Nos. 10-56406, 10-56415
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GLENN TIBBLE, WILLIAM BAUER, WILLIAM IZRAL, HENRY RUNOWIECKI, FREDERICK SUHADOLC and HUGH TINMAN, Jr., as representatives of a class of similarly situated persons, and on behalf of the Plan,
Plaintiffs-Appellants,
v.
EDISON INTERNATIONAL, THE EDISON INTERNATIONAL BENEFITS COMMITTEE, fka The Southern California Edison Benefits Committee, EDISON INTERNATIONAL TRUST INVESTMENT COMMITTEE, SECRETARY OF THE EDISON INTERNATIONAL BENEFITS COMMITTEE, SOUTHERN CALIFORNIA EDISON'S VICE PRESIDENT OF HUMAN RESOURCES and MANAGER OF SOUTHERN CALIFORNIA EDISON'S HR SERVICE CENTER, *Defendants-Appellees*.

Appeal from the United States District Court for the Central District of California, No. 2:07-cv-05359-SVW-AGR · Honorable Stephen V. Wilson

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PETITION FOR REHEARING OR REHEARING *EN BANC*

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GLEN TIBBLE, et al.,
Appellants/Cross-Appellees,

v.

EDISON INTERNATIONAL, et al.,
Appellees/Cross-Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
THE HONORABLE STEPHEN V. WILSON, JUDGE
CASE NO. 2:07-CV-05359-SVW-AGR

RESPONSE OF APPELLEES/CROSS-APPELLANTS TO PETITION FOR REHEARING OR REHEARING EN BANC

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INTRODUCTION

The petition for rehearing raises two questions for review, neither of which implicates any conflict in authority, and both of which were correctly decided by the Court.

The "Limitations Question" asks whether the Court correctly held that ERISA's six-year statute of repose bars certain of plaintiffs' claims, which challenge fiduciary decisions about investment options for a 401(k) plan lineup. Because those decisions were implemented more than six years before plaintiffs' action was filed, and plaintiffs could not prove any materially changed circumstances within that six year period that would have re-triggered the limitations period, the Court properly held the claims barred. Plaintiffs' objection to that ruling is based on a "continuing violation" theory, i.e., that the mere presence of the investment options, even absent any changed circumstances, constitutes a continuing violation that perpetually re-triggers the limitations period.

Plaintiffs are incorrect. This Court and others have consistently held that ERISA does *not* recognize a continuing violation theory; no appellate court has held to the contrary. The two precedents plaintiffs cite are both irrelevant to this case and entirely consistent with this Court's decision: they hold that fiduciaries have a continuing duty to monitor, which requires them to act if there are materially changed circumstances. And the district court here rejected after trial, as a matter of fact, plaintiffs' contention that defendants did not properly respond to changed circumstances within the limitations period. Hence, this Court properly agreed that plaintiffs' could not challenge alleged breaches that occurred more than six years before the commencement of the action.

The "Deference Question" asks whether the Court correctly held that the Plan fiduciaries' interpretation of the relevant Plan language was entitled to deference under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). Plaintiffs argue that *Firestone* deference does not apply because they assert fiduciary-breach claims rather than benefit-denial claims, but the caselaw makes clear that *Firestone* deference applies to *any* discretionary plan interpretation made by a fiduciary, regardless of the claim asserted. Only one outdated, out-of-circuit decision cited by plaintiffs suggests any exception to *Firestone* deference—an exception that applies only where the interpretation reflects a "zero sum" decision involving a "stark" conflict between the employer's interest and the participants' interest. No other circuit has recognized that exception, which is inconsistent both with *Firestone* and more recent Supreme Court authority. Nor would the exception apply here in any event, because the fiduciaries' plan interpretation did *not* involve such a zero-sum conflict, as evidenced not least by the fact that unions representing participants expressly agreed to the challenged practice before it was implemented. Finally, if the exception did apply here it would not matter, because the fiduciaries' plan interpretation is plainly correct on its own terms. The Court should not convene en banc to consider an inapplicable, irrelevant anachronism.

The petition should be denied.

STATEMENT

A. Factual Background

Edison International is the parent company of Southern California Edison Company, a California utility that sponsors a 401(k) savings plan ("the Plan") for the employees of both Edison companies and their affiliates (collectively, "Edison"). Panel Opinion ("Op.") 6 (ECF No. 82). The Plan is a "defined contribution" and "eligible individual account" retirement plan governed by the Employee Retirement Income Security Act ("ERISA"). *Id.* Participants in the Plan have always been able to choose from a menu of possible investment options. *Id.* at 7. Over the years, the number of options grew from six investments to more than forty during the class period. *Id.* The growth was largely spurred by the participants' own desire to include a variety of mutual funds in the investment menu. *See* Excerpts of Record ("ER") 201 ¶ 11. After participants expressed their interests, Edison engaged in collective bargaining with its employees, ultimately settling on a new offering in 1999 consisting of approximately 10 institutional or commingled pools, 40 mutual funds, and one unitized fund (allowing investment in Edison International itself). Op. 7.

During the negotiations, Edison explained that adding a significant number of funds would make the Plan more complex to administer, leading to higher administrative costs. ER 210 ¶ 38. Edison further explained, however, that "revenue sharing" arrangements associated with many of the requested mutual funds would offset some of those costs. *Id.* Under those arrangements, the mutual fund company would pay fees to Hewitt Associates, LLC ("Hewitt"), the Plan's administrative services provider, to reimburse Hewitt for the costs of maintaining records for, and communicating with, Plan participants—functions the mutual fund company itself would otherwise be responsible for. ER 206 ¶ 30; ER 210 ¶ 38; ER 430-32. Because Edison would be paying Hewitt for precisely those same services, Hewitt would credit Edison's account for any revenue sharing payments Hewitt received from the mutual fund companies. ER 210 ¶ 38. The unions agreed to this arrangement. ER 210 ¶ 39.

In August 2007, plaintiffs—a group of past and present employees of one of Edison International's subsidiaries—filed suit under ERISA on behalf of a class comprising all members of Edison's eligible workforce. Op. 7. Plaintiffs alleged an array of prohibited transactions and breached duties of loyalty and prudence with respect to the Plan. The district court granted summary judgment in Edison's favor as to nearly all of plaintiffs' claims. For most claims, the court relied on ERISA's statute of repose, 29 U.S.C. § 1113(a)(1), as an additional, independent basis for summary judgment—it was the primary basis for summary judgment for only a minority of claims. After trial, the district court rejected most of the remaining claims, including plaintiffs' allegations that defendants breached their duty of loyalty to Plan participants. ER 103, ER 150. The district court did find, however, that for three of the mutual funds in the Plan lineup, defendants acted imprudently in relying on the recommendations of professional investment experts in selecting the appropriate share classes for those funds. ER 103-05, ER 164. Plaintiffs appealed and defendants cross-appealed.

B. The Panel Opinion

On March 21, 2013, a unanimous panel of this Court affirmed the district court's judgment in all respects. As relevant here, the Court first agreed with the district court's limitations ruling. Op. 9. The Court explained that the limitations period runs from "the date of the last *action* which constituted a part of the breach or violation," 29 U.S.C. § 1113(a)(1)(A) (emphasis added), and the only "action" at issue in this suit was the "decision to include [the challenged] investments in the Plan." Op. 9. Applying Ninth Circuit precedent, *see Phillips v. Alaska Hotel & Restaurant Employees Pension Fund*, 944 F.2d 509 (9th Cir. 1991), and a recent unanimous Fourth Circuit decision, *see David v. Alphin*, 704 F.3d 327 (4th Cir. 2013), the Court rejected plaintiffs' continuing violation theory, under which their claims would be "timely for as long as the underlying investments remain in the plan." Op. 10. That theory, the Court explained, "would make hash out of ERISA's limitation period and lead to an unworkable result." *Id.*

The Court also affirmed summary judgment for Edison on plaintiffs' claim that revenue sharing arrangements were improperly used to defray Plan administration costs. The Court agreed with the Department of Labor that the revenue sharing arrangements involving the Plan were perfectly lawful under ERISA so long as the Plan document allowed them, and the Court agreed with Edison that they were permitted by the Plan document.

REASONS FOR DENYING THE PETITION

I. THE LIMITATIONS QUESTION DOES NOT WARRANT FURTHER REVIEW

The Limitations Question implicates no conflict in authority and was correctly resolved.

