NO. ____

In the

Supreme Court of the United States

RETIREMENT PLAN FOR EMPLOYEES OF S.C. JOHNSON & SON, INC., and RETIREMENT PLAN FOR EMPLOYEES OF JOHNSONDIVERSEY, INC.,

Cross-Petitioners,

v.

JAMES BARBERIS, ROGER DEMONTRAVEL, MICHAEL J. THOMPSON, DAVID A. TROESTLER, JAMES PATRICK JOHNSON, DAVID GRAY, DAVID THOMPSON, ROBERT K. AULT, TERRY CONLON, MICHAEL S. WAKEFIELD, and ANTHONY DECUBELLIS, on behalf of themselves and all others similarly situated,

Cross-Respondents.

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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February 6, 2012

QUESTIONS PRESENTED

1. Does a cause of action under ERISA Section 502(a), 29 U.S.C. § 1132(a), accrue when a plan publishes and describes an unlawful change in benefits in its plan materials or only years later when the participant recognizes the legal error?

2. When a plan's methodology for calculating benefits is deemed void years later and it becomes necessary to determine which of a number of ERISA-compliant formulas the plan would have selected should a court defer to the view of a plan administrator with "the exclusive right to interpret the Plan and to decide all matters arising thereunder, including without limitation, the power to determine eligibility for benefits under the Plan and the amounts of such benefits" or should it decide the matter without deference?

PARTIES TO THE PROCEEDINGS

Cross-Petitioners, Retirement Plan for Employees of S.C. Johnson & Son, Inc., and Retirement Plan for Employees of JohnsonDiversey, Inc., were defendants-appellees and cross-appellants in the court below. Cross-Respondents, James Barberis, Roger DeMontravel, Michael J. Thompson, David A. Troestler, James Patrick Johnson, David Gray, David Thompson, Robert K. Ault, Terry Conlon, Michael S. Wakefield, and Anthony DeCubellis, and classes of similarly situated persons, were plaintiffs-appellants and cross-appellees in the court below.

RULE 26.1 STATEMENT

Cross-Petitioner Retirement Plan for Employees of S.C. Johnson & Son, Inc., has no parent company. There is no publicly traded company that owns 10% or more of its stock.

Cross-Petitioner Retirement Plan for Employees of Diversey, Inc., has no parent company. There is no publicly traded company that owns 10% or more of its stock. Sealed Air Corporation is the indirect corporate parent of Diversey Holdings, Inc. and its subsidiary Diversey, Inc. Diversey, Inc. is the plan sponsor for respondent Retirement Plan for Employees of Diversey, Inc. There is no publicly traded company that owns 10% or more of the stock of Sealed Air Corporation.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Retirement Plan for Employees of S.C. Johnson & Son, Inc. (the "Plan") and Retirement Plan for Employees of JohnsonDiversey, Inc., (together, the "Plans"), respectfully file this conditional cross-petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the judgment in this case. The Court should deny the petition for a writ of certiorari in No. 11-843 for all the reasons set forth in the Plans' brief in opposition, and, if the Court does so, the Court should also deny this cross-petition. In the unlikely event the Court grants that petition, however, it should also grant this cross-petition.

OPINIONS BELOW

The June 22, 2011, opinion of the United States Court of Appeals for the Seventh Circuit is reported at 651 F.3d 600 and is reproduced at Pet.App.1a–24a.[1] The Seventh Circuit's August 5, 2011, Order denying the petition for rehearing and rehearing *en banc* is unreported but is reproduced at Pet.App.94a–95a. The March 26, 2010, Order of the District Court is reported at 716 F. Supp. 2d 752 and is reproduced at Pet.App.61a–93a. The June 30, 2010, Order of the District Court is reported at 716 F. Supp. 2d 768 and is reproduced at Pet.App.49a–60a. The August 19, 2010, Order of the District Court is unreported but is available at 2010 WL 3282666 and is reproduced at Cross-Pet.App.1a–21a. The November 18, 2010, Order of the District Court

[1] "Pet.App." refers to the Petition Appendix in 11-843.

is unreported but is available at 2010 WL 4723410 and is reproduced at Pet.App.25a–48a.

