



provisions of the Texaco Plans to Plaintiffs and other potential participants and beneficiaries.

III.

These failures are in breach of Defendant's fiduciary duties, imposed by ERISA §§404(a)(1)(A), 404(a)(1)(B), and 404(a)(1)(D).

IV.

Defendant's repeated and continuing breaches of fiduciary duty imposed by ERISA have resulted in losses to the ChevronTexaco Employee Benefit Plans, the Plaintiffs, and all Plan Participants and Beneficiaries.

V.

In addition, Defendants failed to provide Mr. Weber with Plan Documents, as required under ERISA §502(c), and All Plaintiffs with Welfare Benefit Plan SPDs and information relating to the Administrative Process, as required by 29 C.F.R. §§ 2560.503-1(h)(2) and/or (m)(8).

VI.

Finally, it is undisputed that the Plaintiffs' claims under ERISA § 502(a)(1)(B) relating to the 1994 Retirement and 1994 Employees' Thrift Plans were timely filed.

VII.

Plaintiffs' Motion is further supported by a Memorandum in Support, Exhibits, and a Statement of Uncontested Material Facts, which are incorporated fully by reference herein.

**WHEREFORE** Plaintiffs respectfully pray for Judgment in favor of Plaintiffs, Alton Schultz, Jr., Elaine Jackson, Gladys Criddle, and Harold Weber, Jr., and against Defendants, Janet Stoner and

ChevronTexaco Corp., appointing an independent fiduciary to make eligibility determinations in accordance with Plan documents and to calculate the losses to the ChevronTexaco Employee Benefit Plans; declaring that Plaintiffs were, at all pertinent times, eligible to participate in the Texaco and/or ChevronTexaco Employee Benefit Plans; ordering Defendant, Janet Stoner, to make restitution to the ChevronTexaco Employee Benefit Plans for any and all losses incurred as a result of her fiduciary breaches; and awarding benefits, or the value of same, legal interest, the costs of these proceedings, statutory penalties, reasonable attorneys' fees, and any and all other general or equitable relief to which the Plaintiffs, others similarly situated, and/or the Plans are entitled.

Respectfully submitted,

---

**STEPHEN J. HERMAN** (*Pro Hac Vice*)  
**SIDNEY A. COTLAR** (*Pro Hac Vice*)  
**Herman Mathis Casey Kitchens & Gerel LLP**  
820 O'Keefe Avenue  
New Orleans, Louisiana 70113  
Telephone (504) 581-4892  
Fax No. (504) 561-6024

**Attorneys for Alton C. Schultz, Jr.,  
Elaine B. Jackson, Gladys Criddle, and  
Harold J. Weber, Jr., Plaintiffs.**

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

ALTON C. SCHULTZ, JR., et al,	)	Civil Action No.
	)	00 Civ. 0439 (LTS) (MDF) WP
Plaintiffs,	)	<u>MEMORANDUM</u>
	)	<u>IN SUPPORT OF</u>
vs.	)	<u>PLAINTIFFS'</u>
	)	<u>MOTION FOR</u>
JANET L. STONER, et al,	)	<u>SUMMARY JUDGMENT</u>
	)	
Defendants.	)	
	)	

Plaintiffs, Alton Schultz, Jr., Elaine Jackson, Gladys Criddle, and Harold Weber, Jr., through undersigned counsel, respectfully submit the following Memorandum in support of their Motion for Summary Judgment:

**MAY IT PLEASE THE COURT:**

Pursuant to the Court’s Amended Order, dated January 3, 2001, the central issue has been defined as whether “Janet Stoner, as Plan Administrator, breached [her] fiduciary duties, in violation of §§404(a)(1)(A) and 404(a)(1)(D) of ERISA, by failing to identify all employees eligible to participate in the Plans and to ensure that they participated in the Plans.”<sup>1</sup>

Ms. Stoner, in this regard, had a duty to act in accordance with plan documents.<sup>2</sup> But the

---

<sup>1</sup>DECISION AND ORDER, pp.18-19, (Schultz v. Texaco Inc., 127 F.Supp.2d 443, 451 (S.D.N.Y. 2001)).

<sup>2</sup>29 U.S.C. §1104(a)(1)(D).

defendant also had a duty imposed by ERISA to take affirmative steps to identify and include all participants and beneficiaries, in order to ensure that the Plans receive all contributions to which they are entitled.<sup>3</sup> In fulfilling these duties, the defendant had the fiduciary responsibility to act with reasonable prudence, diligence, and care,<sup>4</sup> “solely in the interests of the participants and beneficiaries, for the exclusive purpose of providing benefits to participants and their beneficiaries.”<sup>5</sup>

Ms. Stoner admitted that at no time since she became Plan Administrator in 1997, had she ever taken *any* affirmative steps to attempt to identify potential participants or beneficiaries.<sup>6</sup> Furthermore, to her knowledge, no Plan Administrator had taken steps to identify and include participants and beneficiaries since at least 1989.<sup>7</sup>

When presented with Mr. Schultz and Mr. Weber’s requests for clarification as to eligibility for benefits in 1999, Ms. Stoner conducted absolutely no review of the circumstances under which Plaintiffs provided employment services to Texaco, nor could she point to any facts to support the conclusion that Plaintiffs were not “employees” of Texaco under the terms of the Texaco Employee Benefit Plans.<sup>8</sup>

---

<sup>3</sup>Central States Pension Fund v. Central Transport, 472 U.S. 559, 571-572, 105 S.Ct. 2833, 2841, 86 L.Ed.2d 447 (1985); Diduck v. Kaszyski & Sons Contractors, 874 F.2d 912, 916 (2d Cir. 1989) (“*Diduck I*”), and 974 F.2d 270, 275 (2d Cir. 1992) (“*Diduck II*”); Herman v. Time Warner, 56 F.Supp.2d 411, 416-417 (S.D.N.Y. 1999). *See also*: New York State Teamsters Conference Pension & Retirement Fund v. Boening Bros., Inc., 92 F.3d 127, 131 (2d Cir. 1996); Blatt v. Marshall and Lassman, 812 F.2d 810, 813 (2d Cir. 1987); Agathos v. Starlite Motel, 60 F.3d 143, 152 n.13 (3<sup>rd</sup> Cir. 1995); Struble v. New Jersey Brewery Employee’s Welfare Trust Fund, 732 F.2d 325, 336-337 (3<sup>rd</sup> Cir. 1984).