A. There Is No Circuit Conflict On The Limitations Question

Plaintiffs contend that the Court's limitations ruling "conflicts with decisions of the Second and the Seventh Circuits." Pet. 10-11 (ECF No. 86) (citing *Martin v. Consultants & Adm'rs, Inc.*, 966 F.2d 1078, 1087-88 (7th Cir. 1992); *Morrissey v. Curran*, 567 F.2d 546, 549 n.9 (2d Cir. 1977)). It does not.

Plaintiffs did not even cite *Morrissey* in their merits papers. The omission is understandable, for the case has nothing to do with ERISA's limitations provisions, 29 U.S.C. §§ 1113(1)-(2), which are not even cited in *Morrissey*. The case instead holds that the complaint at issue adequately pleaded jurisdiction under ERISA, even though it challenged an allegedly imprudent investment made before ERISA's effective date, because the complaint alleged that that investment remained unproductive, and that the plan fiduciaries had a duty to review and liquidate it. *Morrissey*, 567 F.2d at 548-49. There was no suggestion that the investment had been made more than six years before the suit was filed, and the court did not consider whether the defendants were entitled to repose. The court simply held that based on the facts alleged, it was error for the district court to rule as a matter of law, with no further inquiry into the facts, that jurisdiction was lacking. *Id.* at 549. That holding is neither relevant to, nor inconsistent with, the Court's decision here. Here, a trial examined the facts of Edison's monitoring of investments (e.g., performance net of fees, changes in management, etc.), and plaintiffs submitted evidence regarding whether defendants met their ongoing duty to prudently monitor selected investment funds. And the district court held that plaintiffs failed to show any new event or circumstances within the limitations period that required the Plan fiduciaries to remove the challenged funds. ER 166. Accordingly, as this Court emphasized, the plaintiffs here did not prove a *new breach* within the limitations period. Op. 11-12.

Martin is off point for similar reasons. The relevant issue there was whether the three-year, actual-knowledge statute of limitations in § 1113(2) foreclosed

DOL's challenges to the process by which defendants awarded dental service contracts. *Martin*, 966 F.2d at 1082. The DOL's suit, filed in 1987, was predicated on two contracts, one awarded for 1984 and another for 1987. The court concluded that the claims based on the 1984 contract were time-barred, because DOL had knowledge of the essential facts more than three years before the suit was filed. *Id.* The defendants argued that the 1987 contract claim also should be barred because "the bidding procedure did not materially change between 1984 and 1987." *Id.* at 1087. The court, however, ruled that the 1987 contract claim was not time-barred because it was a "distinct violation": it involved a new and separate contract, and the bidding procedures, though similar, were separately decided upon with respect to each contract. *Id.* at 1088. This case involves no such distinct affirmative conduct, which is the whole point—plaintiffs cannot prove a new breach within the limitations period. There is thus no conflict with *Martin*.

The only circuit precedent that squarely addresses the question at issue here is the Fourth Circuit's *David* decision. Like the Court's decision here, *David* describes as "untenable" the contention that the defendants' "failure to remove the [challenged] funds at every committee meeting constituted a new … breach of fiduciary duty." *David*, 704 F.3d at 341. The Fourth Circuit in that case denied a petition for rehearing en banc without noted dissent. This Court should do the same.

B. The Court's Limitations Ruling Was Correct

ERISA § 413 establishes a six-year limitations period for fiduciary breach claims where the plaintiff did not have actual knowledge of the breach. *See* 29 U.S.C. § 1113(1). That provision categorically bars any claim filed more than six years after "the date of the last action which constituted a part of the breach or violation." *Id.* § 1113(1)(A). "As a statute of repose, § 413 serves as an absolute barrier to an untimely suit." *Radford v. Gen. Dynamics Corp.*, 151 F.3d 396, 400 (5th Cir. 1998). This Court correctly concluded that the limitations period bars plaintiffs' "claims alleging imprudence in plan design" as to "decision[s] to include … investments in the Plan" made more than six years before the filing of the complaint. Op. 9. Because the alleged breach was complete when the decision was implemented, the Court explained, the limitations period was triggered, giving Plan participants fully six years to sue, but giving Plan fiduciaries repose after that, absent a new breach. Op. 11.

There is no merit to plaintiffs' contention that, even absent changed circumstances, the mere continued offering of a plan option, without more, can perpetually retrigger the limitations period under the banner of a continuing violation. For one thing, the theory is at odds with long-standing Ninth Circuit precedent. *See Phillips*, 944 F.2d at 521 (§ 413(2)'s three-year, actual-knowledge limitations period not re-triggered by maintenance of status quo after initial breach). For another, plaintiffs' theory "confuses the failure to *remedy* the alleged breach of an obligation, with the commission of an alleged *second* breach." (quotations and citation omitted). Op. 11. Here plaintiffs do not allege any "second breach," but instead merely dispute the continued inclusion of the challenged funds in the Plan lineup. That cannot be enough: "Characterizing the mere continued offering of a plan option, without more, as a subsequent breach would render section 413(1)(A) meaningless and [could even] expose present Plan fiduciaries to liability for decisions made by their predecessors—decisions which may have been made decades before and as to which institutional memory may no longer exist." *Id.* at 11 (quotation omitted).

Largely ignoring the text of the statute and *Phillips*, plaintiffs resort to policy arguments. First, they assert that a continuing violation theory is necessary to address "the plight of participants who join the plan more than six years after improper investment options are first included." Pet. 9. That objection simply thwarts the very idea of a statute of repose. As the D.C. Circuit has observed, § 413(1)(A)'s terms "suggest[] a judgment by Congress that when six years ha[ve] passed after a breach or violation, and no fraud or concealment occurs, the value of repose will trump other interests, such as a plaintiff's right to seek a remedy."

Larson v. Northrop Corp., 21 F.3d 1164, 1172 (D.C. Cir. 1994). At that point, fiduciaries should be able to rely on their investment decisions free of the specter of costly litigation over stale claims.

Second, plaintiffs say that unless the limitations period runs forever, newly appointed fiduciaries will disregard their duties with respect to "investments that have remained relatively static for at least six years." Pet. 10 (quotation and citation omitted). Not so. Economic and other variables can change in such a way as to make inclusion of a given fund imprudent—and fiduciaries cannot ignore new information bearing on a fund's prudence. Plaintiffs thus can always seek to "put on evidence that significant changes in conditions occurred within the limitations period that should have prompted a full due diligence review of the funds." Op. 11 (quotations omitted). The possibility of such a showing "illustrates why [the Court's] interpretation of section 413(1)(A) will not alter the duty of fiduciaries to exercise prudence on an ongoing basis." *Id.* at 12. Because plaintiffs made no such showing here, the limitations period was not re-triggered, and their claims were properly rejected. Nothing about that decision warrants further review.

II. THE DEFERENCE QUESTION DOES NOT WARRANT FURTHER REVIEW

The Deference Question also implicates no circuit conflict and was correctly decided. And it has no practical import here.

Though it did not need to given the clarity of the Plan language, *see infra* at 12-13, the Court gave deference under *Firestone* to the fiduciaries' long-standing interpretation of Plan § 19.02, which provided that "[t]he cost of administration of the Plan will be paid by the Company." ER 208-09 ¶ 33. The Court held that the fiduciaries permissibly construed that language as allowing Edison to pay *the cost billed by Hewitt*, the Plan's administrative services provider, which Hewitt reduced by the amount of revenue sharing payments it received from advisers for the mutual funds in the Plan lineup. Op. 32. And plaintiffs are wrong as a matter of fact in asserting that those payments were made from assets belonging to the Plan or its participants. It is perfectly well-settled that revenue sharing payments come from assets belonging to the mutual fund companies, which are not Plan assets. The fact that those payments make Hewitt's bills lower implicates no concern under ERISA, no problem of plan language, and no judicial conflict warranting further review.

A. The Deference Issue Is Irrelevant To The Outcome Of The Case Because The Fiduciaries' Interpretation Would Be Affirmed If Reviewed De Novo

There is no need for further review of whether deference is appropriate because the fiduciaries' interpretation is correct as a matter of law, as the Court's opinion makes clear, and thus would be affirmed even absent deference. The Court found "no explicit conflict with the plain language of the Plan," because

§ 19.02 "required the company to pay the costs [of plan administration], and Edison did." Op. 32. The fiduciaries' construction of § 19.02, the Court continued, is the "more natural" and "commonsense" reading, whereas the reading plaintiffs try to impose is "nonsensical[]." *Id.* The fiduciaries' construction is also the reading "most consistent with the goals of the plan," because it "facilitated the expansion of the Plan's mutual fund offerings." *Id.* at 32-33. And it "has been applied consistently over time." *Id.* at 33.

