12-0067-cv

United States Court of Appeals

for the

Second Circuit

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(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF OF BUSINESS ROUNDTABLE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE ERISA INDUSTRY COMMITTEE, AND AMERICAN BENEFITS COUNCIL AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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Plaintiffs-Appellants,

– v. –

SALLY L. CONKRIGHT, XEROX CORPORATION PENSION PLAN ADMINISTRATOR, PATRICIA M. NAZEMENTZ, XEROX CORPORATION PENSION PLAN ADMINISTRATOR, XEROX CORPORATION, LAWRENCE M. BECKER, XEROX CORPORATION PLAN ADMINISTRATOR, XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN, LAWRENCE BECKER, XEROX CORPORATION PLAN ADMINISTRATORS,

Defendants-Appellees.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), undersigned counsel states that:

The ERISA Industry Committee, the American Benefits Council, the Chamber of Commerce of the United States of America, and the Business Roundtable have no parent corporations.

No publicly held company has any ownership interest in the ERISA Industry Committee, the American Benefits Council, the Chamber of Commerce of the United States, or the Business Roundtable.

Dated: July 26, 2012

/s/ Jeffrey A. Lamken
Jeffrey A. Lamken

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Pursuant to Federal Rule of Appellate Procedure 29, *amici curiae* respectfully submit this brief in support of defendants. All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a).[1]

INTEREST OF *AMICI CURIAE*

Amici curiae are non-profit organizations and trade associations whose members have substantial experience in sponsoring and administering pension and employee-benefit plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*

The ERISA Industry Committee ("ERIC") is a non-profit organization representing the Nation's largest employers with ERISA-covered pension, health-care, disability, and other employee-benefit plans. These employers provide benefits to millions of active workers, retired persons, and their families nationwide.

The American Benefits Council (the "Council") is a broad-based non-profit organization of large U.S. employers that provide employee benefits to active and retired workers. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering more than 100 million Americans.

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[1] Pursuant to Fed. R. App. P. 29(c)(5), *amici* certify that no party's counsel authored this brief in whole or part, that no counsel or party contributed money intended to fund this brief, and that no one other than *amici*, their members, and their counsel made such a contribution.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest federation of businesses, representing 300,000 direct members and having an underlying membership of over 3,000,000 businesses and professional organizations of every size and in every relevant economic sector and geographic region of the country.

The Business Roundtable is an association of chief executive officers of leading U.S. companies with nearly $6 trillion in annual revenues and more than 14 million employees. Collectively, Business Roundtable member companies provide health and retirement benefits to nearly 40 million individuals.

Amici and their members thus have vast experience with, and a strong interest in ensuring the vitality and efficiency of, ERISA plans across the Nation. This case—which has now been to this Court three times and to the U.S. Supreme Court once—raises issues of grave concern to *amici* and their members. To function effectively, ERISA plans require predictability; they must permit employers to rely on the expertise of the plan administrator; and they must permit uniform application throughout the Nation. *See Conkright v. Frommert*, 130 S. Ct. 1640, 1649 (2010). Because employers need not establish ERISA plans, ERISA must not become so bewilderingly "'complex that administrative costs, or litigation expenses'"—or the absence of a "'predictable set of liabilities, under

uniform standards'"—"'discourage employers from offering ERISA plans in the first place.'" *Id.* (citation omitted).

The standards and arguments set forth by plaintiffs and their *amicus* in this case threaten those interests. Contrary to the principle of deference that has long prevailed in this area, plaintiffs and their *amicus* seek to replace the construction of the Plan given by the Plan Administrator with the views of individual ERISA Plan participants; they claim insubstantial "conflicts" that could be asserted with respect to virtually any ERISA plan; they attempt to ignore the Plan's content based on disclosure documents; and they claim entitlement to a remedy with no basis in the governing statutory and equitable standards.

Needless litigation over the interpretation and application of ERISA plans undermines the economic efficiency and social benefits of maintaining ERISA benefit plans. If a plan administrator's construction can be denied deference based on the considerations plaintiffs and their *amicus* raise, it is hard to imagine a case where deference would apply. Their positions, moreover, would subject ERISA plans to potentially competing, *de novo* constructions in myriad district courts, destroying the uniformity on which ERISA plans depend. And they raise the specter of unexpected liabilities, creating uncertainty that can harm plan sponsors and beneficiaries alike.

Amici regularly pursue research, propose legislation, and educate their members on efficient plan management. They regularly advocate on their members' behalf before Congress, regulatory agencies, and the courts to balance the considerable financial costs of offering ERISA-governed benefit plans with their undoubted social benefits to employees and beneficiaries. And they have participated as *amici curiae* before the Supreme Court and other federal courts, including in this case, to protect the deference granted to an ERISA administrator's actions. In light of the experience and expertise of *amici* and their members, *amici* have a unique interest in and insights into the issues before the Court.

SUMMARY OF ARGUMENT

Under settled law—including the Supreme Court's recent decision in this case—courts ordinarily must defer to the ERISA plan administrator's reasonable construction of ambiguous plan provisions. Plaintiffs' and the Department of Labor's ("DOL") efforts to avoid that deference here contradict fundamental ERISA principles and threaten costly and unnecessary uncertainty for ERISA plans, plan administrators, and plan sponsors.