<sup>4</sup>29 U.S.C. §1104(a)(1)(B).

<sup>5</sup>29 U.S.C. §1104(a)(1)(A).

<sup>6</sup>DEPOSITION OF JANET STONER [Plaintiffs’ Exhibit 5], p.36.

<sup>7</sup>STONER DEPO, p.36.

<sup>8</sup>STONER DEPO, pp. 58-65, 112-115, 128-133, 139-140.

Defendant's ongoing and repeated breaches of fiduciary duty were then compounded by: (i) the lack of any established procedures or criteria for making eligibility determinations or for reviewing same; (ii) reliance on the existence of contracts with third-party leasing agencies which weren't even reviewed by the Plan Administrator; (iii) the absence of any semblance of an "administrative record"; (iv) consultation with Texaco's Legal Department regarding the denial of eligibility; (v) the Defendant's post-litigation change in position; and, (vi) letters to the plaintiffs which make material misrepresentations, purporting to quote verbatim from language which is **not** in any plan.

Plaintiffs' claims, and Ms. Stoner's defenses to same, were submitted on Cross-Motions for Summary Judgment, which were denied, in pertinent part, on March 8, 2004. Rejecting Defendant's position that the Plan Administrator was entitled to rely upon the Summary Plan Descriptions, despite contrary language in the formal texts of the Plans,<sup>9</sup> the Court instructed that "the first step of an analysis as to whether the Plan Administrator has carried out appropriately her duties in connection with the enrollment of employees and provision of appropriate benefits is interpretation of the eligibility provisions of the plans."<sup>10</sup> The Court then noted that "Stoner has proffered no evidence of her consideration of [the] differences between the formal text and the SPD language, nor is there any indication that she considered the 1989 plan texts, which were apparently in effect for several of the employment years in question here, or even the 1994 SPDs."<sup>11</sup> Hence, "because, under the plans, interpretation of the disputed provisions is for the Plan Administrator in the first instance, the Court

---

<sup>9</sup>OPINION AND ORDER, pp.22-27, (Schultz v. Stoner, 308 F.Supp.2d 289, 304-308 (S.D.N.Y. 2004)).

<sup>10</sup>OPINION AND ORDER, p.22, (308 F.Supp.2d at 304).

<sup>11</sup>OPINION AND ORDER, p.23, (308 F.Supp.2d at 305).

[remanded] this matter to the current Plan Administrator for a determination of the eligibility issue in question.”<sup>12</sup>

Defendants, however, did not do what the Court instructed. An adversarial “Position Statement of the Plan Administrator” with supporting evidence was prepared by unidentified persons within the ChevronTexaco Legal Department and presented to a ChevronTexaco Review Panel.<sup>13</sup> The Review Panel, as acknowledged by Defense Counsel, did not make any attempt to consider the differences between the language in the Formal Text Plans and the SPDs, or engage in any other effort to interpret the Plans.<sup>14</sup> The Review Panel simply stated that: “All plaintiffs during the qualifying time period, 1991-1999 were either independent contractors or third party contractors working for the Company. In summary, they were the employees of a third party ‘independent contractor’ and not eligible employees of a Participating Company or Company Affiliate.”<sup>15</sup> Like Ms. Stoner,<sup>16</sup> the Review Panel could shed no light on the basis of its conclusions.<sup>17</sup>

It is clear, in sum, that Ms. Stoner breached her fiduciary duties, which resulted in the exclusion of eligible participants, such as and including Plaintiffs, thereby causing a denial of benefits or other loss to the Plaintiffs, other Participants and Beneficiaries, and the Plans. Plaintiffs, therefore, respectfully pray for summary judgment, as more fully provided herein.

---

<sup>12</sup>OPINION AND ORDER, p.24, (308 F.Supp.2d at 305).

<sup>13</sup>See POSITION STATEMENT OF THE PLAN ADMINISTRATOR [Plaintiffs’ Exhibit 24]; DEPOSITION OF JOHN F. HUEY [Plaintiffs’ Exhibit 29], pp.21-24, 28-31.

<sup>14</sup>TRANSCRIPT OF PROCEEDINGS, JUNE 7, 2004 [Plaintiffs’ Exhibit 28], pp.4-5; DEPOSITION OF RHONDA MORRIS (30(b)(6)) [Plaintiffs’ Exhibit 31], pp.12-19.

<sup>15</sup>REVIEW PANEL REPORT OF FINDINGS [Plaintiffs’ Exhibit 27], p.4.

<sup>16</sup>See OPINION AND ORDER, p.28, (308 F.Supp.2d at 308); STONER DEPO, pp.52-53, 58, 86.

<sup>17</sup>MORRIS DEPO, pp.28-45, 77-78, 82-85.