JURISDICTION

The Seventh Circuit rendered its decision on June 22, 2011. Cross-Respondents' petition for rehearing and rehearing *en banc* was denied on August 5, 2011. On October 27, 2011, Justice Kagan granted petitioners' requested extension of time for the filing of a petition for certiorari to and including January 2, 2012, a Court holiday. A timely petition for certiorari was filed on January 3, 2012, and docketed as No. 11-843 on January 5, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent parts of Sections 502(a) and 204(c)(3) of ERISA, 29 U.S.C. §§ 1132(a) & 1054(c), are set forth in the Petition Appendix in No. 11-843.

STATEMENT OF THE CASE

When S.C. Johnson & Son, Inc., converted its employee retirement plan from a defined benefits plan to a "cash-balance" plan, it included an early payment provision, which, while similar to those in other ERISA plans, admittedly did not comply with ERISA.[2] ERISA requires that when a plan gives

[2] The JohnsonDiversey plan was formed as a cash-balance plan and became effective January 1, 1999, when its assets were separated from S.C. Johnson's Plan to provide pension benefits to former S.C. Johnson employees transferred to JohnsonDiversey. Dkt.130-1 at 5–6; Dkt.133-1 at 3. For simplicity and unless otherwise noted, this cross-petition refers only to S.C. Johnson and its Plan, but the companies' ERISA

departing employees the option of receiving an early lump-sum distribution, that lump sum must include the "actuarial equivalent" of what they would have received had they remained in the plan. Under the S. C. Johnson Plan, that equivalent would have included projected future interest to age 65 discounted to reflect the time value of receiving the lump sum immediately, as opposed to at age 65. The Plan used the same rate (the Treasury rate) both to calculate future interest and as the statutory discount rate—resulting in a wash so that recipients received their then-current account balance as a lump sum (or their current balance increased by the Treasury rate to account for future interest and discounted back to present value using the same rate, which is to say, their current balance). The materials explaining the Plan change disclosed that lump-sum distributions would equal participants' current account balances and that participants who chose a lump-sum distribution would lose the ability to earn future interest credits. Departing employees who left their money in the Plan would continue to earn future interest credits under the Plan.

The Plan's decision to use the Treasury rate as both the measure of participants' likely future interest credits and the discount rate violated ERISA. Likely future interest credits depended substantially on the future performance of the Plan's investments, and so they could not be predicted with certainty, but needed to be estimated. A plan would have considerable discretion in selecting a basis for

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plans were identical in all material respects, as were the claims brought against the plans.

estimation, but simply using the Treasury rate was not then a permissible choice. (Congress subsequently changed the law prospectively to allow plans simply to pay departing employees their current balances as their lump-sum distribution. *See* Pension Protection Act of 2006, Pub. L. No. 109-280, § 701(a)(2), 120 Stat. 780, 920, 984 (2006). Because the Plan conceded error and admitted that its practice of simply paying out account balances to those who elected a lump-sum distribution was unlawful, the initial question raised in both the Petition and this Conditional Cross-Petition is when the cause of action accrued. Defendants submit that the applicable six-year statute of limitations runs upon publication of materials describing the lump-sum distributions and making clear that departing employees who elected a lump sum would get only their account balance, while departing employees who kept their money in the Plan would continue to earn future interest.

The Seventh Circuit held, "although not without some difficulty," that the Plan documents did not adequately disclose the unlawful provision. Pet.App.11a. Instead, the Seventh Circuit agreed with the District Court that the cause of action accrued when the plaintiffs received their lump-sum distribution, which constituted a "clear and unequivocal repudiation of rights under the pension plan which has been made known to the beneficiary." Pet.App.91. The Seventh Circuit rejected Plaintiffs' argument that Plan participants could not have understood their injury without seeing the full Plan documents, and thus the statute of limitations has not begun to run even to this day for participants who have not yet seen the Plan.