The deference standard therefore is beside the point—if the Court were to review § 19.02 de novo, there is no doubt that the "more natural," "commonsense" reading that better advanced "the goals of the plan" would prevail.

B. Plaintiffs' Objection Is Premised On A Fundamental Misstatement Of Fact

Plaintiffs' objection to the fiduciaries' interpretation rests on a fundamental misstatement of fact. According to plaintiffs, revenue sharing payments come from assets that belong to Plan participants, and thus Edison's revenue sharing arrangements effectively shift Plan administration costs to the participants. Pet. 8. For that reason, plaintiffs assert, the fiduciaries' long-standing interpretation of § 19.02 conflicts with participants' interests. *Id.*

The premise underlying plaintiffs' argument is flatly incorrect: the revenue sharing arrangements did *not* shift any costs to Plan participants, because revenue sharing payments did not come from assets belonging to Plan participants. When a plan purchases shares in a mutual fund on behalf of a plan participant, the *shares* become a plan asset, but the *underlying assets* of the mutual fund do not. *See* 29 U.S.C. § 1101(b)(1). And revenue sharing payments come from fees collected by the adviser from the mutual fund's underlying assets. The fees belong solely to the mutual fund company—they are not Plan assets in any respect. *See Hecker v. Deere & Co.*, 556 F.3d 575, 584 (7th Cir. 2009). Further, those fees are charged equally to all investors in those mutual funds (Plan participants or otherwise), and thus Plan participants would have been charged the same mutual fund fees regardless, *even if* proceeds from those fees had not been paid to Hewitt. ER 51. Participants, in short, bear no greater plan administration costs when a mutual fund company decides to share some of its revenues with a 401(k) plan recordkeeper like Hewitt, thereby allowing the recordkeeper to reduce its charges to the plan sponsor.

C. The Court's Deference Ruling Implicates No Live Circuit Conflict

Plaintiffs contend that the Court's deference ruling creates a conflict in the circuits over the question whether (and when) *Firestone* deference applies to a fiduciary's plan interpretation when that interpretation is challenged in a fiduciary-breach case under ERISA § 404, rather than in a benefit-denial case under § 502(a)(1)(B). Plaintiffs are incorrect. The circuits are in essential agreement that *Firestone* deference applies in any ERISA case involving a discretionary plan interpretation. One decision has applied an exceedingly narrow exception, but that exception cannot be reconciled with later authority, and it would have no application here in any event.

1. The Court here correctly held that *Firestone* deference applies "globally" under ERISA because the deference rule derives from trust law, and *Firestone* held that trust law principles generally pervade ERISA's terms and legislative history—they are not limited to one "discrete provision." Op. 29; *see Firestone*, 489 U.S. at 109-11. The Third Circuit agrees, recognizing that "after *Firestone*, trust law should guide the standard of review over claims, such as those here, not only under section 1132(a)(1)(B) but also over claims filed pursuant to 29 U.S.C. §1132(a)(2) based on violations of the fiduciary duties set forth in section 1104(a)." *Moench v. Robertson*, 62 F.3d 553, 565 (3d Cir. 1995). Like the Court here, the Third Circuit relied on the fact that *Firestone*'s analysis derived from terms and principles "used throughout ERISA." *Id.* There is no exception in trust law, or in ERISA, for claims asserting breach of fiduciary duty.

The Sixth Circuit also agrees. *See Hunter v. Caliber Sys., Inc.*, 220 F.3d 702, 711 (6th Cir. 2000) ("*Moench*'s analysis of *Firestone*" is consistent with "our prior decisions applying the arbitrary and capricious standard outside of the benefits denial context"). Plaintiffs say that *Hunter* was a benefit-denial case (Pet. 14 n.5), but like the analysis in *Firestone* and *Moench*, the analysis in *Hunter* applies to ERISA globally, as the Sixth Circuit has since recognized. *See Rodriguez v. Tenn. Laborers Health & Welfare Fund*, 89 F. App'x 949, 952 (6th Cir. 2004).

2. Plaintiffs cite only a single decision that declines to apply *Firestone* deference to a fiduciary-breach case under § 404. *See John Blair Commc'ns, Inc. Profit Sharing Plan v. Telemundo Grp., Inc. Profit Sharing Plan*, 26 F.3d 360, 369-70 (2d Cir. 1994). The Second Circuit in that case adopted the standard of a pre-*Firestone* Third Circuit decision, *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325 (3d Cir. 1984), which involved a "stark," "zero-sum" conflict between the employer's interest and the beneficiaries' interest, as the Third Circuit later described it in *Moench*, 62 F.3d at 563.

Here the decision to use revenue sharing was not zero-sum, it was win-win. Revenue-sharing lowered Edison's costs, but not by shifting any costs to participants, as explained *supra* at 13-14; in fact revenue-sharing directly *benefited* participants by facilitating the expansion of the Plan's mutual fund offerings, as the Court recognized. Op. 32-33. Neither *John Blair* nor any other circuit precedent rejects *Firestone* deference in this kind of situation. The Court's decision accordingly does not implicate a conflict justifying further review.

3. Finally, the narrow exception recognized in *John Blair* has been clearly supplanted by subsequent Supreme Court authority. In *Conkright v. Frommert*,

130 S. Ct. 1640 (2010), the Court rejected the Second Circuit's view that if a conflicted fiduciary adopts an erroneous plan interpretation, the fiduciary loses any deference for "subsequent related interpretations of the plan." *Id.* at 1644. The Court held that approach to be at odds with *Firestone*, "which set out a broad standard of deference without any suggestion that the standard was susceptible to ad hoc exceptions like the one adopted by the Court of Appeals." *Id.* at 1646-47. The Court further explained that making special exceptions to *Firestone* deference would be equally contrary to *Metropolitan Life Insurance Co. v. Glenn*, 128 S. Ct. 2343 (2008), which rejected another ad hoc exception essentially on the ground "that ERISA law was already complicated enough without adding 'special procedural or evidentiary rules' to the mix." *Conkright*, 130 S. Ct. at 1647 (quoting *Glenn*, 128 S. Ct. at 2351).

John Blair represents just the sort of ad hoc exception to *Firestone* deference that was rejected in *Conkright* and *Glenn*. The exception may be ripe for review en banc, but only in the Second Circuit—where it can be properly interred—and only in a case where the exception actually matters. This is not such a case.

CONCLUSION

The petition for rehearing should be denied.[1]

[1] If the petition is granted, the Court should also review the issues on which Edison did not prevail. *See Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 995 (9th Cir. 2003) (en banc).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to the Court's April 12, 2013 Order (Dkt. 88) and Circuit Rules 35-4 and 40-1, the attached Response of Appellees/Cross-Appellants to Petition for Rehearing or Rehearing En Banc is proportionately spaced, has a typeface of 14 points or more, and contains 3,963 words.

Dated: May 3, 2013

/s/Jonathan D. Hacker
Jonathan D. Hacker

CERTIFICATE OF SERVICE

Pursuant to Rule 8(a) of the Administrative Order Regarding Electronic Filing in All Ninth Circuit Cases, I certify that on May 3, 2013, I electronically filed the foregoing Response of Appellees/Cross-Appellants to Petition for Rehearing or Rehearing En Banc with the Clerk of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Counsel for all parties are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: May 3, 2013

/s/Jonathan D. Hacker
Jonathan D. Hacker

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RULE 35(B)(1) STATEMENT

This case raises two questions of exceptional importance about the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq*. ("ERISA"):

1. Does the statute of limitations in ERISA, 29 U.S.C. § 1113(1), bar a plan participant from bringing suit against a fiduciary who persists in maintaining imprudent funds on the menu of a 401(k) plan if such funds were initially included more than six years beforehand and had always been unlawful in the same way they are currently unlawful (the "Limitations Question")?