**TABLE OF CONTENTS**

**INTRODUCTION** ..... 1

**TABLE OF CONTENTS** ..... 5

**BREACH OF FIDUCIARY DUTY IN FAILING TO IDENTIFY AND INCLUDE PARTICIPANTS AND BENEFICIARIES** ..... 6

**BREACH OF FIDUCIARY DUTY IN FAILING TO ACT IN ACCORDANCE WITH PLAN DOCUMENTS** ..... 7

**ELIGIBILITY UNDER THE 1994 RETIREMENT PLAN AND 1994 EMPLOYEES THRIFT PLAN** ..... 7

**The Formal Plan Text Governs** ..... 8

**Plaintiffs Were “Employed By” Texaco** ..... 10

**The “Independent Contractor” Exclusion Does Not Apply** ..... 16

**The “Leased Employee” Exclusion Does Not Apply** ..... 26

**ELIGIBILITY UNDER THE 1989 PENSION PLANS** ..... 27

**FAILURE TO PROVIDE PLAN DOCUMENTS AND OTHER INFORMATION** ..... 28

**OTHER FIDUCIARY BREACHES** ..... 29

**Failure to Investigate the Facts** ..... 29

**Misrepresentations to Plaintiffs** ..... 29

**Post-Litigation Changes in Position** ..... 30

**PLAINTIFFS’ SECTION 502(A)(1)(B) CLAIMS OR BENEFITS UNDER THE 1994 RETIREMENT PLAN AND 1994 EMPLOYEES THRIFT PLAN WERE TIMELY FILED** ..... 31

**THE FINDINGS, CONCLUSIONS, RECOMMENDATIONS, DENIALS, AND OTHER ACTIONS AND/OR FAILURES TO ACT BY MS. STONER, OTHER PLAN ADMINISTRATORS AND THE CHEVRONTEXACO REVIEW PANEL CONSTITUTE AN ABUSE OF DISCRETION, WHETHER REVIEWED UNDER A DEFERENTIAL STANDARD OR *DE NOVO*** ..... 32

**CONCLUSION** ..... 36

**CERTIFICATE OF SERVICE** ..... 37

**BREACH OF FIDUCIARY DUTY IN FAILING TO IDENTIFY AND INCLUDE ALL POTENTIAL PLAN PARTICIPANTS AND BENEFICIARIES, IN ORDER TO ENSURE THAT THE PLANS RECEIVE ALL FUNDS TO WHICH THEY ARE ENTITLED**

The Secretary of Labor has confirmed, in this case, that ERISA imposes an affirmative duty to identify and include all participants and beneficiaries, in order to ensure that the Plans receive all contributions to which they are entitled. SECRETARY OF LABOR’S BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS’ OPPOSITION TO TEXACO’S MOTION TO DISMISS, pp.4-7; *citing*, Central States Pension Fund v. Central Transport, 472 U.S. 559, 571-572, 105 S.Ct. 2833, 2841, 86 L.Ed.2d 447 (1985); Diduck v. Kaszyski & Sons Contractors, 874 F.2d 912, 916 (2d Cir. 1989) (“*Diduck I*”), and 974 F.2d 270, 275 (2d Cir. 1992) (“*Diduck II*”); Herman v. Time Warner, 56 F.Supp.2d 411, 416-417 (S.D.N.Y. 1999).<sup>18</sup> In fulfilling these duties, the defendant had the fiduciary responsibility to act with reasonable prudence, diligence, and care,<sup>19</sup> “solely in the interests of the participants and beneficiaries, for the exclusive purpose of providing benefits to participants and their beneficiaries.”<sup>20</sup>

In this case, it is clear that Defendant did not fulfill her responsibilities.

Q. Have you, as Plan Administrator, ever taken any steps to identify potential participants and beneficiaries of the Texaco Retirement Plan?

A. No.

Q. Have you taken any steps to identify potential participants and beneficiaries of the Texaco Thrift Plan?

A. No.

---

<sup>18</sup>*See also*: New York State Teamsters Conference Pension & Retirement Fund v. Boening Bros., Inc., 92 F.3d 127, 131 (2d Cir. 1996); Blatt v. Marshall and Lassman, 812 F.2d 810, 813 (2d Cir. 1987); Agathos v. Starlite Motel, 60 F.3d 143, 152 n.13 (3<sup>rd</sup> Cir. 1995); Struble v. New Jersey Brewery Employee’s Welfare Trust Fund, 732 F.2d 325, 336-337 (3<sup>rd</sup> Cir. 1984).

<sup>19</sup>29 U.S.C. §1104(a)(1)(B).

<sup>20</sup>29 U.S.C. §1104(a)(1)(A).

Q. Are you aware of any steps taken by any previous Plan Administrator from 1989 through the present to identify participants and beneficiaries of one or more of the Texaco Plans?

A. No.<sup>21</sup>

Defendant's own testimony thus establishes an admitted breach of fiduciary duty to the Texaco Plans, and their participants and beneficiaries.

**BREACH OF FIDUCIARY DUTY IN  
FAILING TO ACT IN ACCORDANCE WITH PLAN DOCUMENTS**

**ELIGIBILITY UNDER THE 1994 RETIREMENT PLAN AND 1994 EMPLOYEES' THRIFT PLAN**

The pertinent provisions of the 1994 Texaco Retirement and Employees' Thrift Plans provide as follows:

**Section 2.01. Eligibility.** Participation in this Plan is available to any Employee who meets the requirements of Sections 2.01(A) and 2.01(B):

**(A) The Employee is assigned to service:**

**(1) in the United States** and is not represented by a labor organization or is represented by a labor organization that has bargained for an agreed to the provisions of this Plan, as it may be amended from time to time, in lieu of participation in any other thrift or savings plan to which the Employer contributes, or

**(2) outside the United States but carried on a United States payroll,** provided the Employee would otherwise meet the requirements in Section 2.01 (A)(1) above.

---

<sup>21</sup>DEPOSITION OF JANET STONER [Plaintiffs' Exhibit 5], p.36.

(B) The Employee has been credited with one year of Eligibility Service or makes a Rollover Contribution to the Plan.