I. A. DOL urges that the district court should have considered "plan participants' reasonable expectations" when evaluating the Plan Administrator's construction. But the Plan calls for, and precedent requires, deference to the Plan Administrator to whom the Plan has been entrusted for administration. Giving

weight to the putative expectations of plan participants turns that deference on its head. A plan administrator's construction is either reasonable or not; that there may be other reasonable constructions purportedly held by others is beside the point. As in the trust context, the goal of plan construction is to determine the plan sponsor's (the trust settlor's) intent as evinced in the objective text, structure, and meaning of the plan itself. What meaning *others* may attribute to the plan is not relevant.

Requiring courts to evaluate the views of plan participants, moreover, is at odds with predictability and uniform administration. If the plan's meaning might turn on what beneficiaries subjectively believe, the plan's meaning could vary from participant to participant. And referencing the views of an "objectively reasonable beneficiary" would force courts to speculate about the beliefs beneficiaries should have had. But Supreme Court precedent, trust law principles, and the Plan at issue here relieve courts of that burden by requiring deference to the Plan Administrator's reasonable construction. It is that construction that must be evaluated, not others.

B. DOL's effort to avoid deference by positing a "conflict of interest," and its reliance on alleged omissions from the Summary Plan Description ("SPD"), are similarly problematic. Neither the fact that an issue must be resolved in the context of litigation, nor the fact that the Plan Administrators are employees of the

Plan Sponsor, are the sorts of potential conflicts that should diminish the deference owed to the Administrator. Plans are often construed in the context of disputes over their meaning. And the relationship between the Plan Sponsor and the Plan Administrator here is no different from that in thousands of benefit plans across the country. *See Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 116 (2008) ("lion's share" of ERISA plans and benefits decisions involve employer acting as both sponsor and administrator).

True conflicts may be relevant "if there is some evidence that the conflict may have affected the [plan administrator's] decision." DOL Br. 19 (citation omitted). But there is no such evidence here. The factors DOL does cite—the fact that the Plan Administrator's prior construction was rejected, and that the Plan has been amended to apply that construction prospectively—represent a thinly disguised effort to overturn the Supreme Court's ruling that deference is required even after an initial construction is rejected by the courts. DOL's reliance on alleged "notice" violations in the SPD is equally baseless. Indeed, DOL's efforts come perilously close to the principle of *contra proferentem* (construing ambiguities against the drafter), which courts have universally rejected in the ERISA context. If unsubstantiated claims of conflict like those DOL posits here were sufficient to overcome traditional deference, that deference would become a rarity.

II. Seeking to sidestep deference, plaintiffs and their *amicus* also claim a notice violation—that the Summary Plan Description prepared by the Plan Administrator did not identify the methodology for calculating the offset. But plaintiffs ignore that this is a *summary* plan description. Requiring it to provide all the details regarding the consequences of every contingency for each participant, including those not clear from the Plan itself, would render it so lengthy as to be unusable. The SPD properly gave notice that offsets could result. If plan participants want details on how offsets are calculated, they can contact the Plan Administrator for clarification. But they cannot demand invalidation of the Administrator's otherwise reasonable construction merely because the Plan summary contained the same ambiguity as the Plan itself.

III. For similar reasons, plaintiffs cannot invoke a supposed notice violation to *alter* the Plan's terms through reformation, equitable estoppel, or surcharge to give them benefits the Plan does not provide. ERISA permits the imposition of equitable remedies only if plaintiffs meet the traditional requirements for their requested relief. *See CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1878 (2011). Because there is no credible evidence of fraud, mutual mistake, or even bad faith, plaintiffs do not meet the fundamental requirements of the equitable relief they request. Moreover, the SPD was authored by the Plan Administrator, not the Plan Sponsor; as a result, putative errors in the summary cannot justify

rewriting the Plan the Sponsor established, rejecting a reasonable construction thereof, and expanding the Plan Sponsor's obligations under it.

ARGUMENT

The district court properly deferred to the Plan Administrator's reasonable interpretation of the Plan, in compliance with the Supreme Court's holding in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), and its mandate in this case. Plaintiffs assail that deference, but their arguments would render deference under *Firestone* a rarity. They invoke features that, in *amici*'s experience with tens of thousands of ERISA plans, are overwhelmingly common. They resurrect in a new guise the same rationale for denying deference—that the Plan Administrator's prior construction was overturned—that the Supreme Court specifically rejected. And they would convert the fact that the SPD written by the Plan Administrator does not resolve a Plan ambiguity into grounds for rewriting the Plan.

ERISA reflects a "'careful balancing' between ensuring fair and prompt enforcement of rights under a plan and encouragement of the creation of such plans." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 215 (2004). The arguments pressed by plaintiffs and DOL here would upset that balance, undermine key features of ERISA plans—predictability, administrability, uniformity of application—and unnecessarily deter employers from creating plans in the first instance.

A straightforward application of longstanding ERISA principles requires affirmance of the judgment below.

