was rectified by the changes made to the Plan in 1990"); *id.* (Petitioners argued that the omission "was quickly rectified by changes to the Plan"); *id.* at 29a (Petitioners relied on "a series of subsequently issued changes and clarifications" to the Plan).[4]

Petitioners did not argue that either the non-duplication of benefits provision or any other provision of the 1989 Plan required a reconstructed

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[3] Because the 1989 Plan Restatement took effect (in relevant part) in January 1990, the language at issue was absent only from January through April 1990. *See* Pet. Br. 8 n.1, 11-12 & n.3.

[4] Read in light of these statements in *Frommert I*, the passing statement in *Frommert II* that the Plan Administrator had previously considered "the same terms" appears to mean only that the 1989 Plan terms – along with the pre-1989 and post-1989 Plan terms – were *part* of the plan language that was before the Plan Administrator in the original benefits determinations.

account offset. Petitioners briefly referred to the non-duplication provision, but only for the limited proposition that the Plan was not intended to provide duplicate benefits. *See, e.g.*, J.A. 77a-78a. Indeed, Petitioners expressly acknowledged that there is no requirement in the non-duplication of benefits provision that duplicate benefits be eliminated "through the [reconstructed] account." Pet App. 42a.

On remand, the Plan Administrator therefore addressed a newly-framed question for the first time: how Respondents' benefits should be calculated under the 1989 Plan standing alone.

B. Respondents' Proposed "Same Plan Terms" Exception To *Firestone* Deference Lacks Merit.

The court of appeals found that the Plan Administrator made a mistake of law by calculating Respondents' benefits under post-1989 amendments to the Plan. That mistake does not justify applying a different standard of review to the Plan Administrator's interpretation of the correct set of plan terms on remand. The Plan grants the Plan Administrator broad authority to construe plan documents, and does not withdraw that authority if the Plan Administrator makes a mistake. *See* Pet. Br. 7. Respondents fail to identify a valid basis for overriding express Plan provisions granting this authority to the Plan Administrator.

1. Trust Law Supports *Firestone* Deference.

Contrary to the Government's assertion, *see* U.S. Br. 15-19, trust law supports according *Firestone* deference to the Plan Administrator's interpretation, whether or not it is regarded as an interpretation of the "same plan terms." In the absence of bad faith, dishonesty or the like, deference ordinarily would be due to the trustee "since that is what the [trust instrument] requires." *Eaton* v. *Eaton*, 132 A. 10, 11 (1926); *see* Pet. Br. 39-46; 3 W. Fratcher & M. Ascher, Scott and Ascher on Trusts § 18.2.1, at 1348-49 (5th ed. 2007). A mistake of law does not override this deference because, in the absence of bad faith or dishonesty, the settlor presumably would continue to *want* the trustee to exercise the discretion conferred by the terms of the trust.

Here, Respondents and the Government do not accuse the Plan Administrator of having acted in bad faith. Instead they argue that trust law permits a court to "control" a trustee who commits an abuse of discretion. Resp. Br. 50; U.S. Br. 15. The question raised by this case, however, is not *whether* courts exercise such control, but *how* they do so, *i.e.*, what are the appropriate "[m]ethods of [c]ontrol." Scott and Ascher on Trusts § 18.2.1, at 1347. Absent bad faith, the appropriate method of control is to delineate the boundaries of the trustee's discretion, but to permit the trustee to exercise discretion within those bounds. Pet. Br. 39-46.

The Government essentially argues that trust law imposes no standards whatsoever regarding the

appropriate methods of control. It cites a treatise that identifies three possible courses of action when a court finds that a trustee has abused its discretion: (i) the court may order the trustee to make a "new decision . . . in the light of rules expounded by the court," without "instruct[ing] him as to the specific action which he should take"; or (ii) "[s]ometimes" it may go further by "stating the exact result it desires to achieve"; or (iii) it may "fix[] some limits on the trustee's action and giv[e] him leeway within those limits." G. Bogert & G. Bogert, The Law of Trusts and Trustees § 560, at 222-23 (2d ed. rev. 1980). That observation is true as far as it goes, but Petitioners have identified a more specific trust law principle, clearly articulated in the Scott treatise, governing *why* courts make one decision or the other. Under that principle, in the absence of bad faith or dishonesty, a mistake of law in construing a trust will not divest the trustee of the discretion conferred by the trust instrument. *See* Scott and Ascher on Trusts § 18.2.1, at 1348-49.[5]

The Government also cites cases establishing that a court may order a trustee to do at least the minimum necessary to avoid an abuse of discretion.

[5] Contrary to the Government's assertions, *Colton* v. *Colton* recognizes this principle. *See* 127 U.S. 300, 321-22 (directing the lower court to order a specific payment after reasoning that "the trust must not . . . be defeated" because the trustee fails to exercise his discretion "honestly, and in good faith"); Scott and Ascher on Trusts § 18.2.1, at 1348 & n.3 (citing *Colton* as an example of the bad faith rule). Similarly, *State* v. *Rubion*, 308 S.W.2d 4, 11 (Tex. 1958), discussed by the Government, relies on Scott.