**Section 2.02. Excluded Employees.** Participation in this Plan is not available to any Employee who does not meet the criteria listed in Section 2.01 **or who is a Leased Employee.**<sup>22</sup>

An “**Employee**” is defined as:

**Any individual who is employed by the Employer, including a Leased Employee, but excluding any individual characterized by or under contract with the Employer as an independent contractor.**<sup>23</sup>

A “**Leased Employee**” is defined as:

Any individual **defined in Section 414(n) of the Code. Leased Employees do not include independent contractors or individuals who are not required to be treated as Employees under Section 414(n) and applicable Regulations.**<sup>24</sup>

### THE FORMAL PLAN TEXT GOVERNS

As indicated by the Court in its March 8, 2004 Opinion and Order, the Formal Plan Text is controlling.<sup>25</sup> Among other considerations, Plaintiffs again note for the record that:

- The Plan Administrator testified that she relied on the Formal Text of the Plan;<sup>26</sup>

---

<sup>22</sup>FORMAL TEXT OF THE EMPLOYEES THRIFT PLAN OF TEXACO INC., RESTATED AS OF DECEMBER 31, 1994 [Plaintiffs’ Exhibit 6], §§ 2.01, 2.02. The 1994 Retirement Plan is virtually identical. SEE FORMAL TEXT OF THE RETIREMENT PLAN OF TEXACO INC., RESTATED AS OF DECEMBER 31, 1994 [Plaintiffs’ Exhibit 7], §§ 2.01, 2.02. The only material difference in the text is that the 1994 Retirement Plan includes a section on Eligible Employee Classification, which provides that “the Employee must be within an eligible classification of Employees, designated as eligible for this plan by the board of directors of an Employer from time to time.” RETIREMENT PLAN, §2.01(A). **Defendant Stoner testified, however, that the only designation made by the Board of Directors is the definition set forth in the 1994 Plan.** STONER DEPO, pp.115-116.

<sup>23</sup>EMPLOYEES’ THRIFT PLAN, §1.29; RETIREMENT PLAN, §1.30.

<sup>24</sup>EMPLOYEES’ THRIFT PLAN, §1.46, (emphasis supplied); RETIREMENT PLAN, §1.46, (emphasis supplied).

<sup>25</sup>OPINION AND ORDER, pp.22-27, (Schultz v. Stoner, 308 F.Supp.2d 289, 304-308 (S.D.N.Y. 2004)). See also, Bergt v. Retirement Plan For Pilots Employed by MarkAir, Inc., 293 F.3d 1139, 1145-1146 (9<sup>th</sup> Cir. 2002).

<sup>26</sup>STONER DEPO, pp.107-108. See also: STONER DEPO, pp.52-53, 58.

- The SPDs were not provided to the participants in question;<sup>27</sup>
- The SPDs expressly provide that **“in the event of any conflict between the Summary Plan Description and the Formal Text of the Plan, the more detailed provisions of the Formal Text will control.”**<sup>28</sup>
- Under IRS rules, the terms of a tax-qualified Plan, such as the Texaco Plans at issue, are controlling despite any inconsistent language that might be contained in the SPD;<sup>29</sup>
- The cases previously cited by Defendant stand for the proposition that a *Plan Administrator* cannot invoke undisclosed Plan provisions to the prejudice of an employee;<sup>30</sup>
- The rule is derived from the principle that “*employees* are entitled to rely on the descriptions contained in the summary” – *not* that a Plan Administrator is entitled to materially change the Plan’s eligibility requirements, against the interests of the plan participants, and then rely upon same;<sup>31</sup>
- Courts have indicated that where, as here, the Summary Plan Description provides that the terms of the Plan will govern in the event of any conflict, the Plan Administrator cannot invoke

---

<sup>27</sup>STONER DEPO, pp.38-41, 107.

<sup>28</sup>1999 TEXACO RETIREMENT SUMMARY PLAN DESCRIPTION [Plaintiffs’ Exhibit 12], p.iv; 1999 TEXACO EMPLOYEES’ THRIFT SUMMARY PLAN DESCRIPTION [Plaintiffs’ Exhibit 13], p.iv.

<sup>29</sup>AFFIDAVIT OF A.D. “GUS” FIELDS [Plaintiffs’ Exhibit 17], ¶¶ 5, 6, 8.

<sup>30</sup>*See, e.g., Heidgerd v. Olin Corp.*, 906 F.2d 903, 907 (2d Cir. 1990) (“Olin cannot now rely on language in a document that did not comply with ERISA to contradict the Booklet, which was filed”); *Estate of Ritzer v. National Organization of Industrial Trade*, 822 F.Supp. 951, 954 (E.D.N.Y. 1993) (indicating that the *Heidgerd* rule is intended to “prevent an ERISA plan from enforcing an undisclosed provision”); *Manginaro v. Welfare Fund*, 21 F.Supp.2d 284, 293 (S.D.N.Y. 1998) (refusing to allow the Plan to invoke an undisclosed two-year statute of limitations period).

<sup>31</sup>*Heidgerd*, 906 F.2d at 907; *citing, McKnight v. Southern Life and Health Ins. Co.*, 758 F.2d 1566, 1570 (11th Cir. 1985) (court is concerned that “unfairness will flow to the employee....”); *Moriarity v. UTC Plan*, 158 F.3d 157, 162 (2d Cir. 1998) (“it would seem that under the policy objectives of §1022, an employee should be entitled to rely on his or her reasonable reading of the SPD”). *See also, Bergt, supra*, 293 F.3d at 1145 (“it would be unfair to have the employees bear the burden of a conflicting SPD and formal plan document and, thus... the provision *more favorable* to the employee controlled”).

undisclosed Plan provisions to the detriment of the employees;<sup>32</sup> and,

- **Defendant Stoner herself testified that, in the event of any discrepancy between the Formal Text and the SPD, the Formal Text governs.**<sup>33</sup>

### **PLAINTIFFS WERE “EMPLOYED BY” TEXACO**

It is clear that Mr. Schultz, Ms. Jackson, Ms. Criddle, and Mr. Weber were, at all pertinent times, “employed by” Texaco.<sup>34</sup>

Neither the original denial letters issued by Defendant Stoner,<sup>35</sup> nor her entire deposition testimony,<sup>36</sup> nor the briefs submitted by Defense Counsel,<sup>37</sup> suggested that Plaintiffs were not “employed by” Texaco.