At bottom, the decision below constituted a fact-bound determination as to whether the Plan materials adequately described the unlawful provision. The Seventh Circuit held that they did not, noting that it is "a very close question." Pet.App.10a. The court rejected Plaintiffs' equally fact-bound argument, advanced below and in the Petition in 11-843, that "the injury was somehow concealed from them." Pet.App.16a n.9. As the Seventh Circuit explained, "the Plan defendants did not improperly conceal the wash calculation in the Plan document; they never mentioned it to the participants because it was designed to have no effect." Pet.App.14a.

This dispute, which turns on the lower courts' determination of the meaning and effect of particular plan change materials, warrants no further attention from this Court. In the unlikely event that the Court grants the petition in 11-843, it should also grant this cross petition to ensure that the full range of answers to the accrual question (upon the publication of materials making clear that lump-sum distributions would equal the current balance, upon actual payment of lump sums equal to the current balance, or not yet) are available to this Court.

In the unlikely event this Court considers the fact-bound statute of limitations question, it should also consider the question whether the courts should defer to a plan administrator in the choice among a range of valid means to estimate future interest credits under the Plan. If the Plan had been permitted to remain silent on the correct formula, there would be no question that the Plan administrator would have had the discretion under the Plan to choose among lawful methods of estimating future interest credits. The question then is whether the Plan administrator loses that discretion when the Plan documents themselves specify a methodology (the Treasury rate) that was invalid, thus creating a gap. The Plan administrator thought that a fair method would be either to add a risk premium to the Treasury rate or to average the Plan's interest crediting rates for the previous five years. The District Court deferred at least in part to the latter interpretation, but the Seventh Circuit held that the District Court should have made its own decision, even if it came to the same conclusion as the Plan administrator.

1. The Plans' brief in opposition to the Petition for Certiorari in 11-843 includes a detailed statement of facts, which is incorporated by reference here and need not be repeated. Briefly stated, ERISA and IRS interpretations required at all times relevant to this case that "cash-balance" retirement plan beneficiaries, like cross-respondents, who elect to take a lump-sum distribution of their benefit before age 65 must receive the "actuarial equivalent" of the benefit that they would have received if they had remained in the plan until age 65. Because the Plan awarded interest credits to participants, the actuarial equivalent of a lump-sum benefit had to include credit for the interest that would have been earned, discounted to reflect the present value of those future interest credits.

When S.C. Johnson & Son, Inc., converted from a traditional defined benefits plan to a "cash balance" plan, however, it included a provision that calculated future interest credits based, not on an estimate of likely future interest credits based on the Plan's formula for interest credits or the Plan's actual mix of investments, but on the Treasury rate. The Plan then used that same rate to discount future interest credits to present value with the effect of ensuring that the process of adding future interest credits and discounting them back to present value inevitably meant that those electing lump-sum distributions would receive their current balance. The Summary Plan Descriptions (SPDs) and other Plan documents clearly informed participants of the bottom line that if they elected a lump-sum payment they would receive their current account balance. Those documents also clearly told participants that if they left their funds in the Plan they would continue to earn interest credits pursuant to the Plan's terms. Those documents did not, however, explain the mechanics of the "wash calculation" that produced this result. Pet.App.3a. That calculation was detailed in the amended Plan itself, but not in the SPDs and other Plan documents. In other words, the SPDs and other Plan documents told participants that they would receive their current account balance, not that they would receive their account balance increased by the 30-year Treasury bond rate to reflect interest credits accruing to age 65, and then decreased by the application of that same rate to reflect the value of receiving the distribution now and not at age 65. While the amended Plan specified these calculations, the SPDs and other participant documents focused on the bottom line—take a lump sum and get your current balance or defer and continue to earn interest credits. *See* DA06, DA08, DA18.[3] Pursuant to the calculation specified in the amended Plan and the express promise in the SPD, departing employees who elected a lump-sum distribution received their current account balance, nothing more and nothing less, as their lump-sum distributions.