2. Are ERISA fiduciaries entitled to have their interpretation of plan documents reviewed under the deferential standard established in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), in a lawsuit seeking relief under 29 U.S.C. § 1132(a)(2) where the fiduciary is alleged to have, in violation of 29 U.S.C. § 1104, ignored the valid interests of beneficiaries in favor of non-beneficiaries (the "Deference Question")?

The Panel's holding on both questions conflicts with authoritative decisions of other United States Courts of Appeals that have addressed the same issues. In resolving the Limitations Question, the Panel joined the Fourth Circuit in a holding which, in the words of the United States Department of Labor ("DOL") is "difficult to reconcile with decisions of the Second and Seventh Circuits . . . ." Brief of the Acting Secretary of Labor as Amicus Curiae in Support of Petition for

Rehearing *En Banc* or Panel Rehearing, *David v. Alphin*, 704 F.3d 327, at 14 (4th Cir. Feb. 28, 2013) [hereinafter "DOL Amicus Supporting Rehearing"]. And, in resolving the Deference Question, the Panel *itself* recognized a square circuit split. *Tibble v. Edison Int'l*, No. 10-56406, slip op. at 29 (9th Cir. Mar. 21, 2013) ("We agree with the Third and Sixth Circuits [and disagree with the Second Circuit]."). Moreover, the Panel's opinion substantially affects important rules of national application in which there is an overriding need for national uniformity. *See, e.g.*, *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656-657 (1995) (discussing Congress's intent in enacting ERISA to create a uniform body of law).

STATEMENT

Plaintiffs are a class of participants in an ERISA-governed pension plan sponsored by Edison International ("EI") and its wholly-owned subsidiary Southern California Edison ("SCE"). *Tibble v. Edison Int'l*, 639 F.Supp.2d 1074, 1080, 1081 (C.D. Cal. 2009). The Plan is administered by the SCE Benefits Committee ("SCEBC") – a named fiduciary of the Plan. *Id.* at 1081. Another named fiduciary of the Plan is the EI Trust Investment Committee ("EITIC") which makes investments decisions for the Plan. *Id.* In this lawsuit, Plaintiffs have sued EI, SCE, SCEBC, EITIC, and two human resources professionals employed by SCE (collectively, "Defendants" or "Edison"). *Id.*

Broadly speaking, Plaintiffs' complaint is that Edison has managed "their pension plan . . . imprudently and in a self-interested fashion." *Tibble*, No. 10-56406, slip op. at 31. Because such conduct violates ERISA, Plaintiffs have sought relief under 29 U.S.C. § 1132(a)(2), which permits participants in an ERISA plan to sue a fiduciary whose violation of the statute has resulted in any personal gain or caused any loss to the plan. *Tibble*, 639 F.Supp.2d at 1084. On July 26, 2009, the district court granted summary judgment to Edison on virtually all claims. *Tibble*, No. 10-56406, slip op. at 8. Plaintiffs prevailed at trial on their remaining claims. *Id.* The parties filed cross appeals. *Id.* On March 21, 2013, this Court affirmed the district court in all respects. *Id.* at 50.

On appeal, Plaintiffs argued that the district court erred in granting summary judgment to Edison. To be clear: this Petition seeks rehearing of two specific questions decided by the Panel regarding the proper interpretation of ERISA. Plaintiffs do not seek rehearing of other issues decided in the Panel's opinion.[1]

[1] For example, the Panel rejected Plaintiffs' argument that the use of mutual funds in this plan is imprudent under ERISA. *See Tibble*, No. 10-56406, slip op. at 40-44 (section VI.B). The Panel rejected Plaintiffs' argument that Edison violated ERISA through its use of a short term investment fund. *See id.* at 44-45 (section VI.C). And the Panel rejected Plaintiffs' argument that Edison violated ERISA by using a unitized stock fund. *See id.* at 45-46 (section VI.D). Although Plaintiffs respectfully disagree with the Panel, they do not seek rehearing or rehearing *en banc* on these and other issues.

A. The Limitations Question

Plaintiffs maintain that Edison violated its ERISA duty of prudence by including in its plan menu "retail" class shares as opposed to "institutional" class shares from certain mutual funds. First Brief on Cross-Appeal, *Tibble v. Edison Int'l*, 639 F.Supp.2d 1074, at 7 (9th Cir. April 20, 2011) [hereinafter "Plaintiffs' Brief"]. Plaintiffs' theory is that institutional class shares should have been included instead because, although both classes consisted of the *exact* same underlying investments, retail-class shares charged higher participant fees to support revenue-sharing arrangements like the one to which Edison was a party. *Id.*

With regard to three such retail class share offerings, the district court permitted the claims to proceed to trial at which Plaintiffs prevailed. *See Tibble*, No. 10-56406, slip op. at 46-47. With regard to all other retail class share offerings, however, the district court granted summary judgment in favor of Defendants because – in the court's view – ERISA's statute of limitations barred any claims involving investments that were first included in the Plan more than six-years prior to the commencement of this lawsuit. *See Tibble*, 639 F.Supp.2d at 1086, 1119-20.

On appeal, Plaintiffs – supported by the DOL – argued that the district court incorrectly answered the Limitations Question. In their briefs, both Plaintiffs and the DOL took the position that the fiduciary breaches in this case occurred during the limitations period because the relevant conduct of Edison was not the initial inclusion of the improper mutual funds but rather the failure (year after year) to "switch[] from retail to institutional class shares." Plaintiffs' Brief at 10-11.

As Plaintiffs noted in their brief, the six year limitations period in 29 U.S.C. § 1113(1)(A) "commences on 'the date of the last action which constituted a part of the breach or violation . . . .'" *Id.* at 10. Thus, if Edison's refusal to "switch[] from retail to institutional class shares" is deemed an action, Plaintiffs' claims fall within the limitation period of 29 U.S.C. § 1113(1)(A). As Plaintiffs also noted in their brief, the six year limitations period in 29 U.S.C. § 1113(1)(B) "commences on . . . 'in the case of an omission the latest date on which the fiduciary could have cured the breach or violation.'" *Id.* Thus, if Edison's refusal to "switch[] from retail to institutional class shares" is deemed an omission, Plaintiffs' claims fall within the limitation period of 29 U.S.C. § 1113(1)(B).

In rejecting the position urged by Plaintiffs and the DOL, the Panel held that there is no independent fiduciary duty under ERISA to remove imprudent investment options from a plan. *See Tibble*, No. 10-56406, slip op. at 11 (rejecting the characterization by Plaintiffs and the DOL of "the mere continued offering of a plan option, without more, as a subsequent breach" and asserting that Plaintiffs' "logic 'confuse[s] the failure to *remedy* the alleged breach of an obligation, with the commission of an alleged *second* breach . . . .'") (citing *Phillips v. Alaska Hotel & Rest. Employees Pension Fund*, 944 F.2d 509, 523 (9th Cir. 1991)).

In so doing, the Panel adopted a position that was recently articulated by the Fourth Circuit. *See id.* (citing with approval *David v. Alphin*, 817 F. Supp. 2d 764, 777 (W.D.N.C. 2011), *aff'd*, 704 F.3d 327, 342–43 (4th Cir. 2013)). As the DOL explained: that position (1) fundamentally misinterprets ERISA on a question of exceptional importance and (2) conflicts with authoritative decisions of the Second and Seventh Circuits. Brief of the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellants Urging Reversal, *David v. Alphin*, 704 F.3d 327, at 22-28 (4th Cir. Dec. 28, 2011) [hereinafter "DOL Amicus Urging Reversal"]. *See also* DOL Amicus Supporting Rehearing at 12-15.

B. The Deference Question

Plaintiffs also maintain that Edison breached its fiduciary duties under ERISA by entering into an impermissible fee arrangement with Hewitt, the Plan's administrative service provider. That arrangement worked as follows: Edison added mutual fund offerings to its plan, which – unlike other investment options – required investors to pay various administrative fees. *Tibble*, 639 F.Supp.2d at 1096. A portion of these fees would go to Hewitt to pay for its recordkeeping services. *Id.* In exchange, Hewitt would give Edison a credit that would offset recordkeeping charges that Edison was obligated to pay. *Id.*

Plaintiffs contend, *inter alia*, that such a fee arrangement was prohibited by the terms of the Plan which, at all relevant times, stated that "[t]he cost of the administration of the Plan will be paid by the Company." *Id.* at 1099. This was a breach of fiduciary duty under ERISA because Edison's failure to comply with the Plan violated Section 404(a)(1)(D) of the statute which requires a fiduciary to "discharge his duties with respect to a plan in accordance with the documents and instruments governing the plan." 29 U.S.C. § 1104(a)(1)(D). Edison takes the position that the term "costs" in the above plan provision simply refers to whatever bills it is presented with by Hewitt. *See Tibble*, No. 10-56406, slip op. at 32.