I. This Court Should Defer To The Plan Administrator's Reasonable Construction

A. Deference Is A Critical Feature Of ERISA Plan Administration

Following Congress's direction that the law of trusts should inform the standards in ERISA cases, *see Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996) (citing, *inter alia*, H.R. Rep. No. 93-533, at 11-13 (1973)), the Supreme Court has repeatedly recognized that "[t]rust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers," *Firestone*, 489 U.S. at 111 (citing Restatement (Second) of Trusts § 187 (1959)). Thus, "[a] trustee may be given power to construe disputed or doubtful terms, and in such circumstances the trustee's interpretation will not be disturbed if reasonable." *Id.* (citing G. Bogert & G. Bogert, *The Law of Trusts and Trustees* § 559, at 169-71 (2d rev. ed. 1980)).

Applying that principle, *Firestone* held that an ERISA plan administrator's decision denying benefits is entitled to deference on judicial review if "the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." 489 U.S. at 115. That rule reflects the principle that, "[a]s in all trust cases, in reviewing the fiduciary's actions, the court must be governed by the intent behind the trust" as reflected in

plan documents.[2] Here, the plan documents delegate interpretive authority to the Plan Administrator. Efforts to undercut or usurp that authority defy rather than implement the Plan's objective intent.

Deference also serves important interests. Plan administrators—not courts—have the necessary expertise to interpret and apply plan terms. *See*, *e.g.*, *Evans v. Eaton Corp. Long Term Disability Plan*, 514 F.3d 315, 323 (4th Cir. 2008) (noting "the plan administrator's greater experience and familiarity with plan terms and provisions"); *Berry v. Ciba-Geigy Grp.*, 761 F.2d 1003, 1006 (4th Cir. 1985) (similar). Deference to the plan administrator's reasonable interpretation "ensure[s] that administrative responsibility rests with those whose experience is daily and continual, not with judges whose exposure is episodic and occasional." *Berry,* 761 F.2d at 1006. Deference thus "promotes predictability," permitting the sponsor to "rely on the expertise of the plan administrator rather than worry about unexpected and inaccurate plan interpretations that might result from *de novo* judicial review." *Conkright v. Frommert*, 130 S. Ct. 1640, 1649 (2010).

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[2] *See*, *e.g.*, *Moench v. Robertson*, 62 F.3d 553, 571 (3d Cir. 1995); *Firestone*, 489 U.S. at 112 (quoting Restatement (Second) of Trusts §4 cmt. d (1959)); *Jensen v. SIPCO, Inc.*, 38 F.3d 945, 950 (8th Cir. 1994); G. Bogert *et al*., *The Law of Trusts and Trustees* § 182 (3d rev. ed. 2011); *see also Sankel v. Spector*, 819 N.Y.S.2d 520, 523 (App. Div. 2006); *Arnott v. Arnott*, No. 2010-2180, 2012 WL 2924043, at *4 (Ohio July 18, 2012); *In re Marjorie Q. Ward Revocable Trust*, 265 P.3d 1260, 1263 (Mont. 2011); *In re Estate of Schmidt*, 572 N.W.2d 430, 434 (N.D. 1997); *Gulf Nat'l Bank v. Sturtevant*, 511 So. 2d 936, 937 (Miss. 1987).

Deference also "promotes efficiency by encouraging resolution of benefits disputes through internal administrative proceedings rather than costly litigation." *Conkright*, 130 S. Ct. at 1649. And deference is critical to ERISA's goal of ensuring "that plans and plan sponsors [are] subject to a uniform body of benefits law" so as "to minimize the administrative and financial burden of complying with conflicting directives." *See Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990). Deferring to the administrator's reasonable construction "help[s] to avoid a patchwork of different interpretations of a plan . . . that covers employees in different jurisdictions—a result that would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them." *Conkright*, 130 S. Ct. at 1649 (citation and quotation marks omitted). Indeed, without uniform application, "[s]imilar Xerox employees could be entitled to different benefits depending on where they live, or perhaps where they bring a legal action." *Id.* at 1650. Precisely that appears to have occurred once in this case already: After this Court upheld the district court's prior decision not to defer (before Supreme Court review), Xerox employees in the Ninth Circuit were seemingly subject to one construction of the offset provision and the plaintiffs in this case subject to another. *Id.* at 1651.

Finally, deference promotes one of Congress's key goals in enacting ERISA—encouraging employers to offer ERISA plans. *See*, *e.g.*, *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 648 (1990). Allowing courts to ignore an administrator's reasonable interpretation of a plan defeats that interest. It creates uncertainty by exposing plans to potentially unpredictable and inexpert constructions; it imposes undue administrative and judicial costs; and it creates an intolerable risk of subjecting plans to disuniform judicial interpretations. *See Conkright*, 130 S. Ct. at 1649. Congress sought to create a regulatory regime "that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans." *Varity*, 516 U.S. at 497. Plaintiffs' and DOL's assault on deference here would create precisely the complexities, costs, risks, and inconsistency Congress intended to avoid.