See, e.g., *Schofield* v. *Commerce Trust Co.*, 319 S.W.2d 275, 277 (Mo. Ct. App. 1958) ("if [a trustee] is directed to pay as much of the income and principal as is necessary for the support of a beneficiary he can be compelled to pay *at least the minimum amount* which in the opinion of a reasonable man would be necessary" (emphasis added) (quoting Scott on Trusts § 187, at 1375 (2d ed. 1956))); *Stallard* v. *Johnson*, 116 P.2d 965, 967 (Okla. 1941) (order "directed the trustee to do merely that which he should have done under the directions given him by his testator"); *accord Eaton*, 132 A. at 11 ("The court . . . may find *the least amount that a reasonable judgment would allow*, and order payment accordingly." (emphasis added)).[6] These cases support the proposition that where, as here, the terms of the trust do not limit the trustee to a single course of action, it is the trustee's role to choose among the permissible alternatives.

The Government attempts to distinguish the cases cited by Petitioners on the ground that the trustee in those cases had a "mistaken belief that he lack[ed] th[e] discretion" to make the payment at issue. U.S. Br. 18. The cases, however, do not rely on any such distinction. Moreover, if this *ad hoc* distinction were to be drawn, it would favor

[6] *See also Woodward* v. *Dain* 85 A. 660, 661 (Me. 1913) (court properly ordered trustee to pay beneficiary "*not less* than $20 a month, which sum is *adjudged to be actually necessary* for her support" (emphases added)); *Gardner* v. *O'Loughlin*, 84 A. 935, 936 (N.H. 1912) (approving order of specific sum because it "must be assumed the condition of the beneficiary seemed to require" it).

Petitioners: the Plan's administrators had a mistaken belief that they were required to apply post-1989 Plan amendments to Respondents, and thus had no alternative but to apply a reconstructed account offset. This mistake of law, having been corrected, provides no basis for concluding that the Plan Administrator is incapable of construing the Plan honestly and fairly going forward.

In sum, the weight of trust law authority assesses whether there is "reason to believe that the trustee will fail to act fairly" going forward, U.S. Br. 18, by focusing on whether the trustee has acted in bad faith. Pet. Br. 39-46. Indeed, the district court *upheld* the Plan Administrator's original decision to apply post-1989 Plan amendments to Respondents. Pet. App. 92a. That decision can hardly be viewed as an act of bad faith.

2. ERISA's Objectives Support *Firestone* Deference.

Firestone deference furthers important objectives of ERISA. It promotes uniformity of plan interpretation, avoids unpredictable financial consequences, and allows employers to assign primary responsibility for interpreting ERISA plans to "those whose experience is daily and continual," rather than to "judges whose exposure is episodic and occasional." *Berry* v. *Ciba-Geigy Corp.*, 761 F.2d 1003, 1006 (4th Cir. 1985); *see* Pet. Br. 28-32, 47-49; *see also* ERISA Indus. Comm. & Am. Benefits Counsel Amici Br. 7-12; Business Roundtable *et al.* Amici Br. 26-34. This case illustrates the dangers of departing from these principles: the courts below

adopted an economically nonsensical interpretation of the Plan under which employees earn larger benefits by *leaving* Xerox for a period of years than they earn if they stay with the company without interruption.

Respondents do not deny that *Firestone* deference furthers important ERISA objectives, but they nevertheless argue for an exception to *Firestone* deference when the plan administrator makes a mistake.

This argument is contrary to *Metropolitan Life Insurance Co.* v. *Glenn*, 128 S. Ct. 2343 (2008). *Glenn* expressly rejected "special procedural or evidentiary rules" for stripping away *Firestone* deference. *Id.* at 2351. The Court thus held that a plan administrator who acts under a conflict of interest in interpreting a plan is still entitled to deference. *See id.* at 2350-52. While a conflict of interest may be considered as a "factor" in reviewing for an abuse of discretion, it does not justify "a change in the *standard* of review, say, from deferential to *de novo*." *Id.* at 2350.

A "same plan terms" exception to *Firestone* deference would be precisely the kind of "special procedural or evidentiary rule" that the Court rejected in *Glenn*. Under *Glenn*, the fact that a plan administrator had a previous opportunity to construe the same plan terms is at most a "factor" to consider in applying a deferential standard of review; it is not grounds for "a change in the *standard* of review." *Id.*

Respondents and the Government speculate that, without a "same plan terms" exception to *Firestone* deference, plan administrators will take "a

potentially unlimited number of bites at the interpretation apple," will deliberately adopt interpretations "that unreasonably disfavor[] beneficiaries," and will "proceed seriatim through less favorable interpretations of the plan." U.S. Br. 20-21; Resp. Br. 53. But these concerns do not arise where, as here, the plan administrator originally focused on an incorrect set of plan terms due to a mistake of law. In such cases, the plan administrator is entitled to at least *one* opportunity to construe the correct plan terms once those terms are identified.