The district court granted summary judgment to Edison. *Tibble*, 639 F.Supp.2d at 1102. On appeal, this Court affirmed. *Tibble*, No. 10-56406, slip op. at 33. As an initial matter, the Panel confronted the Deference Question – namely, is Edison entitled to have its interpretation of plan documents reviewed under the deferential standard established in *Firestone* in a lawsuit, like this one, seeking relief under 29 U.S.C. § 1132(a)(2). Acknowledging that the question had (1) been expressly left open by the United States Supreme Court, *id.* at 29 (noting that *Firestone* expressly limited its holding to cases where a Plaintiff seeks benefits under 29 U.S.C. § 1132(a)(1)(B)), and (2) divided the circuits, *id.* at 28-29 (identifying the circuit split), the Panel chose to answer the question in affirmative – i.e., it held that Edison <u>was entitled</u> to *Firestone* deference. *Id.* Applying that standard, it concluded that Edison's interpretation was not arbitrary and capricious and must be accepted. *Id.* at 33.

The Panel's decision to apply *Firestone* deference was of extraordinary importance because, as Plaintiffs explained in their brief, Edison's interpretation of the Plan cannot withstand *de novo* review. Put simply, no fiduciary acting "solely in the interest of the participants," 29 U.S.C. § 1104(a)(1) would interpret "[t]he cost of the administration of the Plan will be paid by the Company" to effectively mean "the cost of administration minus the amount of that cost paid by participants through the Company's revenue sharing agreements."

ARGUMENT

I. THE LIMITATIONS QUESTION SHOULD BE REHEARD OR REVIEWED BY THIS COURT *EN BANC*.

As explained below, the Panel's resolution of the Limitations Question (1) fundamentally misinterprets ERISA on a question of exceptional importance and (2) conflicts with authoritative decisions of the Second and Seventh Circuits.

A. Rehearing *En Banc* Is Needed Because, As the Department of Labor Has Explained, the Panel's Limitations Holding Misinterprets ERISA on a Question of Exceptional Importance.

As the government has recently explained, the Panel's limitations holding fundamentally misinterprets ERISA on a question of exceptional importance. Just like the Fourth Circuit in *David v. Alphin*, 704 F.3d 327 (4th Cir. 2013), the Panel disregarded and severely undermined ERISA's continuing fiduciary duties by holding that – as to funds first included in a plan more than six years prior to litigation – the duty is triggered only when there are "changed circumstances" sufficient to warrant a "full due diligence review of the funds . . . ." *Tibble*, No. 10-56406, slip op. at 11-12. This fundamentally misinterprets ERISA because it gives fiduciaries a "perpetual license to do nothing about the current imprudence of an investment option so long as no material change in circumstances intervenes." DOL Amicus Supporting Rehearing at 12-13. As a practical matter, a fiduciary will often be under no enforceable duty to monitor and remove imprudent investments from a plan menu once six years have passed from the date on which the investments were added. *See also* DOL Amicus Urging Reversal at 22-23. This clearly conflicts with ERISA's regulatory objectives, since, as this Court has recognized, ERISA obligates "fiduciaries . . . to act 'prudently' when determining whether or not to invest, <u>or continue to invest</u> . . . ." *Quan v. Computer Sciences Corp.*, 623 F.3d 870, 878-79 (9th Cir. 2010) (emphasis added).

The Panel's fundamental misreading of the statute's limitations provision "seriously weakens ERISA's fiduciary standards." DOL Amicus Supporting Rehearing at 12. Two simple examples illustrate the untenable consequences of the Panel's limitations holding. First, the holding completely disregards the plight of participants who join the plan more than six years after improper investment options are first included. These individuals will be stuck with imprudent funds even though they could not possibly have taken any action within the limitations period as interpreted by the Panel. *See, e.g.*, *id.* at 14-15 (noting that the Panel's view irrationally "forecloses suits . . . by new participants whose accounts are currently being harmed by the current fiduciaries' failure to monitor and remove imprudent fund options."). Second, the holding "permits a newly appointed fiduciary to disregard his fiduciary duties of prudence or loyalty regarding investments that have remained relatively static for at least six years." *Id.* at 15.

In the words of the government, "[r]ehearing should be granted and the decision overturned to prevent such improper denial of 'ready access to the Federal courts' from becoming commonplace in this Circuit. 29 U.S.C. § 1001(b)." *Id.*

B. Rehearing *En Banc* Is Needed Because, as the Department of Labor has Explained, the Panel's Limitations Holding Conflicts with Authoritative Decisions of the Second and Seventh Circuits.

As the government has also explained, the Panel's limitations holding conflicts with decisions of the Second and the Seventh Circuits. DOL Amicus Supporting Rehearing at 14 ("The . . . decision is . . . difficult to reconcile with decisions of the Second and Seventh Circuits finding [that] the failure to act prudently within the limitations period, despite similar conduct outside the period, precluded a statute of limitations defense.").[2]

[2] The government also intimated that this limitations holding conflicted with United States Supreme Court precedent. *See* DOL Amicus Supporting Rehearing at 13-14 (arguing that "the panel effectively created a federal common law

These circuits have made clear that because ERISA imposes a continuing fiduciary duty to eliminate imprudent investments, the failure to execute that duty is an independent violation for the purpose of determining whether a claim is time-barred regardless of how many times and for how long the violation has occurred. *See Martin v. Consultant & Adm'rs, Inc.*, 966 F.2d 1078, 1087-88 (7th Cir. 1992); *Morrissey v. Curran*, 567 F.2d 546, 549 n.9 (2d Cir. 1977). For this reason, *en banc* review is unquestionably warranted. Fed. R. App. P. 35(b)(1)(B); Cir R. 35-1.[3]

II. THE DEFERENCE QUESTION SHOULD BE REHEARD OR REVIEWED BY THIS COURT *EN BANC*.

Disputes regarding the interpretation of ERISA plan language are extremely common. The vast majority arise in cases where a plaintiff is seeking benefits pursuant to 29 U.S.C. § 1132(a)(1)(B) (authorizing an ERISA plan participant or beneficiary to sue for "benefits due to him under the terms of his plan"). In such cases, the Supreme Court has made clear that the "denial of benefits challenged . . . must be reviewed under a *de novo* standard unless the benefit plan expressly gives

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exception where none is permitted") (citing *Mertens v. Hewitt Associates,* 508 U.S. 248, 259 (1993); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985); *City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981)).

[3] Plaintiffs can find no indication in the Panel's opinion that it intended a holding different from the Fourth Circuit's holding in *David v. Alphin*, 704 F.3d 327 (4th Cir. 2013). In the event that Plaintiffs are mistaken, they respectfully request that the Panel rehear the issue or, at minimum, issue an amended opinion to clarify its holding.

the plan administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the plan's terms." *Firestone*, 489 U.S. at 949-50.

When a plan participant or beneficiary is merely seeking benefits under the terms of her ERISA plan, she is limited to a claim under 29 U.S.C. § 1132(a)(1)(B) – which requires the application of *Firestone*. To be sure: the failure to follow the terms of an ERISA plan may constitute a breach of fiduciary duty. *See* 29 U.S.C. § 1104(a)(1)(D). But, in a benefits case, it is settled law that such a breach is not remediable under 29 U.S.C. §§ 1132(a)(2) or (a)(3).[4]

When a plan participant or beneficiary is not seeking benefits under the terms of her plan, she may pursue claims under 29 U.S.C. §§ 1132(a)(2) or (a)(3) alleging a breach of fiduciary duty based on the defendant's failure to comply with the terms of the relevant ERISA plan. That is precisely this case. In the words of the Panel, "violations of the written plan have been recognized as a basis for liability [under a fiduciary breach theory]." *Tibble*, No. 10-56406, slip op. at 26 (citing *Cal.*

[4] 29 U.S.C. § 1132(a)(2) is unavailable because, in a benefits dispute, no "loss to the plan" has been caused by the fiduciary breach. And 29 U.S.C. § 1132(a)(3), often described as a catchall provision, cannot be used to seek a remedy that is available under 29 U.S.C. § 1132(a)(1)(B). Following the Supreme Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489 (1996), every circuit to address the issue has held that a claim that could be brought under 29 U.S.C. § 1132(a)(1)(B) cannot be brought under 29 U.S.C. § 1132(a)(3) even though the fiduciary's action may constitute a violation of 29 U.S.C. § 1104(a)(1)(D).