B. Plaintiffs' And DOL's Efforts To Evade *Firestone* Are Contrary To ERISA's Fundamental Structure And Purposes

1. *Courts Must Review The Reasonableness Of The Administrator's Construction Without Regard To The Putatively "Reasonable Views" Of Employees*

Notwithstanding the requirement that courts defer to the plan administrator's construction, plaintiffs and DOL seek to overturn the decision below because the district court "avoided consideration of participants' reasonable expectations." DOL Br. 20-23; *see* Pls.' Br. 7, 26. But that turns deference on its head.

Supreme Court precedent requires deference to the *plan administrator*'s reasonable construction. The existence of *other*, competing constructions—and "evidence that the plan administrator's construction is inconsistent with" the plan participants' construction, DOL Br. 21—is beside the point. Indeed, there would be no need to invoke deference if there were only one reasonable construction. Courts reviewing administrative agency decisions, for example, need not ask whether the agency's construction of the statute conforms to the construction of affected entities. Plaintiffs offer no good reason for a different result here.

Plaintiffs' and DOL's proposal is also unworkable. To the extent they want courts to consider the subjective beliefs of actual plan beneficiaries—taking "evidence" and considering "testi[mony]" regarding "employees' reasonable expectations," DOL Br. 21-22, their approach is at war with ERISA's "principal goals" of allowing "employers 'to establish a uniform administrative scheme.'" *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001); p. 11, *supra.* Under their approach, the plan's meaning would vary not merely from judicial district to judicial district, but from beneficiary to beneficiary depending on their subjective beliefs. But a plan can have only one meaning, not multiple meanings that vary with each participant's claimed understanding.

To the extent plaintiffs propose an objective standard, they would require courts to divine the plan interpretations of an imaginary "objective," "reasonable,"

or "average" plan participant. But that would once again shift the role of plan interpretation from administrators to the courts, this time under the rubric of looking for the hypothetical "reasonable man's construction." But the Supreme Court rejected precisely that shift in *Conkright*. *See* 130 S. Ct. at 1649. And plaintiffs' proposal would replace the expert views of plan administrators with the concededly inexpert interpretation of plan beneficiaries, destroying the expertise-preserving goal that deference is supposed to serve. *See* p. 10, *supra*. It would also require the courts to impute certain facts (a uniform understanding by beneficiaries), something the Supreme Court has specifically cautioned against. *See, e.g.*, *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1870-71, 1881-82 (2011) (rejecting the lower court's imputation of "likely harm" and requiring actual harm instead).

Finally, that approach would burden courts with the impossible task of determining what a hypothetical average employee would or would not have expected. In most cases, an average employee would at best have only a generalized expectation regarding most plan provisions. In any event, the Plan is clear that any ambiguity would be resolved by the Plan Administrator. *See* A-156; *see also* A-672 (Restatement of 1989 Plan). Yet it is precisely that power plaintiffs and DOL now seek to overturn.

2. *Plaintiffs' Conflict-Of-Interest Claims Likewise Defy ERISA Principles And Threaten Significant Dislocation*

Plaintiffs and DOL also seek to avoid deference on the theory that the Plan Administrators had a conflict of interest because they are employees of Xerox, the Plan Sponsor. Pls.' Br. 54-57; DOL Br. 22-25. But that is an ordinary feature of ERISA plans that, under Supreme Court precedent, has never by itself been sufficient to overcome deference. If accepted, plaintiffs' and DOL's conflict-of-interest theory would threaten to make deference a nullity.

It is often the case that "the entity that administers the plan, such as an employer or an insurance company, both determines whether an employee is eligible for benefits and pays benefits out of its own pocket." *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 108 (2008). Even where that "dual role creates a conflict of interest," however, it is at most "'weighed *as a factor* in determining whether there is an abuse of discretion.'" *Id*. at 108, 111 (quoting *Firestone*, 489 U.S. at 115) (emphasis added); *see* Restatement (Second) of Trusts § 187 cmt. d (1959). But "a deferential standard of review remains appropriate even in the face of a conflict." *Conkright*, 130 S. Ct. at 1646 (citing *Glenn*, 554 U.S. at 115-16).

Plaintiffs assert a "sever[e]" conflict in this case, Pls.' Br. 11, but they nowhere identify how the alleged conflict here differs from that at issue in every one of the thousands of ERISA plans in which the sponsor and administrator of the plan are governed by the same entity. *See* Brief of America's Health Ins. Plans *et*

al. as *Amici Curiae* in Support of Petitioners at 8, *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008) (No. 06-923) (describing how combined sponsor-administrator roles are now "common" because of the "efficiency advantages" they offer). *Glenn* specifically recognized that the shared sponsor and administrator role was common under ERISA, and refused to adopt a rule that would have effectively overturned *Firestone* by holding that such arrangements deprive administrators of deference. *See Glenn*, 554 U.S. at 115-16.