---

<sup>32</sup>Osborne v. N.Y. State Teamsters Fund, 783 F.Supp. 739, 743 (N.D.N.Y. 1992), *vacated, on other grounds*, 792 F. Supp 177 (N.D.N.Y. 1992); Stang v. American Express, No. 93 Civ. 6615, 1998 U.S. Dist. LEXIS 3138, at \*28-31 (S.D.N.Y. March 16, 1998) (court declines to apply the *Heidgerd* rule where the SPD was never delivered to the plaintiff and expressly stated that the SPD “describes only certain highlights” and “does not supercede the actual provisions of the applicable plan documents”).

<sup>33</sup>STONER DEPO, pp.107-108.

<sup>34</sup>*See generally*: PLAINTIFFS’ SUBMISSION, BY LETTER, TO REVIEW PANEL, APRIL 12, 2004 [Plaintiffs’ Exhibit 23], pp.6-7; *citing*, Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992); RESTATEMENT (SECOND) OF AGENCY, §220; I.R.S. REVISED RULING 87-41; *and*, AFFIDAVIT OF ALTON SCHULTZ, JR. [Plaintiffs’ Exhibit 1], ¶¶III-XVII; AFFIDAVIT OF ELAINE JACKSON [Plaintiffs’ Exhibit 2], ¶¶III-XV; AFFIDAVIT OF GLADYS CRIDDLE [Plaintiffs’ Exhibit 3], ¶¶III-XVI; AFFIDAVIT OF HAROLD J. WEBER, JR. (Supplemental and Amended) [Plaintiffs’ Exhibit 4], ¶¶ IV-XI, XIV, XXVIII-XXIX; SELECTED EMPLOYMENT RECORDS [Plaintiffs’ Exhibit 8, authenticated by the SCHULTZ AFFIDAVIT, ¶XXII]; METRO CONTRACT [Plaintiffs’ Exhibit 14], ¶¶ 2, 4, 5, 11; KELLY SERVICE EXTRA LABOR AGREEMENT [Plaintiffs’ Exhibit 15], ¶¶ 2(a), (i) and (j), 21, 22; PROFESSIONAL TEMPORARIES AGREEMENT [Plaintiffs’ Exhibit 16], ¶¶ 2(a), (i) and (j), 16(a), 22, 23.

<sup>35</sup>*See* LETTER FROM STONER TO SCHULTZ, Dec. 6, 1999 [Plaintiffs’ Exhibit 9]; LETTER FROM STONER TO WEBER, Jan. 11, 2000 [Plaintiffs’ Exhibit 10]. *See also*, LETTER FROM RUSSELL TO JACKSON, Oct. 12, 1999 [Plaintiffs’ Exhibit 11].

<sup>36</sup>*See* DEPOSITION OF JANET L. STONER, (in particular, pp.52-53, 58, and 86).

<sup>37</sup>*See* MEMORANDUM IN SUPPORT OF DEFENDANT JANET L. STONER’S MOTION FOR SUMMARY JUDGMENT (dated May 1, 2001) (in particular, pp.9-10, 14).

Although the Review Panel's decision on remand is ambiguous and unclear,<sup>38</sup> the Review Panel seems to have been influenced by the ChevronTexaco Legal Department's argument on remand that Plaintiffs were not "employed by" Texaco in the first instance.<sup>39</sup>

While Defendants should be estopped from advancing such an argument at this point,<sup>40</sup> Plaintiffs, out of an abundance of caution, note that the "Plan Administrator's" argument that individuals "employed by" Texaco should be restricted to only those workers "formally denominated as Texaco or TEPI employees" is inconsistent with, not only **(i)** the common law definition of employee, but also **(ii)** the Plan's definition of "Employee" – which specifically *includes* "Leased Employees";<sup>41</sup> **(iii)** the fact that the Formal Plan Text could have, but did not, expressly restrict eligibility to those on Texaco's payroll or otherwise "formally denominated as Texaco or TEPI employees";<sup>42</sup> **(iv)** the Eligibility provisions, which refer to individuals "assigned to service" with Texaco;<sup>43</sup> **(v)** the evidence relating to the manner in which Plaintiffs provided services to Texaco;<sup>44</sup>

---

<sup>38</sup>See REVIEW PANEL REPORT OF FINDINGS [Plaintiffs' Exhibit 27], p.4. See also, DEPOSITION OF RHONDA MORRIS (30(b)(6)) [Plaintiffs' Exhibit 31], pp.28-45, 77-78, 82-85.

<sup>39</sup>POSITION STATEMENT OF THE PLAN ADMINISTRATOR [Plaintiffs' Exhibit 24], pp.7-10.

<sup>40</sup>Juliano v. HMO of New Jersey, 221 F.3d 279, 287 (2d Cir. 2000); quoting, Marolt v. Alliant Techsystems, 146 F.3d 617, 620 (8th Cir. 1998) ("We will not permit ERISA claimants denied the timely and specific explanation to which the law entitles them to be sandbagged by after-the-fact plan interpretations devised for the purposes of litigation").

<sup>41</sup>1994 EMPLOYEES THRIFT PLAN, §1.29; 1994 RETIREMENT PLAN, §1.30.

<sup>42</sup>*Compare, for example:* 1994 THRIFT PLAN §§ 1.29, 2.01, and 1994 RETIREMENT PLAN §§ 1.30, 2.01, with, 2002 CHEVRONTEXACO RETIREMENT PLAN [Plaintiffs' Exhibit 21], § 2(c), (d), and 2002 CHEVRONTEXACO EMPLOYEES SAVINGS INVESTMENT PLAN [Plaintiffs' Exhibit 22], §§ 3.3, 3.4, (as well as the Text of the 1989 Texaco Plans and the 1999 Texaco SPDs).

<sup>43</sup>1994 THRIFT PLAN §2.01(A); 1994 RETIREMENT PLAN §2.01(B).