Ironworkers Field Pension Trust v. Loomis Sayles & Co., 259 F.3d 1036, 1042 (9th Cir. 2001)).

As the Panel admitted, the *Firestone* Court expressly left open the question of whether judicial deference should apply in this situation. *Tibble*, No. 10-56406, slip op. at 29. In holding that an ERISA fiduciary is always entitled to *Firestone* deference when offering a plan interpretation in a lawsuit brought under 29 U.S.C. §§ 1132(a)(2) or (a)(3), the Panel has created a need for *en banc* rehearing for the following reasons.

A. Rehearing Is Needed Because, As the Panel Expressly Noted, There is a Square Circuit Conflict on the Deference Question.

According to the Panel, it was joining the majority side of a 3-1 circuit split over the deference question. In its words:

> At least one court [*i.e.*, the Second Circuit] has held that in cases implicating ERISA § 404 fiduciary duties, the standard fleshed out in *Firestone*, *Glenn*, and *Conkright* is not applicable. *See John Blair Commc'ns, Inc. Profit Sharing Plan v. Telemundo Grp., Inc. Profit Sharing Plan*, 26 F.3d 360, 369–70 (2d Cir. 1994). Other courts of appeals [*i.e.*, the Third and Sixth Circuits] have declined to follow suit. *See Hunter v. Caliber Sys., Inc.*, 220 F.3d 702, 711–12 (6th Cir. 2000); *Moench v. Robertson*, 62 F.3d 553, 565 (3d Cir. 1995) (expressly disagreeing with *John Blair*). We agree with the Third and Sixth Circuits.

Tibble, No. 10-56406, slip op. at 28-29. That reason alone justifies rehearing *en banc*. *See* Fed. R. App. P. 35(b)(1)(B); Cir. R. 35-1.

The case for rehearing is much more compelling here, however, because, contrary to the Panel's belief, it did not join a split, but rather *created* one. The

Panel's decision is in direct conflict with the law of the Second and Third Circuits.[5]

B. Rehearing Is Needed Because The Panel Misinterpreted Authoritative Decisions of the Second and Third Circuits on an Important Question of ERISA Law.

The Panel seemed to believe that the Second Circuit had held that *Firestone* deference is inapplicable in "cases implicating ERISA § 404 fiduciary duties" under 29 U.S.C. §§ 1132(a)(2) and (a)(3). *Tibble*, No. 10-56406, slip op. at 28. In actuality, however, the Second and Third Circuits have both announced the same rule. That rule works as follows: A court should apply *Firestone* deference in actions under 29 U.S.C. §§ 1132(a)(2) and (a)(3) when the fiduciary conduct challenged involves balancing the interests of present and future beneficiaries (i.e., in situations analogous to those that might give rise to a claim for benefits under 29 U.S.C. § 1132(a)(1)(B)). A court should <u>not</u>, however, apply *Firestone* deference in actions under 29 U.S.C. §§ 1132(a)(2) and (a)(3) when the fiduciary conduct challenged involves sacrificing the valid interests of beneficiaries in favor of the interests of non-beneficiaries. *See, e.g.*, *Moench v. Robertson*, 62 F.3d 553, 565 (3d Cir. 1995) (expressly <u>agreeing</u> with *John Blair*); *John Blair Commc'ns,*

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[5] Although the Panel also identified the Sixth Circuit as involved in this conflict via *Hunte*r, 220 F.3d 702, that case is actually inapposite. As the *Hunter* court itself noted, the question it faced was whether *Firestone* deference should be applied in adjudicating a claim under 29 U.S.C. § 1132(a)(1)(B). *Id.* at 711. The Deference Question, however, concerns the circumstances in which *Firestone* applies to claims under ERISA's <u>other</u> remedial provisions – *i.e.*, 29 U.S.C. §§ 1132(a)(2) and (a)(3).

Inc. Profit Sharing Plan v. Telemundo Grp., Inc. Profit Sharing Plan, 26 F.3d 360, 369-70 (2d Cir. 1994); *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 333-34 (3d Cir. 1984). By adopting a different rule – *i.e.*, that a court should always apply *Firestone* deference in actions under 29 U.S.C. §§ 1132(a)(2) and (a)(3) – the Panel created a circuit split. *See Tibble*, No. 10-56406, slip op. at 28-31 (expressly rejecting *John Blair*, noting that *Firestone*'s "teaching[s] govern ERISA globally," and applying *Firestone* deference in a case in which it would not have been applied under the Second and Third Circuits' rule).

Rehearing *en banc* is needed to address this conflict, which substantially affects rules of national application in which there is an overriding need for national uniformity. *See* Fed. R. App. P. 35(b)(1)(B); Cir. R. 35-1. *See also LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 255 (2008) ("Defined contribution plans [like Edison's] dominate the retirement plan scene today."); *Evans v. Safeco Life Ins. Co.*, 916 F.2d 1437, 1440 (9th Cir. 1990) (citing Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 55 (1987)) ("Congress expects uniformity of decisions under ERISA.").

CONCLUSION

This petition for rehearing or rehearing *en banc* should be granted.

April 4, 2013

Respectfully submitted,

/s/ Peter K. Stris

Peter K. Stris
Attorney for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rules 35-4 and 40-1(a), the attached Petition for Rehearing or Rehearing *En Banc* complies with Fed. R. App. P. 32(c)(2) and does not exceed 4,200 words.

/s/ Peter K. Stris
Peter K. Stris
Attorney for Plaintiffs-Appellants
April 4, 2013

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 4, 2013. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

- Christopher D. Catalano
- Gary S. Tell

/s/ Peter K. Stris
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Attorney for Plaintiffs-Appellants
April 4, 2013

Nos. 10-56406, 11-56415
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GLENN TIBBLE, WILLIAM BAUER, WILLIAM IZRAL, HENRY RUNOWIECKI, FREDERICK SUHADOLC and HUGH TINMAN, Jr., as representatives of a class of similarly situated persons, and on behalf of the Plan,
Plaintiffs-Appellants,

v.

EDISON INTERNATIONAL, THE EDISON INTERNATIONAL BENEFITS COMMITTEE, fka The Southern California Edison Benefits Committee, EDISON INTERNATIONAL TRUST INVESTMENT COMMITTEE, SECRETARY OF THE EDISON INTERNATIONAL BENEFITS COMMITTEE, SOUTHERN CALIFORNIA EDISON'S VICE PRESIDENT OF HUMAN RESOURCES and MANAGER OF SOUTHERN CALIFORNIA EDISON'S HR SERVICE CENTER, *Defendants-Appellees*.

Appeal from the United States District Court for the Central District of California,
No. 2:07-cv-05359-SVW-AGR · Honorable Stephen V. Wilson

REPLY IN SUPPORT OF PETITION FOR PANEL REHEARING OR REHEARING *EN BANC*

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INTRODUCTION

The response to the petition for rehearing (the "Response") in this case is an *exceptional* piece of advocacy. That is not surprising. It was prepared by the same law firm that recently persuaded the Fourth Circuit, over vociferous protests by the United States as *amicus curiae*, to endorse an unprecedented interpretation of ERISA. As explained below, however, nothing in the Response changes the fact that further review is warranted on both the Limitations and Deference Questions.[1]

ARGUMENT

I. AS EXPLAINED IN DETAIL BY THE UNITED STATES, THE LIMITATIONS QUESTION WARRANTS FURTHER REVIEW.

It is well-settled that the failure to remove an imprudent investment from a pension plan is – wholly separate from the initial decision to include the imprudent investment – a fiduciary breach under ERISA. *See, e.g.*, *Pfeil v. State St. Bank & Trust Co.*, 671 F.3d 585, 597 (6th Cir. 2012); *Howell v. Motorola, Inc.*, 633 F.3d 552, 567 (7th Cir. 2011); *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 420 (4th Cir. 2007); *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 312 (5th Cir.