In any event, the parade of horribles conjured up by Respondents is overblown. It rests on the implausible premise that employers will deliberately set out to mistreat their own work force. *See Marrs* v. *Motorola, Inc.*, 577 F.3d 783, 787 (7th Cir. 2009) (noting that employers have strong countervailing incentives). It also assumes that plan administrators will be willing to violate their fiduciary duties. *See* 29 U.S.C. § 1104(a)(1). In addition, it ignores the fact that courts have long administered the law of trusts without a "same trust terms" exception to deferential review, yet have had no apparent difficulty with trustees seeking "unlimited bites at the interpretation apple."

Respondents likewise ignore ample judicial safeguards against the type of misconduct they discuss: *Firestone* deference may be denied altogether if a plan administrator acts in bad faith, and short of that, a plan administrator's prior interpretations of a plan may (if appropriate) be considered as a "factor" under *Glenn*. Respondents nowhere explain why taking such conduct into

account as a "factor" would be insufficient. If the type of misconduct imagined by Respondents were actually to occur, it could be treated as "important (perhaps of great importance)" under *Glenn*. 128 S. Ct. at 2351.

Respondents' speculation about a threat to "the timely delivery of benefits" is also unpersuasive. Resp. Br. 53. This case illustrates why. On remand from *Frommert I*, the question was not whether there would or would not be further interpretation of the Plan; further interpretation was inevitable. The question instead was whether this additional interpretation would proceed with or without *Firestone* deference. Thus, despite the fact that the lower courts denied *Firestone* deference on remand, the district court still held a hearing; it still considered briefs and arguments from the parties; and it still had to arrive at an interpretation of the Plan. While the denial of *Firestone* deference impacted the *accuracy* of the interpretation reached on remand, it did not prolong the *time* required to reach that interpretation. Indeed, *Firestone* deference might actually have *shortened* the proceedings below by providing a clear basis on which to choose among competing interpretations.

C. Respondents' Proposed "Litigation Position" Exception To *Firestone* Deference Lacks Merit.

Respondents (but not the Government) argue that the Plan Administrator's interpretation of the Plan on remand deserves no deference because it is a "litigation position." Resp. Br. 54-56. An exception to

Firestone deference for interpretations offered in litigation, like a "same plan terms" exception, would be inconsistent with *Glenn*. The fact that an interpretation is offered in litigation may be grounds for inferring a conflict of interest, but *Glenn* holds that a conflict of interest is at most a factor to consider in reviewing for abuse of discretion; it is not a basis for applying a different standard of review. *See Glenn,* 128 S. Ct. at 2351.

Respondents' contrary argument confuses interpretations adopted by plan administrators with interpretations put forward by counsel. Respondents correctly note that the litigation positions of counsel receive no deference under administrative law, but that does not imply that the "fair and considered" views of plan administrators deserve no deference. *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997). The fact that it was "litigation which disclosed the need" for a plan administrator's interpretation makes no difference to its validity. *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 741 (1996); *see also* Pet. Br. 49 n.17.

Here, the Plan Administrator first offered an interpretation of the 1989 Plan terms on remand from *Frommert I. See supra* at 2-5. This "actuarial equivalence" interpretation was the only interpretation of the 1989 Plan that was identified as the Plan Administrator's interpretation, and it was the only interpretation for which Petitioners sought *Firestone* deference. While Petitioners also advanced an alternative "new hire" approach, Petitioners did not present this approach as the Plan Administrator's interpretation or claim that it was

entitled to *Firestone* deference. Petitioners suggested this alternative because certain Respondents themselves claimed that they expected to be treated like newly-hired employees when Xerox re-hired them. *See* J.A. 64a, 118a.

Respondents fare no better in arguing that the Plan Administrator has not attempted to apply his interpretation during the pendency of this litigation. Especially in light of the rejection of that interpretation in *Frommert II*, Petitioners reasonably may wait for the conclusion of the litigation to apply that interpretation in practice.

II. ABSENT DEFERENCE TO THE PLAN ADMINISTRATOR, THE DISTRICT COURT'S DECISION SHOULD HAVE BEEN REVIEWED *DE NOVO*.

The court of appeals reviewed the district court's interpretation of the Plan on remand under a deferential "allowable discretion" standard and upheld that interpretation as "one reasonable approach among several reasonable alternatives." Pet. App. 13a-14a. That was error. As the Government acknowledges, in the absence of *Firestone* deference, "de novo review applies to plan interpretation even if an appellate court is reviewing a district court's remedial decision." U.S. Br. 27.