To the extent this case differs from the norm, it undermines any claim of conflict. Xerox does not administer the Plan; it has appointed individual employees, cognizant of their fiduciary responsibility, to do so. There is no claim Xerox attempted to influence those employees' decision-making or created inducements of the sort that would encourage anything but objective decision-making. *Cf. Glenn*, 554 U.S. at 117-18. More important, unlike *Glenn*, this is *not* a case where the party making benefits determinations also "pays benefits out of its own pocket." *Id*. at 108. Benefits here are paid not by Xerox but by an ERISA pension trust, a separate legal entity with hundreds of millions (perhaps billions) of dollars of its own assets; Xerox at most has a conditional responsibility to make contributions to the trust if the trust's liabilities exceed its assets, and there is no

allegation that the claims here created that sort of risk. That reduces the importance of any claimed conflict "to the vanishing point." *Id.* at 117.[3]

Moreover, this Court has held that even a genuine conflict should be given "[n]o weight" in the "absence of any evidence that the conflict actually affected the administrator's decision." *Durakovic v. Bldg. Serv. 32 BJ Pension Fund*, 609 F.3d 133, 140 (2d Cir. 2010). There is no such evidence in the record here. Although DOL complains that the district court dismissed the conflict claim as "'vague speculation,'" DOL Br. 22, that description could not be more on point. If this case requires the rejection or diminution of deference, virtually every case would. The Plan Administrators in this case did exactly what plan administrators around the country do on a daily basis: They made a benefit determination that was disputed, and that disappointed the beneficiaries at issue. That decision was not

[3] *See also Parsons v. Power Mountain Coal Co.*, 604 F.3d 177, 183-84 (4th Cir. 2010) (finding no conflict absent a "direct financial stake" on the part of the employer in denying claims); *O'Callaghan v. SPX Corp.*, 442 F. App'x 180, 185 (6th Cir. 2011) (where employer's ERISA plan was "funded entirely by employee contributions," and there was no evidence that the employer ever had to make up any shortfall in the trust, "there [was] no evidence that any conflict of interest actually influenced the plan administrator's decision," and "even if there was a structural conflict of interest . . . its effect on the plan administrator's decision was negligible"); *Holland v. Int'l Paper Co. Ret. Plan*, 576 F.3d 240, 249 (5th Cir. 2009) ("[T]he creation of the trust diminishes, but does not entirely negate, the impact of [a] conflict."); *Burke v. Pitney Bowes, Inc. Long-Term Disability Plan*, 544 F.3d 1016, 1026-27 (9th Cir. 2008).

the result of any conflict of interest, but only the result of a construction that the district court deemed reasonable and therefore appropriate under *Firestone*.[4]

Finally, it makes no difference (*see* DOL Br. 22-23) that the Plan Administrator's determination was issued in the course of expensive litigation, or that the Administrator applied another method (the "phantom account") that was expressly adopted after 1998 for post-1998 determinations. The Supreme Court has ruled in this very case that the Administrator's construction is entitled to deference even if courts have overturned his prior construction. 130 S. Ct. at 1646. That later construction is necessarily issued in the course of litigation. DOL and plaintiffs thus seek to overturn the Supreme Court's decision in this case by resurrecting the rejected one-strike-and-you're-out rule under the rubric of conflict-of-interest allegations.

C. The Administrator's Actuarial Method Reflects A Reasonable Construction Of The Plan

Actuarial predictions are the bedrock of ERISA plans. *See Conkright*, 130 S. Ct. at 1650. The Supreme Court thus recognized that the time-value of money

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[4] Plaintiffs claim that "the trial court simply refused to conduct—or even allow plaintiffs to seek discovery regarding—the required conflict of interest analysis." Pls.' Br. 55-56. The district court did nothing of the sort. It simply recognized that plaintiffs had been free to seek the discovery they requested during the discovery window, had failed to do so, and could not now seek to reopen discovery. *See* SPA 20-22.

should ordinarily be taken into account. Indeed, it would have been "highly unforeseeable" and "heresy" *not* to account for the time-value of money. *Id*.[5]

Carefully following the Supreme Court's guidelines in *Conkright*, the district court found that the Plan Administrator had properly accounted for the time-value of money by applying rates derived from market interest rate data. SPA 11-12 (citing *Berger v. Xerox Corp. Ret. Income Guarantee Plan*, 338 F.3d 755, 760 (7th Cir. 2003)). The court recognized that using those rates was reasonable because "the 1989 Restatement of the Plan specified the use of those rates for converting certain benefits to annuities," SPA 12 (citing 1989 Restatement §§4.3(e), (f), 8.2(c)), and because they fell "within the scope of the notice that was given to plaintiffs concerning the effect of prior distributions," SPA 9.