[1] "If the petition is granted, [Defendants argue that] the Court should also review the issues on which Edison did not prevail." Response at 17. Presumably, they refer to the district court's acceptance of the interpretation of 29 U.S.C. § 1104(c) urged by Plaintiffs and the Department of Labor ("DOL"). *See Tibble v. Edison Int'l*, CV 07-5359SVW(AGRX), 2010 WL 2757153, at 18-30 (C.D. Cal. July 8, 2010). Plaintiffs concede that further review of that question would be appropriate because it implicates a well-recognized circuit split. *See* Panel Opinion at 16 ("Op.") (ECF No. 82) (discussing the circuit split).

2007); *Martin v. Consultant & Adm'rs, Inc.*, 966 F.2d 1078, 1087-88 (7th Cir. 1992); *Morrissey v. Curran*, 567 F.2d 546, 549 n.9 (2d Cir. 1977). In some cases, this distinction is critical because the initial fiduciary breach is undiscovered for years. As such, only the later breach (i.e., the failure to remove the imprudent investment) falls within the relevant statute of limitations. *See, e.g.*, 29 U.S.C. § 1113(1)(B) (providing that "in the case of an omission," the statute of limitations "commences on . . . the latest date on which the fiduciary could have cured the breach or violation.").

In an unprecedented decision of extraordinary importance, the Fourth Circuit recently held, in deciding the Limitations Question, that there is no independent fiduciary duty under ERISA to remove imprudent investment options from a pension plan. *See David v. Alphin*, 704 F.3d 327 (4th Cir. 2013). As the DOL has explained: that position fundamentally misinterprets ERISA and conflicts with authoritative decisions of the Second and Seventh Circuits. *See* Brief of the Acting Secretary of Labor as *Amicus Curiae* in Support of Petition for Rehearing *En Banc* or Panel Rehearing, *David v. Alphin*, 704 F.3d 327, at 12-15 (4th Cir. Feb. 28, 2013) ("DOL *Amicus* Supporting Rehearing in *David*"); Brief of the Secretary of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellants Urging Reversal, *David v. Alphin*, 704 F.3d 327, at 22-28 (4th Cir. Dec. 28, 2011) ("DOL *Amicus* Supporting Reversal in *David*").

Defendants concede that the Panel in this case joined the Fourth Circuit in deciding the Limitations Question. *See* Response at 5 (describing the Panel as "[a]pplying . . . a recent unanimous Fourth Circuit decision . . . .") (citing *David v. Alphin*, 704 F.3d 327 (4th Cir. 2013)). And Defendants invite this Court to join the Fourth Circuit in rejecting – without *en banc* consideration – the formal DOL position. *See* Response at 8-9.[2] This Court should decline the invitation.

A. The Rejection of the Formal Position of the United States on a Question of ERISA Interpretation Screams for *En Banc* Consideration.

Defendants do not dispute that the Panel, in deciding the Limitations Question, expressly rejected the formal position of the DOL. Nor could they. The DOL made its position clear in this case. *See* Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellants, *Tibble v. Edison Int'l*, 711 F.3d 1061, at 12-19 (9th Cir. May 25, 2011) ("DOL *Amicus* Supporting Plaintiffs in *Tibble*"). And the DOL made its position clear in *David*. *See* DOL *Amicus* Supporting Rehearing in *David* at 12-15; DOL *Amicus* Supporting Reversal in *David* at 22-28.

[2] Defendants correctly note that "The Fourth Circuit [in *David v. Alphin*, 704 F.3d 327 (4th Cir. 2013),] denied a petition for rehearing en banc without noted dissent." Response at 8-9. And it did so despite the fact that the United States filed an *amicus* brief urging the Court to grant rehearing *en banc* to reconsider its rejection of the DOL's interpretation of ERISA.

If past is prologue, however, such a decision by the Fourth Circuit should be viewed with a healthy dose of skepticism. *See, e.g.*, *LaRue v. DeWolff, Boberg & Associates*, *Inc.*, 552 U.S. 248 (2008) (unanimously reversing the Fourth Circuit and, instead, adopting the interpretation of ERISA advanced by the United States); *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149 (2010) (same).

Tellingly, however, the Response fails to mention the DOL, its position, or its *amicus* participation. That is not surprising because the Limitations Question is a straightforward matter of statutory interpretation. And the DOL has primary authority to interpret and enforce the provisions of Title I of ERISA, which are designed to promote the interests of employees and their beneficiaries in employee benefit plans by ensuring the prudent and loyal management of plans and their assets. *See* 29 U.S.C. §§ 1132, 1135; *Donovan v. Cunningham*, 716 F.2d 1455, 1462-63 (5th Cir. 1983).

As such, it is not difficult to see why further review is warranted in this case. The formal position of the agency charged with the administration of ERISA has been rejected by a three-judge panel on a question of statutory interpretation deemed so important that the agency has briefed and argued its position as *amicus* in both court of appeals cases where the contrary position has been advanced. *See* DOL Amicus Supporting Plaintiffs in *Tibble* at 12-19; DOL Amicus Supporting Rehearing in *David* at 12-15; DOL Amicus Supporting Reversal in *David* at 22-28.

Indeed, it is an understatement to say that further review of the Limitations Question is warranted. It would be more accurate to say that this Court is now presented with a *paradigmatic* case for further review. The reason is simple. The agency position rejected by the Panel has been confirmed as the official view of the United States that it will defend before the Supreme Court. *See United States* *v. Black*, 733 F.2d 349, 350 (4th Cir. 1984) (noting that 28 C.F.R. § 0.20 "requires the government to seek authorization from the Solicitor General before filing a motion for rehearing en banc.").[3]

B. Defendants' Focus on the Merits of the Limitations Question Only Serves to Underscore the Pressing Need for Further Review.

Understandably, Defendants studiously avoid any mention of the fact that their interpretation of ERISA (i.e., the one adopted by the Panel) is precisely the opposite of the official position of the United States. Defendants do, however, argue at length that the official position of the United States is wrong. *See* Response at 9-11 ("The Court's Limitations Ruling Was Correct").

Of course, Plaintiffs (like the United States) disagree with these merits-based arguments and will respond in detail if this Court grants further review. For present purposes, however, Defendants' focus on the merits of the Limitations Question only serves to underscore the pressing need for further review.

To be sure: the position urged by Defendants can be defended. After all, it was expressly adopted by the Fourth Circuit and the Panel in this case. But the same is obviously true of the position urged by Plaintiffs. After all, it represents the considered view of the United States and, in the Plaintiffs' and government's view,

[3] Such filings are extraordinarily rare. Since the year 2000, it appears that the DOL has filed *amicus* briefs in support of *en banc* review in only 19 cases. *See* U.S. Dep't of Labor, SOL Briefs, *available at* http://www.dol.gov/sol/media/briefs/ (last visited May 6, 2012).

the Second and Seventh Circuits. Indeed, the existence of profound disagreement on this important question (where the United States has made clear it will maintain its position before the Supreme Court) is precisely why further review is warranted. Even if the question must ultimately be decided by the Supreme Court, there can be no serious dispute that its resolution would benefit from the most thorough review possible by the lower courts (i.e., *en banc* consideration).

C. Defendants' Attempt to Minimize the Circuit Conflict Identified by the United States Is Unpersuasive.

In its *amicus* filings, the United States has observed that the Panel's "decision is . . . difficult to reconcile with decisions of the Second and Seventh Circuits." DOL *Amicus* Supporting Rehearing in *David* at 14. In the Response, Defendants dispute the existence of this conflict. *See* Response at 6-9 ("There Is no Circuit Conflict On The Limitations Question"). Defendants are wrong.[4]

Martin v. Consultant & Adm'rs, Inc., 966 F.2d 1078 (7th Cir. 1992), affirmed "the continuing nature of a trustee's duty under ERISA to review plan investments and eliminate imprudent ones." *Id.* at 1087-88. Likewise, *Morrissey v. Curran*, 567 F.2d 546 (2d Cir. 1977), affirmed "[t]he trustee's obligation to dispose of

[4] Even if the circuit conflict identified by the DOL were ignored, further review would still be warranted. *See supra* pp. 3-6 (Sections I.A and I.B). There can be little, if any, doubt that the DOL views this issue as important and will continue to advance its position as the issue arises in various circuits. And Defendants cannot deny that this case is an ideal vehicle through which this Court, sitting *en banc*, can announce its considered view on the Limitations Question.

improper investments within a reasonable time." *Id.* at 549 n.9. The Panel, however, held that unless "significant changes in conditions occurred within the limitations period that should have prompted 'a full due diligence review . . .'" the duty of prudence is limited to the initial investment decision. *See* Op. at 11. Such a reading "effectively treats imprudent, disloyal, and prohibited plan investments as forever permissible if maintained unchallenged for more than six years without material change." *See* DOL *Amicus* Supporting Reversal in *David* at 27. As such, the Panel's reading conflicts with the existence of the continuing duty to review and dispose of impudent investments that the Second and Seventh Circuits have expressly recognized.