Having agreed with Petitioners on this key point, the Government largely avoids the question of whether the court of appeals applied the correct standard of review, arguing instead that the ultimate *result* reached in the courts below is correct in light of ERISA's disclosure requirements. *See* U.S.

Br. 28-30. These disclosure arguments are erroneous, and they stray beyond the questions on which this Court granted review. *See infra* at 28-31. To the extent that the Government and Respondents actually address the question presented – whether the court of appeals applied the correct standard of review – their arguments lack merit for the reasons set forth below.

A. The Court Of Appeals Should Not Have Deferred To The District Court's Plan Interpretation.

The Government originally argued that deferential review of the district court's interpretation of the Plan was justified "because the Plan was silent about how to calculate the offset for the prior distributions." U.S. Br. in Opposition to Cert. 13; *see also id.* at 9, 18. Now, in the face of Petitioners' demonstration that the Plan is *not* silent regarding the offset, *see* Pet. Br. 16, 51-52, 59-60, the Government abandons that contention and retreats to an assertion that "the Plan did not address the offset issue with sufficient clarity." U.S. Br. 29. In the absence of "sufficient clarity," the Government argues, the district court was free to use "equitable principles" to fashion an "equitable remedy." *Id.* at 27-28. This argument fails for several reasons.

First, the district court and the court of appeals both recognized that the task on remand was one of plan interpretation. In *Frommert I*, the court of appeals remanded for a recalculation of Respondents' benefits under the "pre-amendment" terms of the Plan. Pet. App. 51a. The district court, in turn,

understood its task on remand as one of "interpret[ing] the Plan as written." *Id.* at 104a; *see also id.* ("The Court's task, as directed by the Court of Appeals, is simply to determine, based on the language of the Plan and the SPD, what benefits are now due this group of rehired employees."). Finally, in *Frommert II*, the court of appeals observed that the district court "explicitly" "utilize[d] pre-1998 Plan terms" as the basis for its nominal offset approach, "but simply applied those terms to [Respondents] differently than [Petitioners] proposed." *Id.* at 9a.[7]

Moreover, the court of appeals dismissed Respondents' claim for equitable relief under ERISA § 502(a)(3) and directed the district court to proceed under § 502(a)(1)(B), a provision that applies only to claims for benefits due "under the terms of [the] plan." 29 U.S.C. § 1132(a)(1)(B). The court dismissed Respondents' claim for equitable relief because it held that the relief Respondents are seeking "falls comfortably within the scope of § 502(a)(1)(B)." Pet. App. 53a. The Government asserts that § 502(a)(1)(B) extends beyond claims based on plan

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[7] Respondents assert that Petitioners "blatantly misrepresented [their] prior litigation position" because, according to Respondents, Petitioners defended the Plan Administrator's approach in the proceedings below not as an interpretation of the Plan but "merely" as "the most equitable remedy." Resp. Br. 34 & n.10. To the contrary, Petitioners' briefs below make clear that the task on remand was one of plan interpretation. *E.g.*, *Frommert II* App. A-284 ("[P]laintiffs are claiming benefits under the terms of the Plan, and interpretation of the Plan terms is therefore required. The party charged with and responsible for that task is the Plan Administrator." (citation omitted)).

terms, U.S. Br. 30, but that argument – which was neither made nor considered in the courts below – is incorrect.[8]

Second, when properly construed, the terms of the Plan *do* speak with "sufficient clarity" to permit "a precise calculation of benefits." U.S. Br. 28, 30. As Petitioners showed in their opening brief, the terms of the 1989 Plan are best read to require a standard actuarial equivalence offset for prior distributions. *See* Pet. Br. 59-60; *see also infra* at 20-21 & n.10. Tellingly, the Government does not deny that this interpretation is superior to the district court's interpretation as a textual matter. Indeed, the Government never even addresses the relevant terms of the Plan. The court of appeals likewise failed to address whether an actuarial equivalence

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[8] Although § 502(a)(1)(B), by its terms, authorizes only claims for benefits due under "the terms of [the] plan," 29 U.S.C. § 1132(a)(1)(B), the Government argues that it also applies to claims asserted under the provisions of ERISA. U.S. Br. 30. If that is what Congress had intended, it would have provided that § 502(a)(1)(B) applies to claims asserted under "any provision of [ERISA] *or* the terms of the plan" – language it used elsewhere in the very same section of ERISA. 29 U.S.C. § 1132(a)(3). Congress deliberately limited § 502(a)(1)(B) to claims asserted under "the terms of the plan" to prevent state courts from interpreting or enforcing ERISA provisions under their § 502(a)(1)(B) jurisdiction. *See* 29 U.S.C. § 1132(e)(1); H.R. Conf. Rep. No. 93-1280 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5107. Courts have therefore held that statutory claims cannot be asserted under § 502(a)(1)(B). *See, e.g., Ross* v. *Rail Car Am. Group Disability Income Plan*, 285 F.3d 735, 741 (8th Cir. 2002); *Carrabba* v. *Randalls Food Markets, Inc.*, 145 F. Supp. 2d 763, 770 (N.D. Tex. 2000), *aff'd* 252 F.3d 721 (5th Cir. 2001); *Bodine* v. *Webb*, 992 S.W.2d 672, 677 (Tex. App. 1999).

interpretation is superior to the district court's interpretation. Instead, it improperly deferred to the district court's interpretation as a permissible exercise of "allowable discretion." Pet. App. 8a.