<sup>44</sup>See SCHULTZ AFFIDAVIT, ¶¶ III-XVII; JACKSON AFFIDAVIT, ¶¶ III-XV; CRIDDLE AFFIDAVIT, ¶¶ III-XVI; WEBER AFFIDAVIT, ¶¶ IV-XI, XIV, XXVIII-XXIX.

and, (vi) Texaco business records which characterize the Plaintiffs as being “employed by” Texaco and/or TEPI.<sup>45</sup>

Unlike the plans at issue in cases such as *Biscardi* and *Montesano*, the Texaco Plans do **not** have Texaco payroll requirements.<sup>46</sup> The Texaco Plans, rather, expand eligibility to all employees “assigned to service” in the United States.<sup>47</sup> There is no requirement that an “employee” be carried on the Texaco payroll.<sup>48</sup> Yet, significantly, employees assigned to service outside the United States must be “carried on a United States payroll.”<sup>49</sup> The only reasonable interpretation of the Texaco eligibility requirements, therefore, is that there is no payroll requirement for any employees assigned to service within the United States. This interpretation was confirmed by Defendant Stoner in her deposition:

---

<sup>45</sup>See SELECTED EMPLOYMENT RECORDS [Plaintiffs’ Exhibit 8, authenticated by the AFFIDAVIT OF ALTON SCHULTZ, JR., ¶XXII, (Plaintiffs’ Exhibit 1).]; METRO CONTRACT [Plaintiffs’ Exhibit 14], ¶¶ 2, 4, 5, 11; KELLY SERVICE EXTRA LABOR AGREEMENT [Plaintiffs’ Exhibit 15], ¶¶ 2(a), (i) and (j), 21, 22; PROFESSIONAL TEMPORARIES AGREEMENT [Plaintiffs’ Exhibit 16], ¶¶ 2(a), (i) and (j), 16(a), 22, 23.

<sup>46</sup>*Administrative Committee of Time Warner v. Biscardi*, 2000 U.S. Dist. LEXIS 16707, at \*\*38,40 (S.D.N.Y. Nov. 17, 2000) (determination not arbitrary and capricious where based upon the fact that workers were not “paid on the TMI or TINM payroll” and “plans, at certain times, expressly restrict eligibility to employees paid on the ‘regular payroll’”), *and*, *Montesano v. Xerox Corp. Retirement Plan*, 117 F.Supp.2d 147, 160 (D.Conn. 2000), *aff’d*, 256 F.3d 86 (2d Cir. 2001) (the plan administrator found that the plaintiffs “did not meet the Plans’ ‘on the payroll’ and ‘compensation’ requirements”). There are, of course, several other important distinctions between this case and the other two cases: (i) The Texaco Plans, unlike the Time Warner Plans and unlike almost all of the Xerox Plans, specifically define “leased employee” by incorporating IRC Section 414(n). (ii) In this case, unlike *Montesano* and *Biscardi*, Texaco arbitrarily excluded Plaintiffs who worked side-by-side in the same positions as workers classified by Texaco as “employees”. (iii) The Plan Administrator in this case did not, like the plan administrators in the other cases, review the *Darden* factors and determine that the plaintiffs were “leased employees” or “independent contractors” as opposed to “common law employees”. (iv) The Plan Administrator in this case could not articulate a reasonable basis for her interpretation of the Plans, and, in fact, expressly relied upon language that was not in any plan. And, (v) the defendant in this case squarely admitted that she breached her fiduciary duties under ERISA Section 404 and *Central States*.

<sup>47</sup>EMPLOYEES’ THRIFT PLAN, §2.01(A)(1); RETIREMENT PLAN, §2.01(B)(1).

<sup>48</sup>EMPLOYEES’ THRIFT PLAN, §1.29; RETIREMENT PLAN, §1.30.

<sup>49</sup>EMPLOYEES’ THRIFT PLAN, §2.01(A)(2); RETIREMENT PLAN, §2.01(B)(3).

Q. Is there a requirement in Section 2 of the Employees Thrift Plan of Texaco Restated as of December 31, 1994, that requires employees assigned to service in the United States to be on Texaco's payroll?

A. No.<sup>50</sup>

Ms. Rhonda Morris, (as the Review Panel's designated 30(b)(6) Representative), testified along the same lines:

Q. [W]as there a conclusion that, in order to be an employee under Section 1.29 [of the 1994 Employees Thrift Plan], that you had to be on Texaco's payroll?

A. We made our decision based on the definition of an employer. That's in Section 1.29. I don't recall any conversations about payroll status – excuse me. I'm sorry, that's incorrect. We did have conversations about payroll with respect to these four individuals.

Q. Okay. I'm not sure if you answered my question. Did you make a finding, and if so where is it in [Deposition] Exhibit 11 [*i.e.* the May 6, 2004 Review Panel Findings] [Plaintiffs' Exhibit 27], that, in order to be an employee under this plan, you have to be on Texaco's payroll?

A. We did not make that finding in this document.

Q. Did you make a finding in the document predicated on that finding?

A. I'm sorry.... Did we make a determination that to be – I'm rephrasing your question – to be an employee you had to be on the Texaco payroll?

Q. Did you make that determination in order to come to the conclusions in [Deposition] Exhibit 11?

A. We made our determination based on the definition of employee that's stated in the plan text....

Q. **And that definition doesn't say anything about having to be on Texaco or an affiliated company's payroll; correct?**

A. **I don't believe so.**

---

<sup>50</sup>STONER DEPO, p.30. *See also:* STONER DEPO, pp.20-22.