Plaintiffs and DOL nonetheless challenge that construction by arguing that new hires would receive greater benefits than rehired employees. DOL Br. 21. But they misunderstand the Plan. The Plan has at least two components. It has a "defined benefit" component under which employees receive benefits under a formula that takes into account, among other things, the employee's earnings history, tenure, and age. And it has a "defined contribution" component, which

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[5] Without such an offset, rehired employees would receive a windfall upon their second departure because they would receive benefits based on their initial tenure at the company on two separate occasions. *See Conkright*, 130 S. Ct. at 1650. And ERISA "abhor[s]" "windfalls." *Harms v. Cavenham Forest Indus., Inc.*, 984 F.2d 686, 693 (5th Cir. 1993).

consists of annual beneficiary contributions to the Plan plus any return on investments (somewhat like a 401(k)). In a "floor-offset" plan like the one at issue here, the defined benefit component merely ensures a minimum level of benefits no matter how the defined contribution component performs; it operates as "insurance against the vagaries of securities investments [in the defined contribution] component." *Lunn v. Montgomery Ward & Co*., 166 F.3d 880, 881, 883 (7th Cir. 1999). Thus, when the defined contribution component performs well, "many [employees] will have little or no benefit from the defined benefit plan." Employee Benefit Research Inst., *Hybrid Retirement Plans: The Retirement Income System Continues to Evolve*, EBRI Special Report No. SR-32, at 18 (1996), http://www.ebri.org/pdf/briefspdf/0396ib.pdf. In fact, it is common for employees in floor-offset plans not to receive *any* benefits under the defined benefit component of the plan—instead, such employees receive their benefits wholly from the defined contribution component.

Here, the offset challenged by plaintiffs is applied *only to the defined benefit component*. A-658 ¶7 (Becker Aff.). In floor-offset plans, such an offset typically applies only to (i) rehired employees (ii) who took a lump-sum payment upon their first departure and (iii) whose defined contribution account has performed so poorly that reliance on the defined benefit component is necessary. *See id.*; A-662 ¶18 (Becker Aff.). Rehired employees who do not have to rely on the defined

benefit "insurance policy" will not receive lower benefits than a new hire. Nothing in the Plan required the Administrator to construe the Plan as establishing not merely an offset, but also providing a guarantee that the resulting benefits will at least be equal to the defined benefits that would be received by a new hire. To inject such a requirement into the Plan would effectively rewrite the benefit formula and require the Plan to ignore the full actuarial value of the offset.

II. Plaintiffs' Notice Theory Is Untenable

A. The Proposed Standard Would Render Summary Plan Descriptions Unworkable

Alternatively, plaintiffs and DOL attempt to avoid deference altogether by shifting from challenging the Administrator's construction to challenging the adequacy of notice. Specifically, they argue that the SPD failed to give them sufficiently detailed notice about the offset's calculation. Plaintiffs do not claim that they were kept ignorant of an offset. They instead challenge the SPD's failure to explain the methodology that would be used to calculate the offset.[6]

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[6] DOL suggests that the SPD was affirmatively misleading because it states that prior lump sum distributions "may," rather than "would," result in an offset. DOL Br. 15. But the SPD's disclosure is wholly accurate. As noted above, there is no offset except in the limited scenario when the defined contribution portion of the plan performs so poorly that the beneficiary must rely on the defined benefit part of the plan that acts as "insurance." A-658 ¶7 (Becker Aff.); pp. 19-20, *supra*. It would therefore have been affirmatively misleading for the SPD to suggest that such an offset "would" occur.

That new theory ignores the realities of ERISA benefit plan management. A summary plan description is just that—a summary. It need not describe every facet of the plan in detail. To do so would in fact be counterproductive. "Larding the summary with minutiae . . . defeat[s] that document's function: to provide a capsule guide in simple language for employees." *Herrmann v. Cencom Cable Assocs., Inc*., 978 F.2d 978, 984 (7th Cir. 1992). And requiring the SPD "to contain all of the terms and conditions of the plan document itself, lest they be unenforceable, . . . calls for the impossible—for the SPD to merely summarize the plan document and yet be just as comprehensive and detailed as the plan document." Hollis T. Hurd, *No, The SPD Does Not Control*, 236 Pension & Benefits Daily (BNA), at 4 (Dec. 13, 2010). As the Supreme Court has explained, making "the language of a plan summary legally binding could well lead plan administrators to sacrifice simplicity and comprehensibility in order to describe plan terms in the language of lawyers." *Amara*, 131 S. Ct. at 1877-78. Especially for large ERISA plans, which may have myriad provisions dealing with specialized situations (like rehires), the level of granularity demanded by DOL and plaintiffs cannot be achieved.[7]

[7] Excessive disclosure is also counterproductive: Too much information can create "information overload" that impairs decision-making. *See* Troy A. Paredes, *Blinded By The Light: Information Overload And Its Consequences For Securities*

Plaintiffs' claim that the SPD should detail methodologies for offsets is particularly misplaced. This Court and others have recognized that ERISA does not "impose[] a blanket requirement under which a Summary Plan Description invariably must describe the method of calculating an actuarial reduction." *McCarthy v. Dun & Bradstreet Corp*., 482 F.3d 184, 197 (2d Cir. 2007); *see 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."). ERISA requires only that the SPD "identify[] *circumstances which may result in . . . offset* . . . of any benefits," 29 C.F.R. §2520.102-3(1) (emphasis added)—not detail the amounts, *see id.* §2520.102-2(a) (an SPD need only be "sufficiently comprehensive" to "apprise" beneficiaries of their rights and obligations under the plan). If beneficiaries were interested in the methodology for calculating the fully disclosed offset, they needed only to ask the Plan Administrator.