Third, the Government's attempt to fashion a malleable "sufficient clarity" exception to *de novo* review is not supported by precedent. As noted above, the Government no longer argues that the Plan is "silent" as opposed to "ambiguous." *See* U.S. Br. 29 ("[W]hether the Plan is . . . silent or ambiguous is beside the point."). Under settled law, however, interpretations of written instruments are reviewed *de novo* even when the written instrument is ambiguous.[9] The law contains no "sufficient clarity" exception to that principle. Nor does the Government suggest any reliable basis on which a court could distinguish between written instruments that are "merely" ambiguous and those that are "sufficiently" ambiguous to justify abandoning *de novo* review.

Finally, a "sufficient clarity" exception to *de novo* review would wreak havoc on the administration of ERISA plans. In any instance in which a plan failed to address an issue with "sufficient clarity" to satisfy

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[9] *See* 11 S. Williston & R. Lord, A Treatise on the Law of Contracts § 30:7, at 91-92 (4th ed. 1999) (interpretation of an ambiguous contract is a question of law in the absence of relevant and disputed extrinsic evidence); *City of Clinton* v. *Moffitt*, 812 F.2d 341, 344 (7th Cir. 1987) (same); *Otten* v. *Stonewall Ins. Co.*, 511 F.2d 143, 147 (8th Cir. 1975) (same). As explained in Part II.B, *infra*, the district court did not rely on extrinsic evidence in interpreting the Plan on remand.

a court, district courts would have "allowable discretion" to adopt conflicting interpretations of the very same plan, destroying the uniformity and consistency that is indispensable to the operation of ERISA plans. *See* Pet. Br. 30-31; Chief Actuaries Amici Br. 9 (if "different district courts are permitted to give different meanings to the same benefit provision in a single plan, actuaries cannot perform their core responsibilities" under ERISA).

B. The District Court Did Not Rely On Extrinsic Evidence In Interpreting The Plan.

Respondents (but not the Government) argue that deference to the district court was appropriate because the district court made findings of fact based on "extrinsic evidence" regarding the reasonable expectations of plan participants. Resp. Br. 60-61. Respondents are mistaken. The district court did not consider extrinsic evidence on the question of a participant's reasonable expectations. *See Frommert II* App. A-402-03 (indicating that witness testimony would not illuminate this "objective" question and observing that plaintiffs' counsel "could put on 50 clients and they all may say 50 different things"). Nor did the district court make findings of fact on that question. As the court of appeals observed in *Frommert II*, "we did not anticipate . . . extensive fact finding, and none occurred on remand." Pet. App. 12a. No deference was due to the district court on the basis of findings of fact that were not made and extrinsic evidence that was not considered.

C. The District Court's Interpretation Of The Plan Cannot Be Sustained Under *De Novo* Review.

The most natural reading of the text of the 1989 Plan is that it provides for a standard actuarial equivalence offset for prior distributions. *See* Pet. Br. 59-60. This reading also avoids the irrational results that follow from the district court's nominal offset interpretation. *Id.* at 60-61. Respondents nonetheless attempt to defend the nominal offset interpretation under a *de novo* standard of review, calling it "the most reasonable" interpretation of the 1989 Plan. Resp. Br. 62-63. These arguments are unconvincing.

1. The most straightforward reading of the 1989 Plan is that it provides for an actuarial equivalence offset. The Plan's non-duplication of benefits provision requires that the benefits payable to rehired employees must be offset by "the *accrued benefit* attributable to [the prior] distribution." Pet. App. 141a (emphasis added). The Plan defines the term "accrued benefit," in pertinent part, as a monthly retirement annuity "computed in accordance with Section . . . 4.3." *Id.* at 134a. The relevant portion of Section 4.3 – Section 4.3(e) – states that the monthly retirement annuity attributable to a participant's defined contribution account is the annuity that the account would purchase "using annuity rates established by the PBGC."[10] *Id.* at 141. The 1989 Plan is therefore best

[10] Section 4.3(e) is the relevant provision in Section 4.3 because it is the provision that deals with the conversion of "Transitional Retirement Accounts" into equivalent annuities.

understood as providing that a prior distribution from a participant's defined contribution account must be offset by converting the distribution into a monthly annuity "using annuity rates established by the PBGC." *Id.*

Respondents offer no direct criticism of this interpretation as a textual matter, but they do offer a brief textual defense of the district court's nominal offset approach. Their argument suffers from two incurable flaws.