\* \* \*

- Q. So your decision, even though it doesn't say it in [Deposition] Exhibit 11 [*i.e.* the May 6, 2004 Review Panel Findings], is that, in order to be eligible, you have to be paid by Texaco?
- A. Our decision was that these employees did not meet the definition of employees under the plan text.
- Q. Because?
- A. Because they were not employees.
- Q. Because?
- A. They were hired by third-party contractors to –  
... – perform services for Texaco.
- Q. Okay. Isn't that true of all leased employees?
- A. I don't know.
- Q. .... **Can you think of anybody that would be called a, quote unquote, leased employee that would not be hired by or paid by or have their payroll administered through a company other than Texaco?**
- A. **That could or couldn't happen. I can't speculate.**
- Q. Okay. Did you have any discussion or deliberation about how you could only be employed by Texaco if you were paid by Texaco, then why a leased employee is included within the definition of employee?
- A. I don't understand your question.
- Q. Let's assume that it was determined by the review panel – and I'm not sure if it was, but **let's assume that the review panel decided that the only people that are paid by Texaco. I'm not sure that's what the review panel decided. Is that what the review panel decided?**
- A. **No.** The review panel only made a decision based on the four individuals involved in this case.
- Q. Okay. **If it is true that you can only be employed by Texaco if you are paid by Texaco, then why does the definition of employee in Section 1.29 include, quote unquote, leased employees?**

**A. I don't know.**<sup>51</sup>

The Review Panel followed the ChevronTexaco Legal Department's suggestion to disregard the question of whether Plaintiffs were "common law" employees.<sup>52</sup> Assuming, *arguendo*, however, that the ultimate question of common-law employment status is not *determinative* of the eligibility question, the Review Panel was not free to completely disregard and dismiss the *relevance* of *evidence* that Plaintiffs were "employed by" Texaco and/or TEPI under the terms of the Plans.

The Review Panel's decision, in this regard, is inconsistent with, not only Plaintiffs' Affidavits, but Texaco's own business records, including those submitted by ChevronTexaco's Legal Department to the Review Panel. As discussed *infra*, Plaintiffs were characterized by Texaco as "Employees", "Salaried Employees", "Statutory Employees", "Temporary Employees", "Contract Personnel", and "Contract Employees".<sup>53</sup> A confidentiality agreement relating to Texaco's proprietary information, for example, repeatedly refers to Mr. Schultz's "employment at Texaco."<sup>54</sup> One TEPI document submitted by the "Plan Administrator" identifies Mr. Schultz as a "Contract Employee" of Texaco.<sup>55</sup> And the Kelly Personnel Record submitted by the "Plan Administrator" dated October 27, 1995, lists Mr. Schultz's "Employer" as "Texaco Exploration and Production Inc." since May 1991.<sup>56</sup>

---

<sup>51</sup>MORRIS DEPO, pp.36-37, 39-40, (emphasis supplied). As discussed *infra*, there must be some overlap between workers "employed by" Texaco and "Leased Employees," or else those workers being specifically included as Leased Employees could never qualify as "employed by" Texaco in the first place.

<sup>52</sup>POSITION STATEMENT OF THE PLAN ADMINISTRATOR, pp.2-4; REVIEW PANEL FINDINGS, p.4; MORRIS DEPO, pp.45-46.

<sup>53</sup>See SELECTED EMPLOYMENT RECORDS; *see also*, PROFESSIONAL TEMPORARIES AGREEMENT, ¶16(a); METRO CONTRACT, ¶¶ 2, 5.

<sup>54</sup>SELECTED EMPLOYMENT RECORDS, at p. PLF000041.

<sup>55</sup>SELECTED EMPLOYMENT RECORDS, at p.PLF000104.

<sup>56</sup>SELECTED EMPLOYMENT RECORDS, at pp.PLF000121-122.

## THE “INDEPENDENT CONTRACTOR” EXCLUSION DOES NOT APPLY

The Texaco Retirement and Thrift Plans that were in effect from December 31, 1994, thru the present, exclude: “any individual characterized by or under contract with the Employer as an independent contractor.”<sup>57</sup> The Court instructed the current Plan Administrator to interpret this provision.<sup>58</sup> Defendants, however, failed to do so.<sup>59</sup> Plaintiffs, therefore, respectfully submit that the Plans should be given a straight-forward reading; and that any ambiguity be construed in Plaintiffs’ favor.<sup>60</sup>

Nevertheless, under any reading of the Plans, Plaintiffs cannot be excluded as “independent contractors” because: **(i)** they were not “under contract with” Texaco as independent contractors, or otherwise; **(ii)** they were not characterized by Texaco as “independent contractors”; **(iii)** to the extent the Plans give Texaco the arbitrary and unbridled discretion to classify employees as “independent contractors”, such provisions are prohibited by the Internal Revenue Code; and, **(iv)** the plaintiffs were not, in fact, “independent contractors” under the *Darden* factors.

---

<sup>57</sup>EMPLOYEES’ THRIFT PLAN, §1.29; RETIREMENT PLAN, §1.30.

<sup>58</sup>OPINION AND ORDER, p.22-24, (308 F.Supp.2d at 304-305).

<sup>59</sup>REVIEW PANEL FINDINGS, pp.3-5; TRANSCRIPT OF PROCEEDINGS, JUNE 7, 2004, pp.4-5; MORRIS DEPO, pp.12-19; *see also*, MORRIS DEPO, pp.28-45, 77-78, 82-85.

<sup>60</sup>*See* STONER DEPO, pp.49-50 (any ambiguity in the plan language should be construed in favor of the plans and their participants and beneficiaries). *See also*: Velez v. Prudential Health Care Plan, 943 F.Supp.2d 332, 342 (S.D.N.Y. 1996); *quoting*, Brown v. Blue Cross & Blue Shield of Alabama, 898 F.2d 1556, 1566-1567 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 712, 112 L.Ed.2d 701 (1991) (“a wrong but apparently reasonable interpretation is arbitrary and capricious if it advances the conflicting interest of the fiduciary at the expense of the affected beneficiary or beneficiaries”); *see also*, 29 U.S.C. §1104(a)(1)(A) (Plan Fiduciary must act “solely in the interests of the participants and beneficiaries, for the exclusive purpose of providing benefits to participants and their beneficiaries”); Shepley v. New Coleman Holdings, 174 F.3d 65 (2d Cir. 1999) (suggesting that *contra preferentum* is appropriate if the plan is, in fact, ambiguous); I.V. Services of America v. Trustees of the American Consulting Engineers, 136 F.3d 114 (2d Cir. 1998) (recognizing application of *contra preferentum* under *de novo* review).