B. Plaintiffs' Notice Theory Seeks To Overturn The Supreme Court's *Conkright* Decision *Sub Silentio*

Notwithstanding the Supreme Court's direction that "the lower courts should have applied the standard established in *Firestone* and *Glenn*," *Conkright*, 130 S. Ct. at 1651, plaintiffs seek to evade that clear mandate through verbal sleight-of-

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Regulation, 81 Wash. U. L.Q. 417, 419, 434-43 (2003) (collecting studies in the securities context).

hand. Plaintiffs argue that, while the Plan Administrator's interpretation of the *meaning* of the plan may be entitled to deference, this Court must analyze the adequacy of the SPD's *notice* under a *de novo* standard. Pls.' Br. 26-28.

As the district court properly observed, however, that effectively seeks to overturn the Supreme Court's decision by changing labels. SPA 11 ("[P]laintiffs still contend here that I could decline to adopt the Plan Administrator's approach, and render the same decision I did in 2007, albeit on different grounds."). In so doing, they would render *Firestone*, *Glenn*, and *Conkright* practical nullities. In their view, even where a plan administrator received deference under *Firestone* for its interpretation, the administrator would lose anyway unless the *summary* of the plan set forth that construction in advance. But that will rarely, if ever, be the case: Where the plan itself is ambiguous, the SPD will almost never set forth the details of how that ambiguity is resolved; the SPD is a *summary* of the plan's terms, not an expansion on them. This Court ought not accept the plaintiffs' effort to overturn the Supreme Court's rulings *sub silentio*.

III. The Court Cannot Provide Reformation Or Any Other Equitable Remedy Under *Amara*

Plaintiffs' and DOL's new "notice" theory suffers from a final, fatal defect—it attempts to expand available remedies beyond permissible bounds. In *Amara*, the Supreme Court explained that ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), allows plan beneficiaries to obtain appropriate equitable relief in

certain circumstances. 131 S. Ct. at 1876, 1879-80. Invoking that decision, plaintiffs (at 33-39) and DOL (at 26-31) now request that the Court grant plaintiffs relief under the equitable doctrines of reformation, estoppel, or surcharge. But that request would stretch the law of equity, and the Supreme Court's observations in *Amara*, beyond all reasonable bounds.

A. The Traditional Remedy Of Reformation Is Not Available For Claimed Summary Plan Notice Violations Such As The Ones Alleged Here

Notwithstanding plaintiffs' invocation of *Amara*, that case defeats their claims. Under *Amara*, claimants seeking equitable remedies under ERISA must at least show that they meet the traditional equitable requirements for that relief. *See Amara*, 131 S. Ct. at 1880-82. Plaintiffs do not come close to doing that here.

1. *Reformation Is Not Available Absent Fraud Or Mutual Mistake*

Reformation of a written agreement has long been considered appropriate relief only in cases of fraud or mutual mistake. *See Hearne v. Marine Ins. Co.*, 87 U.S. (20 Wall.) 488, 490 (1874) ("The reformation of written contracts for fraud or mistake is an ordinary head of equity jurisdiction."); *Chimart Assocs. v. Paul*, 489 N.E.2d 231, 233-34 (N.Y. 1986) (fraud or mutual mistake proper grounds for reformation). For that reason, the Ninth Circuit recently held that reformation of an ERISA plan "is proper only in cases of fraud and mistake," such that the original instrument "fail[s] to reflect [the] drafter's true intent." *Skinner v.*

Northrop Grumman Ret. Plan B, 673 F.3d 1162, 1166 (9th Cir. 2012) (citing Restatement (Third) of Trusts §§ 12, 62 (2003); Restatement (Second) of Contracts § 155 (1981)).

Here, plaintiffs have no evidence of fraud of any sort, and certainly have not come forward with the particularized factual allegations required under Fed. R. Civ. P. 9(b). Their assertions are wholly conclusory.[8] Nor have they presented any evidence that the Plan "contains terms that fail to reflect [the] drafter's true intent," much less a *mutual* mistake by the Plan Sponsor and plan participants. *See Skinner*, 673 F.3d at 1165-66. That stands in stark contrast to *Amara*, where the record was laden with specific findings of fraud by CIGNA, which served both as Plan Sponsor and Plan Administrator. 131 S. Ct. at 1874 ("CIGNA intentionally misled its employees"); *id.* at 1872-75 (detailing CIGNA's allegedly misleading scheme).

2. *Reformation Of The Plan Is Not Available For Alleged Violations By The Plan Administrator*

Plaintiffs' attempt to reform the Plan based on the SPD—specifically, based on the failure to describe the method for calculating the offset—fails for a second reason: It conflates the Plan with the SPD, and the Plan Sponsor with the Plan

[8] *See* Pls.' Br. 38 (stating without evidence that "[t]he defendants induced plaintiffs to return to Xerox by misleading plaintiffs about the size of their pension annuities"); DOL Br. 30 (stating that "defendants . . . appear to have been mistaken" about the terms of the plan, and that "[a]dditionally, defendants may have engaged in 'fraud' or 'inequitable conduct' ").