First, Respondents rely on the wrong definition of "accrued benefit." Respondents correctly recognize that under the non-duplication of benefits provision, their benefits must be offset by the "accrued benefit attributable to" their prior distributions. Pet. App. 141a; Resp. Br. 63. They then look to the ERISA definition of "accrued benefit" under a defined contribution plan, which states that a participant's accrued benefit is the balance in the participant's account. *See* 29 U.S.C. § 1002(23)(B). Relying on this definition, Respondents argue that their benefits should be offset only by the nominal account

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Pet. App. 141a. Respondents' initial distributions consisted of a distribution of the balance in their "Retirement Accounts," which Respondents refer to as PSP accounts. Resp. Br. 12. These "Retirement Accounts" were renamed "Transitional Retirement Accounts" in the 1989 Restatement. Pet. Br. 8 & n.1. As the district court observed, references in the Plan to "Transitional Retirement Accounts" are reasonably understood to refer to these accounts under their prior name "Retirement Accounts" as well. *See* Pet. App. 86a.

balances that they were paid after their initial departure from Xerox. Resp. Br. 63.

The question here, however, is how to calculate an offset under the Plan's defined benefit formula, not its defined contribution formula. *See* Pet. Br. 9-10. Consistent with the ERISA requirements pertaining to defined benefit plans, *see* 29 U.S.C. § 1002(23)(A), the Plan defines a participant's "accrued benefit" as an annuity beginning on a participant's normal retirement date. Pet. App. 134a. Respondents therefore err in asserting that the "accrued benefit attributable to" their prior distributions is the nominal account balance. Instead, under the relevant Plan terms, the accrued benefit attributable to the prior distributions is calculated by converting those distributions into equivalent retirement annuities using standard PBGC conversion factors. *See supra* at 20-21. As the Government recognizes, this is how ERISA plans "typically" calculate offsets for prior distributions. U.S. Br. 26 n.7.

Second, Respondents ignore the fact that it is not logically possible to offset a lump sum amount against a monthly annuity. Respondents' prior distributions consisted of lump sum payments. *See* Pet. Br. 12. The Plan's guaranteed floor benefit, by contrast, consists of a monthly retirement annuity. *Id.* at 8. Thus, as Respondents effectively acknowledge in the chart appended to their brief, *some* conversion of their prior distributions into annuity form must be made in order to calculate the necessary offset. *See* Resp. Br. 2b-3b (noting at step three that floor-offset plans perform offset

calculations by converting defined contribution account balances into equivalent annuities).

Respondents implicitly argue that this conversion should be done using two different sets of conversion factors. Specifically, under Respondents' nominal offset approach, one set of factors – a *zero* interest rate and a *zero* mortality rate – applies between the date of their original distributions and the date of their ultimate retirement. At retirement age, however, Respondents apply a different set of conversion factors – a standard interest and mortality rate – to convert their prior distributions into equivalent annuities.

This schizophrenic approach is both counterintuitive and irrational. *See* Chief Actuaries Amici Br. 12-14. Indeed, even Respondents' own expert rejected it as unfair. Pet. Br. 15, 61. For these reasons, as well, the nominal offset approach is not the "most reasonable interpretation" of the Plan.

2. Respondents' argument is not improved by their assertion that the district court's nominal offset approach is the only approach consistent with their "reasonable expectations." Employees cannot reasonably expect to receive larger benefits if they leave Xerox and then return than if their service to the company is uninterrupted. But that is precisely what occurs under the nominal offset approach. *See* Pet. Br. 14-15. Nor can employees reasonably expect the Plan to treat a dollar paid twenty years ago as if it has the same value as a dollar paid today. But that, too, is what happens under the nominal offset approach. *Id.*; Chief Actuaries Amici Br. 11-13. The

end result is that re-hired employees receive a large measure of double credit for their initial period of service. *See* Pet. Br. 61.[11] Try as they might, neither Respondents nor the Government can make sense of this economically nonsensical interpretation of the Plan.[12]

At bottom, Respondents' reasonable expectations argument does not seek benefits allegedly due Respondents under the terms of the Plan; instead, it seeks the benefits Respondents say they expected based on allegedly defective benefit statements. *E.g.*, Resp. Br. 35-36, 43. But Respondents' alleged expectations cannot trump the text of the Plan

[11] Respondent Clair candidly admitted that he had no such unreasonable expectation. *See* Pet. Br. 61. The Government's citation to *subsequent* testimony in which Mr. Clair attempted to recant his earlier affidavit, U.S. Br. 32, is unpersuasive.