The administrator of the Plan is a Benefits Administration Committee to which the Plan commits "the exclusive right to interpret the Plan and to decide all matters arising thereunder, including without limitation, the power to determine eligibility for benefits under the Plan and the amounts of such benefits." A094, § 11.3.[4] The Plan also grants the administrator discretion to appoint legal counsel "as may be necessary or convenient in the administration of the Plan." A094, § 11.2.

2. On November 27, 2007, the first class-action lawsuit seeking recovery of the unpaid interest was filed on behalf of former S.C. Johnson employees. Several months later, former employees of JohnsonDiversey joined the case. Although the applicable statute of limitations is six years, Pet.App.9a, 79a–80a (applying six-year period for bringing contract claims under Wisconsin law), the class actions included employees who had received

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[3] "DA" refers to the Defendants-Appellees-Cross-Appellants' Appendix, in Nos. 10-3917, 10-3918, 10-3988, 10-3989 (7th Circuit).

[4] "A" refers to the Special Appendix for Plaintiffs-Appellants-Cross-Appellees in Nos. 10-3917 and 10-3918 (7th Circuit).

their lump-sum distributions more than six before the filing of the actions. Moreover, every class member received notice through the SPDs and other documents more than six years before the suit was filed that they would receive only their current balance if they elected a lump-sum distribution. Because liability was conceded after motions to dismiss, the focus of the summary judgment proceedings below was on whether any plaintiffs had timely claims and, if so, how the remedy should be calculated.

The District Court divided the class into two subclasses based upon the date when class members received their lump-sum distributions. Subclass A members received their distributions on or after November 27, 2001, *i.e.*, within six years of the suit being filed. Subclass B members received their distributions before November 27, 2001. Notwithstanding the plain language of the amended Plan and the numerous disclosures made directly to Plan participants in 1998 and 1999 concerning lump-sum distributions, the District Court concluded that the Plan did not clearly and unequivocally repudiate participants' rights to future interest credits until they received lump-sum payments reflecting only the amount of their nominal accounts. Pet.App.83a. Applying the six-year statute of limitations, the District Court entered summary judgment in favor of the Plan on the Subclass B claims and in favor of the plaintiffs on the Subclass A claims.[5]

[5] There were actually four subclasses in the courts below—a Subclass A and a Subclass B for S.C. Johnson and one of each for JohnsonDiversey.

With respect to the remedy, the District Court ordered the Plan in the first instance to "recalculate the lump sum distributions pursuant to the requirements of the law" and propose a new method to the plaintiffs. Pet.App.88a. In doing so, the District Court cast doubt on one potential method of calculation, namely adding a risk premium above the Treasury rate. Although the Plan administrator expressed interest in adopting that risk premium methodology, it viewed that option as foreclosed by the District Court. *See* A164, 169, 225–226; Dkt.242 at 11 n.5.[6] Accordingly, after considering a variety of potential methods to estimate likely future earnings under the Plan, the Plan administrator chose a five-year average adjusted in the final year pursuant to the Plan terms. When the plaintiffs refused to agree to the Plan's new methodology, the District Court reconsidered the issue. And, although the District Court ordered the Plan to use a "true" five-year average instead one including an adjusted rate in the final year as the Plan administrator had chosen, the court otherwise deferred to the Plan's proposed method consistent with this Court's decision in *Conkright v. Frommert*, 130 S. Ct. 1640, 1644 (2010). Pet.App.46a–47a.

Plaintiffs appealed and the Plans cross-appealed. The Court of Appeals affirmed the District Court's judgment on the statute of limitations issue but remanded on the remedies issue with instructions to give no deference to the

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[6] "Dkt." refers to the docket of the United States District Court for the Eastern District of Wisconsin, Case No. 2:07-cv-01047-JPS.

Plan administrators' preferred method. Pet.App.21a–23a. According to the Court of Appeals, *Conkright* and *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), "have little authoritative to say" in this case because "this is not [a] case about the fiduciaries' construal of the Plan." Pet.App.21a–23a.