Administrator. *Amara* itself makes the distinction between Plan and SPD clear, emphasizing that it is the Plan, not the SPD, that controls rights and obligations. For that reason, the Court held that SPD notice violations could not support the express statutory remedy of "'enforc[ing]' the *'terms of the plan*.'" 131 S. Ct. at 1877 (emphasis added). The "summary documents," the Court ruled, "provide communication with beneficiaries *about* the plan, but . . . their statements themselves do not constitute the *terms* of the plan." *Id.* at 1878.

More fundamentally, under ERISA, a plan sponsor is the entity that writes the plan, that creates it, and that funds it. *See Amara*, 131 S. Ct. at 1877. The plan administrator, by contrast, is the entity that administers the plan, that writes plan summaries, that deals with beneficiaries, and that makes beneficiary determinations. *See id*. As *Amara* recognized, ERISA carefully distinguishes those roles, finding "no reason to believe that the statute intends to mix the responsibilities by giving the administrator the power to set plan terms indirectly by including them in the summary plan descriptions." *Id.*

Yet plaintiffs and DOL attempt to erase those distinctions. They ask this Court to reform the Plan (which is controlling) to correspond to their own, inconsistent, interpretation of the summary (which is not controlling and is silent on methodology in any event), when there is in fact no inconsistency between the Plan and the SPD. More fundamentally, plaintiffs ask the Court to alter the

obligations under the Plan (written by the Plan Sponsor) based on supposed errors by the Plan Administrator (who wrote the SPD). Nowhere do they explain why a putative error by the Plan *Administrator* should be used to globally rewrite the terms set by the Plan *Sponsor* in the Plan (much less do so in a way that does not conform with its intent). Nor do they identify any reason for ignoring the legal distinction between sponsors and administrators established in *Amara*. *See* 131 S. Ct. at 1877; *id.* at 1884-85 (Scalia, J., concurring in the judgment). And they identify no equitable principle that allows a contract between Person A and Person B to be reformed based on the alleged mistakes of an entirely separate Person C. That is because there is no such principle. *See id.* at 1884 (Scalia, J., concurring in the judgment) (reformation cannot be invoked "to alter the terms of a contract in response to a third party's representations").

The distinction between a plan's sponsor and its administrator is critical given that only the administrator owes the beneficiaries a fiduciary duty. *See* ERISA § 3(21)(A)(iii), 29 U.S.C. § 1002(21)(A)(iii); *Varity Corp.*, 516 U.S. at 498. It is thus quite unworkable for a plan designed by the employer—an entity free from fiduciary responsibility—to be reformed by the plan administrator, an entity bound to act solely in the interest of plan participants and plan solvency. *See* Hurd, *supra*, at 2 (allowing the SPD to control would "place plan design decisions, which must take into account the interests of the sponsor, in the hands of the plan

administrator—a fiduciary who is duty bound to ignore the interests of the sponsor and act solely in the interests of the participants"). Giving administrators power to unwittingly reform the plan would directly frustrate the rule that a plan should be executed according to the sponsor's intent. The Plan Administrator did exactly what he was supposed to do here: He interpreted and applied the Plan by taking the time-value of money into account in a reasonable and appropriate manner.

B. None Of The Other Equitable Remedies Identified By Plaintiffs Is Appropriate Here

Plaintiffs mention the remedies of equitable estoppel and surcharge, but neither is appropriate here. The remedy of equitable estoppel is available in ERISA cases only in "extraordinary circumstances" upon proof of: "(1) a promise, (2) reliance on the promise, (3) injury caused by the reliance, and (4) an injustice if the promise is not enforced." *Schonholz v. Long Island Jewish Med. Ctr.*, 87 F.3d 72, 78-79 (2d Cir. 1996). Importantly, the promise must have come from the party to be estopped. *In re Vebeliunas*, 332 F.3d 85, 93 (2d Cir. 2003) ("'The doctrine of equitable estoppel is properly invoked where the enforcement of the rights of one party would work an injustice upon the other party due to the latter's justifiable reliance *upon the former's words or conduct*.'" (emphasis added) (citation omitted)). But plaintiffs do not claim *the Plan* or *the Plan Sponsor* made a false promise. They claim that the SPD—authored by *the Plan Administrator*—represented a promise regarding their benefits. But plaintiffs now seek a remedy of

equitable estoppel that would run against *the Plan*. That is not a proper use of equitable remedies.

Plaintiffs allude to surcharge in passing in a footnote of their brief. Pls.' Br. 36 n.10 (citing *Amara*, 131 S. Ct. at 1881). But they make no effort to meet the requirements for that remedy; they make no showing of the actual "damages" or "misrepresentation" required. Their conclusory statements are insufficient to preserve the claim, and certainly do not substantiate it. *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998).

CONCLUSION

The district court's judgment should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B)(i) because this brief contains 6,979 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of July, 2012, I caused a true and correct copy of the Brief of Business Roundtable, Chamber of Commerce of the United States of America, the ERISA Industry Committee, and American Benefits Council as *Amici Curiae* in Support of Defendants-Appellees and Affirmance to be served on the following counsel of record in this appeal via CM/ECF pursuant to Local Rules 25.1(h)(1) & (2):

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