[12] The Government speculates that an employer might *want* to confer windfalls on re-hired employees in order to entice skilled workers to return. U.S. Br. 32-33. If that were an employer's goal, there are far less destructive means of achieving it than adopting a pension plan that treats career employees like "suckers" and that rewards employees only if they leave the company and then return after a disruption of their service. *White* v. *Sundstrand Corp.*, 256 F.3d 580, 584 (7th Cir. 2001) (noting that employers are unlikely to "want a pension plan that rewards employees for quitting"). The Government also asserts that the Plan Administrator's actuarial equivalence offset treats re-hired employees worse than newly-hired employees. U.S. Br. 33. That is not correct. Comparing employees with the same number of years of service, and taking account of all their benefit distributions, offsetting only by the actuarial equivalent of a prior distribution *cannot* leave re-hired employees worse off than newly-hired employees, because an actuarial equivalence offset merely reduces an employee's benefit by the actual value of the prior distribution.

unless, among other things, Respondents can demonstrate on a participant-by-participant basis that they actually relied to their detriment on misleading statements by the Plan. *See, e.g.*, *Mello* v. *Sara Lee Corp.*, 431 F.3d 440, 445-48 (5th Cir. 2005); *Gridley* v. *Cleveland Pneumatic Co.*, 924 F.2d 1310, 1319 (3d Cir. 1991) (Alito, J.). Respondents made no such showings below, and the district court made no such factual findings. *See supra* at 19.

III. THE PLAN ADMINISTRATOR'S INTERPRETATION IS CONSISTENT WITH ERISA'S DISCLOSURE REQUIREMENTS.

Respondents and the Government invite the Court to decide whether the Plan Administrator's interpretation satisfies ERISA's disclosure requirements. *See* 29 U.S.C. § 1022. That question was not decided by the court of appeals and is not among the questions on which this Court granted review. Accordingly, this Court should not consider it. *See Blessing* v. *Freestone*, 520 U.S. 329, 340 n.3 (1997). In any event, the Plan Administrator's interpretation is consistent with ERISA's disclosure requirements.[13]

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[13] The Government also asserts in passing that even a properly-disclosed reconstructed account offset would be illegal because it would reduce a participant's "accrued benefit" in an impermissible manner. *See* U.S. Br. 25-26 (citing 29 U.S.C. § 1054(c)(3)). The Second Circuit held that the reconstructed account offset "may permissibly be applied to" employees after it was properly disclosed in 1998, *see* Pet App. 51a, and Respondents have not challenged that aspect of the decision.

A. The "Actuarial Equivalence" Offset Is Significantly Different From The Reconstructed Account Methodology.

Respondents and the Government suggest that the Plan Administrator's "actuarial equivalence" approach scarcely differs from the reconstructed account offset that the Second Circuit struck down as inadequately disclosed. *See* U.S. Br. 6; Resp. Br. 65. In actuality, the two approaches are markedly different.

The reconstructed account methodology calculates an offset based on "hypothetical growth in a nonexistent account." Pet. App. 50a. Specifically, benefits are offset based on the growth that would have occurred in a hypothetical profit sharing account if Respondents had left their benefits in the Xerox profit sharing plan after their initial departure from the company. *Id.* Because the profit sharing plan experienced extraordinarily high rates of return in the 1990s, the reconstructed account offset led to "large" offsets for these particular rehired employees. *See id.*

Nor is the Government's assertion correct. In *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), this Court held that a participant's statutory "accrued benefit" under a plan is the amount remaining *after* any plan-specified offsets are taken into account. Thus, a plan-specified offset – such as the reconstructed account offset – cannot result in a forfeiture of "accrued benefits" because the offset is part of the formula used to calculate "accrued benefits" in the first instance. *See id.* at 511-12.

The Plan Administrator's approach, in contrast, does not use hypothetical accounts or hypothetical investment gains to calculate an offset. Instead it uses "the amounts [Respondents] had actually received" after their initial departure. Resp. Br. 32. Because these amounts were received in lump sum form, they must be converted into annuity form before they can be offset against the annuity floor benefit guaranteed by the Plan. *See* Pet. Br. 6. The Plan Administrator's approach therefore converts the amounts that Respondents "actually received" into equivalent annuities using standard PBGC actuarial equivalence factors. Pet. App. 150a-53a. As the Government concedes, this is how plans "typically" calculate such offsets. U.S. Br. 26 n.7. It is also a preferred approach under the applicable Treasury Regulations. 26 C.F.R. § 1.401(a)(4)-8(d)(1)(i).

Furthermore, it is not unusual or a cause for concern for participants in a floor-offset plan to receive no benefit from the defined benefit component of the plan. Floor-offset plans use defined benefit formulas as a kind of insurance policy, to ensure a minimum level of benefits in case the defined contribution component of the plan performs poorly. *See* Pet. Br. 5. When the defined contribution component performs well, "many [employees] will have little or no benefit from the defined benefit plan." Employee Benefit Research Institute, *Hybrid Retirement Plans: The Retirement Income System Continues to Evolve*, EBRI Special Report SR-32, at 18 (1996), *at* http://www.ebri.org/pdf/briefspdf/0396ib.pdf.

