NO. 11-970

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

REPLY BRIEF FOR CONDITIONAL CROSS-PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

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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 reply in support of their conditional cross-petition for a writ of certiorari. Plaintiffs oppose the Plans' Conditional Cross-Petition and take the position that this Court should only consider half of a fact-bound controversy over when the claims of two subclasses of Plaintiffs accrued. But their emphasis on the fact-bound nature of the accrual question only underscores why the Plans filed only a *conditional* cross-petition: The accrual question is a fact-bound question that does not merit review and this Court should deny the Petition in 11-843. But in the unlikely event that this Court grants review of the accrual question, there is absolutely no reason for it to grant review on half a loaf. There is one basic accrual question in this case and three potential answers. If this Court grants review at all, it should consider when the claims of all Plaintiffs accrued and have available to it all three potential answers to the accrual question—when participants were first told they would receive only their account balance as a lump sum, when they actually received their account balance as a lump sum, or never. Granting the Petition and not the Conditional Cross-Petition would limit this Court to a choice between the second and third answers, when there is substantial reason to believe the first is the correct one.

Moreover, if this Court were to grant certiorari to consider the accrual question, it should also grant

review on the deference question. As the Conditional Cross-Petition made clear, the decision below conflicts with decisions of this Court and the Sixth Circuit on the deference question, and that issue is the only certworthy question raised by the decision below.

ARGUMENT

I. IF THE COURT REVIEWS THE FACT-BOUND ACCRUAL QUESTION AT ALL, IT SHOULD ENSURE THAT IT CAN REACH ALL ANSWERS TO THE QUESTION AND CONSIDER THE CLAIMS OF ALL PLAINTIFFS IN THE CASE.

A. This is a fact-bound case that produced a mixed result for Plaintiffs on the parties' cross-motions for summary judgment. The claims of one subclass of Plaintiffs were deemed timely and allowed to proceed, while the claims of the other subclass were held untimely and dismissed. The Plans argued that the claims accrued when the plan documents made clear that departing employees withdrawing from the Plans would receive only their account balance as a lump sum. Plaintiffs argued that there effectively is no statute of limitations for their ERISA benefit claims because the claims did not accrue until they were told that the Plans had violated the law and undervalued the benefit—something that still may not have occurred as to some class members. And both the District Court and Court of Appeals took a middle position that the claims accrued when the departing employees actually received their lump-sum distribution equal to their account balances.

Plaintiffs' opposition to the Conditional Cross-Petition only underscores that this accrual question is fact-bound, implicates no circuit split, and does not warrant this Court's review. Plaintiffs themselves acknowledge that the Seventh Circuit's decision in this case about when Plaintiffs' ERISA benefit claims accrued resolves a "factual dispute" and therefore does not warrant this Court's review. Opp'n 1–5. As Plaintiffs explain, the Seventh Circuit "carefully analyzed" plan documents and "evaluat[ed] the record" to reach a "factual conclusion" about when the claims accrued. Opp'n 2. The court below considered the evidence and found the disclosures in the plan documents "insufficient" and "inadequate" to support an accrual date earlier than the date of the lump-sum distributions. Opp'n 3. This fact-bound nature of the accrual question is precisely why the Plans filed only a conditional cross-petition and precisely why this Court should deny review of both the Petition in 11-843 and this Conditional Cross-Petition. *See* Plan Opp'n 28–31 (emphasizing fact-bound nature of the accrual question as among the reasons to deny certiorari); *see also* Pet.App.14a, 52a, 55a (courts below explaining factual basis for their decisions).[1]

Plaintiffs attempt to distinguish their Petition in 11-843 and the Plans' Conditional Cross-Petition by incorrectly asserting that the latter implicates different potential accrual "rule[s]." Opp'n 4–5. The

[1] "Plan Opp'n" refers to the S.C. Johnson Plan's Brief in Opposition to the Petition in 11-843, dated February 6, 2012. "Pet.App." refers to the Petition Appendix in 11-843.