The Court of Appeals denied rehearing and rehearing *en banc*, and the time-barred plaintiffs filed the petition in 11-843 seeking review of the judgment.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

This Court should deny review of the petition in 11-843 and consequently of this conditional cross-petition. But in the unlikely event that this Court grants the petition in 11-843, it should grant this cross-petition as well as to both questions presented. The case for granting the cross-petition on the first question is straightforward: If this Court is to consider the fact-bound accrual issue it must have all of the available options squarely before it. There are three possible accrual events: 1) when the SPDs and other communications put participants on clear notice that they would receive their current balance as a lump-sum distribution and would continue to earn interest credits only if they kept their balances in the Plans, 2) when the Plans made good on the promise of the SPDs and actually distributed a lump-sum amount equal to the current balances, or 3) not yet. Petitioners contend that the court of appeals erred in adopting the second option over the third. But as noted the court of appeals thought it "a very close question" whether the first or second option was the accrual event. Granting this cross-petition would ensure that this Court, like the court of appeals, could consider the first option as well. If this Court were to consider the statute of limitations issue, it should consider the deference issue raised in the second question presented. There is a far stronger case for certiorari on the deference issue than on any issue raised by the petition.

I. THE CAUSE OF ACTION ACCRUED WHEN THE PLANS PUBLISHED DESCRIPTIONS OF HOW LUMP-SUM DISTRIBUTIONS WOULD BE CALCULATED.

The petition in 11-843 presupposes, contrary to the factual findings of the district court and the holding of the Seventh Circuit, that the Plans' administrators concealed the unlawful provision and asks this Court to adopt some sort of discovery rule. That issue does not merit this Court's review. But if the Court would wade into the thicket, the only reasonable interpretation of the facts is that the Plans' description materials adequately disclosed the unlawful provision and thus the cause of action accrued upon distribution of such materials.

A. The overwhelming factual record before the courts below established that the Plans clearly and unequivocally repudiated the Plans' participants' rights to future interest credits by 1999, at the very latest. The record showed that before and after S.C. Johnson's and Johnson Diversey's transition to cash-balance plans, the Plans' participants received various communications explaining the Plans' lump-sum option. Plaintiffs themselves acknowledged during oral argument in the court of appeals that these communications were clear, *see* Oral Arg. Audio Recording, *Thompson v. Retirement Plan*, No. 10-3917 (May 13, 2011), *available at* http://www.ca7.uscourts.gov/tmp/FA0QHZH8.mp3, as they must: The materials unambiguously explained that if participants elected to take a lump-sum distribution before reaching age 65, the distribution amount would equal the amount reflected in their account balance, and no more. *See, e.g.*, Dkt.130-1 at 8–10; Dkt.132-1 at 50–61; DA01–21. They went further and underscored that if the Plans' participants wanted to continue to earn future interest credits, they would need to leave their money in the Plans, and not take a lump-sum distribution. *See, e.g.*, DA06, DA08, DA15, DA18. Specifically, during the spring of 1998 and continuing through 1999, Plan participants received a series of educational newsletters that stated repeatedly that a participant's early lump-sum distribution would include only the participant's account balance at the time of distribution.[7] DA15, 17, 19, 20–21. And as early as the fall of 1998, the participants received summary plan descriptions stating that if they took a lump-sum payment, the "entire value of your account is paid in one payment"

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[7] For example, the newsletters explained that a terminated employee's early lump-sum distribution would equal his "entire Cash Balance Plan account balance," DA17, and that "if you choose to receive a lump-sum payment of your account balance, your account will be considered to be 'paid in full.'" DA15. In contrast, the newsletters explained that if a terminated employee remained in the Plan and deferred distribution, his pension benefit would continue to grow through the accrual of annual interest credits added to his account balance. DA15–20.

and that "[n]o further pension benefit will be payable from the Company." DA03, 06. In addition to these summary communications, participants received annually personalized statements showing the current amount—*i.e.*, the amount they would receive in a lump-sum distribution—in their notional accounts. Dkt.135 at 1–2.