B. Disclosure Issues Do Not Support Affirmance.

In *Frommert I*, the court of appeals found that the reconstructed account offset was inadequately disclosed in the Xerox Summary Plan Description ("SPD"). The Government argues that the same disclosure issues also foreclose the Plan Administrator's "actuarial equivalence" interpretation, *see* U.S. Br. 29-30, but the court of appeals did not adopt this conclusion. To the contrary, the court of appeals concluded that the nominal offset methodology is but "one . . . among several" permissible approaches, Pet. App. 13a-14a, which belies any suggestion that the nominal offset approach was the *only* permissible outcome given Xerox's disclosures.

The Government's argument also fails on the merits. The Government does not contend – nor could it – that the SPD promised Respondents that only a nominal offset would be applied. The SPD simply informed Respondents that their benefits were subject to an offset for prior distributions; it did not specify that a nominal offset would be applied. *See* J.A. 47. Accordingly, this is not a case in which the terms of the SPD are inconsistent with the terms of the Plan. *See Mers* v. *Marriott Int'l Group Accidental Death & Dismemberment Plan*, 144 F.3d 1014, 1023 (7th Cir. 1998) (requiring "a direct conflict between the SPD and the underlying policy" in order for the SPD to control); *Jensen* v. *SIPCO, Inc.*, 38 F.3d 945, 952 (8th Cir. 1994) (explaining that the plan will control "when the plan document is

specific and the SPD is silent on a particular matter").

Furthermore, the Government's suggestion that a standard actuarial equivalence conversion must be specifically disclosed in an SPD is incorrect. By definition, a Summary Plan Document is a *summary* of the principal provisions of a plan. While such summaries must "identify[] circumstances which may result in . . . offset . . . of any benefits," 29 C.F.R. § 2520.102-3(*l*), they need not disclose the actuarial factors used to calculate the offset. *See McCarthy* v. *Dun & Bradstreet Corp.*, 482 F.3d 184, 197 (2d Cir. 2007) (ERISA does not "impose[] a blanket requirement under which a Summary Plan Description invariably must describe the method of calculating an actuarial reduction."); *Stamper* v. *Total Petroleum, Inc. Ret. Plan*, 188 F.3d 1233, 1243 (10th Cir. 1999) ("While the SPD may be silent on the actuarial reduction assumptions of 'deferred severance benefits,' it in no way contradicts the Plan regarding these benefits. As such, the Plan must control."). Especially when such details affect only a small percentage of plan participants – such as the re-hired employees at issue in this case – "[l]arding the summary" with this technical "minutiae" would "defeat that document's function." *Herrmann* v. *Cencom Cable Assocs., Inc.*, 978 F.2d 978, 983-984 (7th Cir. 1992).[14]

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[14] *See also, e.g.*, *Kress* v. *Food Employers Labor Relations Ass'n*, 391 F.3d 563, 568 (4th Cir. 2004); *Stahl* v. *Tony's Bldg. Materials, Inc.*, 875 F.2d 1404, 1409 (9th Cir. 1989); *Pompano* v.

Here, it is undisputed that the SPD disclosed the "circumstances which may result in offset[s]." 29 C.F.R. § 2520.102-3(*l*); *see* J.A. 47a. Moreover, since a prior lump sum payment *must* be converted into an annuity before it can be offset against the Plan's annuity floor benefit, it is not at all surprising for the conversion to be performed in the "typical" way, *see* U.S. Br 26 n.7, using standard PBGC conversion factors. By contrast, the same cannot be said of the unusual features of the reconstructed account offset. The heightened disclosure concerns raised by the reconstructed account offset therefore do not apply to the standard offset approach proposed on remand.

Any other conclusion could jeopardize large numbers of pension plans. Pension plans contain numerous actuarial calculations, conversions and reductions that apply to particular participants in particular circumstances, but SPDs often do not discuss such calculations other than to identify the circumstances in which they may occur. *See, e.g., Stamper*, 188 F.3d at 1243. Accordingly, if this Court were to delve into SPD disclosure issues without an adequate record, it would risk invalidating scores of pension plans across the country.

Finally, if the Government were correct that plan administrators may not rely on interpretations of ambiguous plan language that are not disclosed in an SPD, *Firestone* deference would be seriously eroded. Rarely if ever will an interpretation of

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Michael Schiavone & Sons, Inc., 680 F.2d 911, 914 (2d Cir. 1982).

ambiguous plan language be explicitly disclosed in an SPD. Thus, in the only cases in which *Firestone* deference matters – cases involving ambiguous plan language – the Government's approach would result in *de novo* review "of the lion's share of ERISA plan claims denials," 128 S. Ct. at 2350, a result that *Glenn* rejected.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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