Cross-Petition does not seek review of different accrual *rules,* but simply seeks to ensure that, if this Court considers the accrual question at all, it has the ability to evaluate all possible accrual *events* in this case. It is Plaintiffs who imagine an uber split among the courts of appeals over a general "discovery rule." *See* Pet. 2. But as explained in Opposition to the Petition in 11-843, there is no circuit split over the accrual rules applicable to ERISA benefit causes of action. *See* Plan Opp'n 2, 14. The reality is that this case turns only on the fact-bound question of when the ERISA benefit causes of action in this particular case accrued under well-established and uniform rules.[2] The Plans and Plaintiffs each take issue with the Seventh Circuit's "factual conclusion," Pet.App.13a–14a, regarding which event started the statute of limitations running. But both the District Court and Court of Appeals saw the facts the same way, and the parties continued disagreement over this fact-bound question is not a promising candidate for this Court's review.

B. In the unlikely event this Court does review the fact-bound accrual question, there is no reason it should artificially limit its review to half the question and half the claims. Instead, the Court

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[2] The petitioning Plaintiffs urge a departure from the well-established "clear repudiation" accrual rule applicable in ERISA benefit cases in favor a different "discovery rule." But given the "factual conclusion" reached by the courts below, even an accrual rule different from the one now uniformly being applied by the courts of appeals would not lead to the claims being timely. *See* Plan Opp'n 29–30.

should consider all the claims and have available to it the full range of potential answers to the accrual question. Plaintiffs won in part and lost in part in the courts below. The claims brought by the subclass A members who received their distributions on or after November 21, 2001, *i.e.*, within six years of the suit being filed, were deemed timely. The same claims brought by subclass B members who received their lump-sum distributions before November 21, 2001, were not. *See* Cross-Pet.9. The Petition in 11-843 seeks review of the judgment only with respect to the losing subclass B plaintiffs.

But the question of whether Plaintiffs' right to future interest credits was clearly repudiated is a fact-bound one. And the answer to that question affects equally the timeliness of the claims asserted by both subclasses of Plaintiffs. Plaintiffs argued that—regardless of which subclass Plaintiffs belong to—neither the plan materials nor the lump-sum distributions were sufficient to repudiate clearly their right to the future interest credits. The Plans, on the other hand, argued that—also regardless of which subclass Plaintiffs belong to—the plan materials were sufficient to repudiate the right. The court below adopted neither party's view on what was sufficient to repudiate the right in this case and instead adopted a middle ground: The plan materials alone were not sufficient, but those materials plus the final-lump distributions were. That was enough to constitute a clear repudiation of Plaintiffs' right to the future interest credits, and Plaintiffs knew or should have known it no later than the time of the lump-sum distributions. Pet.App.10a, 13a–15a.

It would make no sense for the Court to grant review of the Petition in 11-843 and consider the sufficiency of the repudiation with respect to subclass B but to deny review of the Cross-Petition and ignore the same basic question with respect to subclass A. That could leave this Court in the untenable position of not being able to reach the proper resolution of the accrual question. As noted, there are three possible answers to the question and one of them—indeed, the correct one in the Plans' view and a "very close call" in the estimation of the Seventh Circuit, Pet.App.10a—can only be reached if the Court grants the Cross-Petition. Plaintiffs offer no reason why the Court should put itself in that position, and there is none.

Accordingly, if the Court grants review in 11-843, it should also review the first question presented in the Cross-Petition so that it can consider the entire judgment in this case and the timeliness of all of the claims asserted by both subclasses.

II. IF THIS COURT REVIEWS THE ACCRUAL QUESTION, IT SHOULD ALSO REVIEW THE MORE CERTWORTHY DEFERENCE QUESTION.

The only aspect of the decision below that remotely warrants this Court's review is the question of what deference is owed to ERISA plan administrators when a methodology for calculating benefits in a plan is deemed void years later. The Seventh Circuit adopted a bright-line rule that district courts must always decide the proper replacement methodology for themselves and should

not give the plan administrator the first opportunity to address the issue and then defer to the plan administrator's judgment. Pet.App.23. That holding conflicts with the Sixth Circuit's holding in *Durand* and with this Court's precedents addressing deference to plan administrators including, most prominently, its decision just last Term in *Conkright*.

A. Plaintiffs would downplay the starkness of the split with *Durand* by arguing that the Sixth Circuit "merely permitted" but did not "mandate[ ]" giving the plan administrator the first opportunity to propose a plan remedy when exhaustion of plan remedies is not required. Opp'n 6–7. But that asserted distinction is both wrong and does nothing to lessen the conflict between *Durand* and the decision below. The distinction is wrong because nothing in *Durand* suggests that giving the plan administrator a first opportunity to consider a replacement methodology was merely permissive. To the contrary, 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 judicial finding of liability without exhaustion would deprive the plan administrator of its discretion under the plan. *See Durand v. Hanover Ins. Grp., Inc.*, 560 F.3d 436, 441–42 (6th Cir. 2009). There was no suggestion that the "first opportunity" was optional, and only a mandatory opportunity would provide an answer to the plan's argument that a plan administrator always needed an opportunity to exercise its discretion under the plan.