II. THE DEFERENCE QUESTION WARRANTS FURTHER REVIEW.

As the Panel in this case expressly noted: the Deference Question has been left open by the Supreme Court and divided the circuits. Petition for Rehearing or Rehearing En Banc at 7 ("Petition") (citing Op. at 28-29)). The Panel was correct on both counts. The Deference Question has undeniably been left open by the Supreme Court. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 108 (1989) ("We express no view as to the appropriate standard of review for actions under other remedial provisions of ERISA.") And it is the subject of a square circuit conflict. *See* Op. at 28-29 (citing the relevant cases from various courts of appeals). Faced with another ideal candidate for *en banc* consideration, Defendants' counsel skillfully manufacture two arguments against further review. As explained below, however, neither is tenable.

A. Resolution of the Deference Question Is Outcome Determinative.

In several respects, this litigation turns on a question of plan interpretation. *See* Op. at 26-27 (summarizing the parties' disagreement over the meaning of the phrase "[t]he cost of the administration of the Plan"). The relevant question on appeal is "whether the district court correctly determined that no triable issue existed over whether the pre-amendment version of section 19.02 allowed offsets." *Id.* at 27 (citing Fed. R. Civ. P. 56(a)).

The Panel affirmed the district court on narrow grounds. First, it addressed the Deference Question. *See* Op. at 26-31 (Section V.A.1.). In so doing, the Panel explained at length why it was rejecting the position of the Second Circuit. *See id.* at 29-31 (Sections V.A.1.i. and V.A.1.i.i). Ultimately, it concluded that "the usual abuse of discretion standard applies to cases such as this." *Id.* at 29. Second, the Panel addressed whether – *under a deferential standard of review* – the district court correctly determined that no triable issue existed on the plan interpretation question. *Id.* at 32-33 (Section V.A.2.). Applying such a standard, the Panel affirmed the grant of summary judgment by the district court.

Defendants argue that the Deference Question does not warrant further review because it cannot possibly be outcome determinative. *See* Response at 12-13

("The Deference Issue Is Irrelevant To The Outcome Of The Case Because The Fiduciaries' Interpretation Would Be Affirmed If Reviewed De Novo"). Defendants are mistaken.

To be clear: the Panel did not address whether – *under a de novo standard* – the district court correctly determined that no triable issue existed on the plan interpretation question. Although Defendants point to language in the Panel's opinion that appears hostile to Plaintiff's interpretation, see Response at 12-13, the opinion unquestionably does not contain an alternative holding. *Compare, e.g.*, *Frommert v. Conkright*, 433 F.3d 254, 266 n.11 (2d Cir. 2006) ("[W]e find the Plan Administrator's conclusion to be unreasonable under either [*de novo* or arbitrary and capricious review]."').

Reversal on the Deference Question would necessarily require adjudication of the plan interpretation question in this case under a *de novo* standard. That, by itself, means that resolution of the Deference Question is outcome determinative. Contrary to the suggestion of Defendants, Plaintiffs need not establish that they will prevail under a *de novo* standard. It is enough that a different resolution of the Deference Question will result in a new *adjudication*. Under Defendants' logic, *en banc* – or United States Supreme Court – review of a threshold legal question would never be appropriate in a case where the lower court suggests in *dicta* that a plaintiff's case is weak on the merits. That is obviously wrong.

B. There Is a Live Circuit Conflict Over the Deference Question.

As explained above, Defendants largely attempt to avoid further review of the Deference Question by incorrectly claiming that its resolution is irrelevant to the outcome of this case. *See* Response at 12-14. Nonetheless, Defendants do make a half-hearted attempt to argue that, despite the Panel's express statement to the contrary, there is no live circuit conflict on the Deference Question. *See* Response at 14-17 ("The Court's Deference Ruling Implicates No Live Circuit Conflict."). Again, Defendants are mistaken.

Indeed, the Response – despite the claim made in its section heading – actually concedes the existence of a live circuit split. *See* Response at 16-17 (accepting that the Second Circuit has split with other circuits on the Deference Question and coyly noting that the question "may be ripe for review en banc, but only in the Second Circuit – where it can be properly interred."). Essentially, Defendants argue that (i) only the Second Circuit is on Plaintiffs' side of this circuit split, (ii) the Second Circuit's position is foreclosed by the Supreme Court's recent decision in *Conkright v. Frommert*, 130 S. Ct. 1640 (2010), and therefore, (iii) further review of the Deference Question is only warranted in the Second Circuit. Defendants are wrong on several counts.

First, Defendants – like the Panel – have mischaracterized the positions of the Third and Sixth Circuits. *See* Petition at 14-15. For example, Defendants completely ignore the fact – identified by Plaintiffs in their petition – that the key Third Circuit decision in the circuit split, *Moench v. Robertson,* 62 F.3d 553 (3d Cir. 1995), expressly agreed with the key Second Circuit decision in the split, *John Blair Commc'ns, Inc. Profit Sharing Plan v. Telemundo Grp., Inc. Profit Sharing Plan*, 26 F.3d 360 (2d Cir. 1994). *See* Petition at 14 (noting that the *Moench* Court expressly agreed with the *John Blair* Court).

Second, Defendants have overstated the scope of the *Conkright* Court's endorsement of *Firestone* deference. *See, e.g.*, Response at 17 (arguing that *Conkright* expressly disapproved *ad hoc* exceptions to *Firestone* deference). Put simply, *Conkright* – like *Firestone* – addressed questions of judicial deference only in the context of a claim for benefits under 29 U.S.C. § 1132(a)(1)(B).[5]

Finally, Defendants suggest that Plaintiffs would not be entitled to *de novo* review even in the Second Circuit because this case, unlike *John Blair*, does not

[5] Counsel for Plaintiffs in this case argued *Conkright* before the Supreme Court and is well aware of creative attempts to extend the holding of that case. Indeed, such a dispute has arisen on remand in *Conkright*. *See* Brief and Special Appendix for Plaintiffs-Appellants, *Frommert v. Conkright*, No. 12-0067-cv, at 26-28 (2d Cir. April 20, 2012) (arguing that the district court incorrectly interpreted *Conkright* as extending *Firestone* deference to the interpretation and sufficiency of summary plan descriptions in adjudicating non-benefit claims under 29 U.S.C. § 1132(a)(3)). If this Court believes that *Conkright* is somehow relevant to the Deference Question, however, that would provide further support for *en banc* review because the position articulated by Defendants has been directly and formally repudiated by the DOL. *See* Brief for the Secretary of Labor as *Amicus Curiae* Supporting Appellants and Requesting Reversal, *Frommert v. Conkright*, No. 12-0067-cv, at 19-25 (2d Cir. May 11, 2012) (supporting the position on *Firestone* deference advanced by the *Conkright* plaintiffs).

involve a zero-sum conflict between the employer's and beneficiaries' interests. *See* Response at 16. This claim is hard to take seriously. The offset arrangement challenged by Plaintiffs in this case directly transferred specific costs from Defendants to plan participants. It unquestionably constitutes a situation where the Second Circuit would reject the application of *Firestone* deference. For that very reason, the Panel took great pains to explain why it had rejected the position of the *John Blair* Court. *See* Op. at 29-31.

CONCLUSION

This petition for rehearing or rehearing *en banc* should be granted.

May 29, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Circuit Rules 35-4 and 40-1(a) do not require that a Certificate of Compliance by submitted with a reply. Nevertheless, the above Reply in Support of Petition for Panel Rehearing or Rehearing *En Banc* complies with the format and length requirements of Fed. R. App. P. 32(c)(2) and Circuit Rules 35-4 and 40-1(a). The Reply is proportionally spaced, has a typeface of 14 points or more, and contains 3,544 words.

/s/ Peter K. Stris
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May 29, 2013

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 29, 2013. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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