The record also showed that the Plans did not conceal the details of the lump-sum payment. The S.C. Johnson and Johnson Diversey Plan documents themselves "included all the requisite information underlying the current lump sum claims," including a description of the unlawful wash calculation. Pet.App.55a–56a. And as the District Court and Seventh Circuit concluded, there was "no evidence showing that the Plans purposefully concealed details" about the calculation of the lump sums because "all information giving rise to the plaintiff's claims" was available in Plan documents that plaintiffs could obtain "with reasonable diligence." Pet.App.59a; *see also* Pet.App.14a.

B. Properly applied to these facts, the Seventh Circuit should have dismissed all claims as time-barred under the "clear and unequivocal repudiation" standard, which has been adopted by all circuits to have squarely considered the issue. *See Daill v. Sheet Metal Workers' Local 73 Pension Fund*, 100 F.3d 62, 66 (7th Cir. 1996) ("a cause of action accrues upon a clear and unequivocal repudiation of rights under the pension plan which has been made known to the beneficiary").

The information communicated to participants was not, as the Court of Appeals concluded, merely a "collection of hints." Pet.App.12a. The information about the lump sums communicated to the participants was consistent and repeated. And it communicated the "simple fact" that made the Plans unlawful: Participants would "receive their account balance and no more." Pet.App.15a. If they wanted to continue to earn future interest credits, they were told, they needed to keep their funds in the Plans. Accordingly, the Court of Appeals should have held that the clear repudiation of the Plans' participants' rights to future interest credits occurred by 1998 or 1999 at the very latest.

C. Although the administrators of the Plans believe that the court of appeals erred in not finding a clear repudiation and not finding all of the claims time-barred, they did not seek certiorari for a simple reason: this fact-bound dispute about when these claims accrued is not remotely certworthy. *See* Brief in Opposition. But in the unlikely event this Court disagrees and grants the petition in 11-843, there is no reason it should review half a loaf. In that event, it also should grant this cross-petition so that it can consider the timeliness of the claims asserted by all of the subclasses, reverse (or affirm) the judgment below in part or its entirety, and dismiss (or not) some or all of the claims as time-barred.

II. THE PLANS' ERRONEOUS SELECTION OF THE INITIAL METHODOLOGY FOR ESTIMATING FUTURE INTEREST CREDITS SHOULD NOT HAVE DEPRIVED THE PLAN ADMINISTRATORS OF THE DISCRETION CONFERRED BY THE PLANS.

In the unlikely event this Court decides to review the statute of limitations issue, it should also consider whether the Seventh Circuit erred in holding that the Plans' administrators are owed no deference in their interpretation of reasonable alternatives to the unlawful wash method.

The Court of Appeals specifically "reverse[d] the district court to the extent that it held that some deference was owed to the Plan defendants' preferred calculation method." Pet.App.23a. That holding conflicts with the approach of at least one other court of appeals—*i.e.*, the Sixth Circuit, whose decision the District Court relied upon in this case—and is in significant tension with this Court's precedents. If the District Court erred, it was in according too little, not too much, deference to the Plans' chosen method of calculating future interest. And in all events, the Seventh Circuit was wrong to hold that courts must give no deference to plan administrators when they are attempting to devise a workable remedy to an illegal plan benefit provision that is fair to all plan beneficiaries.

A. The decision below acknowledges and deepens a split among the courts of appeals over when deference is owed to the decisions of ERISA plan administrators in the wake of an improper "wash calculation" or "whipsaw transaction." In this case, the Court of Appeals joined the Second Circuit, which in a case involving a similar ERISA benefit claim, concluded that it "shall be for the district court in the first instance to determine the proper projection rate for the calculation of damages." *See* Pet.App.22a (quoting *Esden v. Bank of Bos.*, 229 F.3d 154, 177 (2d Cir. 2000)). But the Sixth Circuit took a different approach when it considered such a claim. In *Durand v. Hanover Insurance Group, Inc.*, 560 F.3d 436 (6th Cir. 2009), the plaintiff, like cross-respondents in this case and the plaintiffs in *Esden*, challenged a cash-benefit retirement plan's method of calculating future interest credits, arguing that the method was unlawful under ERISA. Unlike the Plans here, in *Durand* the defendant plan attempted to resist liability on the ground that overriding the plan's decision to choose a method for estimating future interest credits that resulted in a wash would inevitably lead to a court-ordered remedy inconsistent with the plan's right to have the "first opportunity" to determine whether a plan participant's benefit was properly calculated. The Sixth Circuit rejected the plan's liability argument and dismissed its argument based on the need for deference as based on a false premise. Judge Kethledge explained that the adjudication of the plaintiff's claim that the plan used an illegal future interest methodology "need not put the district court on a path that ends with the court itself trying to estimate what [the plaintiff's] future interest credits would have been." *Id.* at 442. To the contrary, "if the district court determines that the Plan's methodology violates ERISA, the court could simply award injunctive relief that requires Allmerica, in the first instance, to do what the law requires" and give Allmerica "the 'first opportunity' for which it argues at length in its brief." *Id.*