In any event, the purported distinction does nothing to lessen the conflict. Here, the District Court did give the plan administrators the "first opportunity" to consider a replacement methodology, and the Seventh Circuit held that it was error to do so; the District Court should have simply decided the matter itself. In reaching that conclusion, the Seventh Circuit followed the Second Circuit and acknowledged that its decision was directly contrary to *Durand*. Pet.App.22–23. The split is therefore both stark and acknowledged.

The circuit split also calls into sharp relief the conflict between the decision below and this Court's precedents. The Sixth Circuit's "first opportunity" approach is not, as Plaintiffs suggest, simply a matter of chronological order or efficient procedure—*i.e.*, first the plan administrator considers available methods, then the district court does. Opp'n 7–8. The Sixth Circuit gave the plan administrator a "first opportunity" so that it could exercise its discretion under the plan. And with discretion comes deference under this Court's precedents. Indeed, this Court's decision in *Conkright* makes clear that deference to ERISA plan administrators given discretion by the plan terms is essential to protect the "'careful balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans.'" *Conkright v. Frommert*, 130 S. Ct. 1640, 1649 (2010). The decision below, on the other hand, departs from *Conkright* because it forecloses the exercise of the very discretion that this Court has recognized to be

an essential incentive to plan creation and feature of plan administration.[3]

B. Plaintiffs' other arguments against review of the deference question are equally unavailing. Plaintiffs are wrong to dismiss this question as merely raising "a dispute about the correct interpretation of one clause" in the Plans. Opp'n 12. More than one "clause" establishes the administrators' broad discretion under the Plans. *See* Cross-Pet.8, 20. And in all events, Section 11.2 of the Plans commits just the sort of broad discretion to the administrators that this Court has recognized to be particularly worthy of protection, not usurpation, by federal courts. *See Conkright*, 130 S. Ct. at 1649 (deference to plan administrators "preserves the 'careful balancing' on which ERISA is based").

Plaintiffs are also wrong when they argue that no deference under *Conkright* is owed here because the Plans themselves established the methodology

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[3] Plaintiffs' attempt to make something of the fact that the District Court cited *Durand* in one of its orders but not in two others is misguided. Opp'n 8–9. The District Court very clearly recognized that *Durand* is consistent with *Conkright* when it explained that "*Conkright* supports *referral* of the interest crediting rate question to the Plans and compels a grant of deference" to the methodology selected. Cross-Pet.App.13a (emphasis added). It was *Durand* that the District Court followed in referring the issue to the Plans, Pet.App.88a, and it was that referral that the Seventh Circuit expressly rejected when it stripped the Plans' administrators of discretion and committed it instead to the District Court on remand, Pet.App.22a–23a.

and thus if the Plans' administrators were to choose a new one they would be "abandon[ing]," not "interpret[ing]," the Plans' terms and acting contrary to "controlling" IRS guidance. Opp'n 10. That argument, advanced by the court below, ignores that ERISA requires plan administrators to act in accordance with plan terms only to the extent that they are consistent with the statute itself. *See* 29 U.S.C. § 1104(a)(1)(D); Cross-Pet.20. And nothing in the IRS guidance favors federal courts over plan administrators when it comes to choosing how to correct a plan sponsor's mistake in plan formation. Indeed, this Court's decision in *Conkright* dictates just the opposite approach: Plan administrators in whom broad discretion is vested by the plan itself should not be stripped of discretion because of a "single honest mistake." *See Conkright*, 130 S. Ct. at 1647. The plan administrators, not the courts, get the "first opportunity" to address mistakes.

In the end, on the question of what deference is owed to plan administrators, the decision below conflicts with decisions of the Sixth Circuit and this Court. Accordingly, if review is granted in 11-843, the Court should also consider the deference issue in the second question presented in the Cross-Petition.

CONCLUSION

The Plans do not believe that this case is certworthy. For the reasons set forth above and in the Cross-Petition, however, if the Court grants the petition for a writ of certiorari in No. 11-843, it should also grant the Cross-Petition.

Respectfully submitted,

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