Although the Sixth Circuit's *Durand* case arises in a different context from the decision below (*Durand* addresses deference in deciding liability; while the decision below addressed deference in deciding the remedial issue), its discussion of deference was a holding, not dictum. The Sixth Circuit's observation that the plan administrator would receive the "first opportunity" to interpret the plan in the event of a finding of liability by the court was critical to the court's rejection of the defendant's argument that a finding of liability would deprive the plan administrator of its discretion under the plan. The difference between the holdings of the courts of appeals is therefore stark: The Sixth Circuit approach permits district courts to give plan administrators the first opportunity to choose a methodology to recalculate a plan benefit when the method required by the plan's terms is unlawful. The Second and Seventh Circuits, on the other hand, foreclose that opportunity for deference and insist that the choice belongs to the federal courts.

B. The Sixth Circuit has it right. The approach of the Seventh and Second Circuits conflicts not only with *Durand* but with this Court's precedents developing and applying so-called *Firestone* deference. Indeed, as the District Court recognized, it is the approach followed by the Sixth Circuit in *Durand* that is consistent with this Court's precedents addressing the standard for reviewing the decisions of ERISA plan administrators. *See* Cross-Pet.App.13a–16a; Pet.App.46a.

In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), this Court held that *de novo* review of a denial of benefits challenge is not appropriate where "the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Id.* at 115. Central to the holding was this Court's conclusion that federal courts are guided by trust principles when determining the appropriate standard of review for actions against plan administrators, who are ERISA fiduciaries, and that long-established principles of the law of trusts "make a deferential standard of review appropriate when a trustee exercises discretionary powers" that are committed to the trustee by the terms of the trust. *See id.* at 111. The Court confirmed and expanded upon this principle of deference to plan administrators in *Metropolitan Life Insurance Co. v. Glenn*, 554 U.S. 105 (2008), which held that a deferential standard of review remains appropriate even in the face of a conflict of interest, so long as the terms of the plan grant discretionary authority to the plan administrator. And most recently and most pertinently in *Conkright v. Frommert*, 130 S. Ct. 1640 (2010), this Court applied the same principle in holding that "a single honest mistake in plan interpretation" does not justify "stripping the administrator of deference for subsequent related interpretations of the plan." *Id.* at 1644.

The Court of Appeals thought *Firestone* deference inapplicable because the Plans "did not give the administrators any discretion in how to calculate future interest for lump-sum distributees because the unlawful 'wash' calculation was effectively codified in the" Plans and did not give the administrators any "discretion to amend the Plan terms," which was an authority reserved to S.C. Johnson and JohnsonDiversey as the Plans' sponsors. Pet.App.17a–18a. But once the Plans acknowledged in the District Court proceedings that the Plans' provisions establishing the "whipsaw" methodology were unlawful, A35, 46-47, they were no longer binding upon the Plans' administrators. As fiduciaries, the administrators must act in accordance with Plans' terms only to the extent that they are consistent with ERISA. *See* 29 U.S.C. § 1104(a)(1)(D). At that point, the administrators unquestionably were confronted with a question of discretionary plan interpretation or gap-filling, and deference was owed to the administrators' method under *Firestone* and *Conkright*.

Moreover, the Plans committed more than merely plan interpretation to the discretion of the Plans' administrators. The Plans also committed to the administrators' discretion "the exclusive right" to "decide any and all matters arising" under the Plans, general administrative authority, and the authority to "employ or appoint" legal counsel "as may be necessary or convenient in the administration of the Plan." *See, e.g.*, A094. That discretion, exercised in this case to remedy the unlawful future interest calculation and otherwise comply with the District Court's order, is no less important to the administrators' effective discharge of their fiduciary duties than is the discretion to interpret the terms of Plans themselves.

Indeed, the appropriateness of deference is underscored by the difficult task facing whomever—be it the District Court or the Plans' administrators—must attempt to devise, after the fact, an appropriate methodology for estimating future interest payments. The problem for whomever must construct a basis for such future estimates is that there is no one right answer, at least under Plans like these. In Plans like these where future interest credits depend in part of the future performance of the Plans' investments, there is no way to ascertain future investment performance precisely. One can only estimate. If an employee elects for a lump-distribution at age 55, there is no way to know how the market as a whole, let alone the Plans' investments, will perform over the next ten years. Nor is there one universally-accepted way to estimate likely future performance. There are a range of valid possibilities giving different weight to past performance versus risk premiums. If the Plans had been permitted to remain silent about the methodology for calculating future interest credits, there is no question that the Plan administrators would have had the discretion to choose among the alternatives and the courts would defer under *Firestone*. There is no reason for a different result when the approach adopted by the Plans' sponsors (use of the Treasury rate) is invalidated and an ambiguity in the Plans essentially created.

Indeed, the disjunction between the discretion the Plans' administrators would enjoy if the Plans were silent and the no discretion/deference approach adopted by the court of appeals underscores the conflict between the decision below and this Court's decision in *Conkright*. In *Conkright*, this Court reversed a lower court decision that refused to defer to a plan administrator who initially erred in interpreting the plan. This Court explained that nothing in the plan provision granting the plan administrator "general authority to '[c]onstrue the Plan'" "suggests that the grant of authority is limited to first efforts to construe the Plan." 130 S. Ct. at 1647. The authority of the Plans' administrators is equally broad and here it is not even the Plans' administrators who made the initial mistake. That mistake was in the Plans themselves. Under these circumstances, there is even less reason to refuse to defer to the Plans' administrators in addressing a mistake not of their own making. That is especially true in light of the nature of the inquiry, in which someone—either the court or the Plans' administrators—must choose among a range of potential methodologies for estimating future interest credits. This Court's precedents make clear that the choice between decision makers is clear: the Plans' administrators get the "first opportunity."

C. To be clear, the Plans' administrators do not believe that this case is certworthy. But if there is any question in this case that warrants this Court's review, it is the question of what deference is owed to ERISA plan administrators. Not only is the decision below in conflict with decisions of the Sixth Circuit and this Court, but the issue is important, as underscored by the number of this Court's ERISA deference precedents. As the Chief Justice has emphasized, deference to plan administrators' discretionary benefit eligibility determinations and plan interpretations is among the significant safeguards that "encourage employers and others to undertake the voluntary step of providing medical and retirement benefits to plan participants and have no doubt engendered substantial reliance interests on the part of plans and fiduciaries." *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 259 (2008) (Roberts, C.J., concurring) (citation omitted). Thus, allowing flexibility in remedying illegal plan provisions therefore redounds to the benefit of plan participants, because employers are encouraged to offer the plans in the first place. And, of course, failing to defer and allowing the courts to decide puts ERISA *litigants* in a favored position over ERISA *participants*. *See Conkright*, 130 S. Ct. at 1650. Therefore, in the unlikely event that the Court decides to review the statute of limitations question presented in the petition (as supplemented by the first question presented in this conditional cross-petition), it should consider the deference issue in the second question presented.

CONCLUSION

If the Court grants the petition for a writ of certiorari in No. 11-843, it should also grant this cross-petition for a writ of certiorari for the foregoing reasons.

Respectfully submitted,

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