**Plaintiffs Were Not “Under Contract With Employer” as Independent Contractors, or Otherwise**

Plaintiffs were not under contract with Texaco.<sup>61</sup> Defendants rely, rather, upon contracts between Texaco and third-party payroll agencies.<sup>62</sup> On its face, therefore, the exclusion does not apply.

Contrary to the ChevronTexaco Legal Department’s strained argument, (which does not seem to have been adopted by the Review Panel), that Plaintiffs were “under contract with” Texaco as independent contractors because they were under contract with third-party payroll services whose contracts with Texaco included boiler-plate language characterizing the third party agencies as “independent contractors”, those contractual provisions should be read *in para materia* with the contracts as a whole.<sup>63</sup> The surrounding provisions make it abundantly clear that these employees were not “independent contractors,” (and that the third parties were not really “employers”, but nothing more than sham, pass-through, payroll processors, with a mark-up for assuming workers compensation and tax liability).<sup>64</sup> As discussed more fully both *supra* and *infra*, such an interpretation is further belied by the Plan Text, which *includes* “Leased Employees” within the definition of Employee.

---

<sup>61</sup>The exclusion only applies to workers who were “under Contract *with Employer*” [i.e. Texaco, or an affiliated company, such as TEPI]. EMPLOYEES’ THRIFT PLAN, §1.29; RETIREMENT PLAN, §1.30.

<sup>62</sup>These contracts, (discussed more fully *infra*), are classic leasing arrangements. And, in fact, Texaco initially attempted to exclude the Plaintiffs – *not* as “independent contractors” – but as “leased employees”. LETTER FROM STONER TO SCHULTZ, Dec. 6, 1999 [Plaintiffs’ Exhibit 9]; LETTER FROM STONER TO WEBER, Jan. 11, 2000 [Plaintiffs’ Exhibit 10]; LETTER FROM ELISE M. BLOOM TO THE HONORABLE BARRINGTON PARKER, Feb. 20, 2001.

<sup>63</sup>See PLAINTIFFS’ SUPPLEMENTAL SUBMISSION [Plaintiffs’ Exhibit 25], p.4.

<sup>64</sup>The contracts, (as discussed more fully *infra*), do not characterize the plaintiffs as “independent contractors”, but rather, the **employees** of the third-party leasing agencies, “even though said personnel are working on or with TEPI data, property, information, etc. and are under day to day TEPI supervision.” CONTRACT BETWEEN TEPI AND METRO CAREERS, ¶2. See also: KELLY SERVICE EXTRA LABOR AGREEMENT, ¶¶ 2(a), (i) and (j), 21, 22; PROFESSIONAL TEMPORARIES EXTRA LABOR AGREEMENT, ¶¶ 2(a), (i) and (j), 16(a), 22, 23.

## **Plaintiffs Were Not “Characterized” as “Independent Contractors”**

Plaintiffs were never characterized by Texaco as “independent contractors.”<sup>65</sup> In fact, Plaintiffs were characterized by Texaco as:

- “Employees”<sup>66</sup>
- “Salaried... Employees”<sup>67</sup>
- “Statutory Employees”<sup>68</sup>
- “Temporary Employees”<sup>69</sup>
- “Contract Personnel”<sup>70</sup>
- “Contract Employees”<sup>71</sup>

Texaco did not issue 1099s to the Plaintiffs.<sup>72</sup>

Not even the contracts relied upon by Defendant “characterize” Plaintiffs as “independent contractors”. The contract between Texaco and Metro, for example, provides that: “TEPI may provide to Metro the name(s) of pertinent individuals... which TEPI desires Metro to employ as potential Contract Personnel.”<sup>73</sup> Contract Personnel are defined as “the employee(s) of Metro even though said personnel are *working on or with TEPI data, property, information, etc. and are under*

---

<sup>65</sup>See, e.g., STONER DEPO, pp.128-134; see also, e.g., STONER DEPO, pp.38, 58-63, 112-115.

<sup>66</sup>See, e.g., SELECTED EMPLOYMENT RECORDS, at pp. PLF000082, 105-106, 143-144, 169, and 390.

<sup>67</sup>See, e.g., SELECTED EMPLOYMENT RECORDS, at p.PLF000052.

<sup>68</sup>See, e.g., PROFESSIONAL TEMPORARIES AGREEMENT, ¶16(a).

<sup>69</sup>See, e.g., SELECTED EMPLOYMENT RECORDS, at pp. PLF000041.

<sup>70</sup>See, e.g., METRO CONTRACT, ¶¶2, 5; SELECTED EMPLOYMENT RECORDS, at pp. PLF000066, 129, 130, 131.

<sup>71</sup>See, e.g., SELECTED EMPLOYMENT RECORDS, at pp. PLF000103, 104.

<sup>72</sup>This, of course, would have likely resulted in an audit by the IRS. See EXAMINATION GUIDELINES – INTERNAL REVENUE MANUAL (Part 4) (“IRM”), §4.23.3.4.5. The IRS examiners would have considered the issue of whether they were truly “independent contractors”, and determined that they were, in fact, Texaco’s employees. IRM §4.10.5.5.3.

<sup>73</sup>METRO CONTRACT, ¶5.

*day to day TEPI supervision.*”<sup>74</sup> The agreement between Texaco and Professional Temporaries even stipulates that Plaintiffs are the “*Statutory Employees*” of Texaco.<sup>75</sup>

The Affidavit of Glenn Phillips, (not considered by the Review Panel), does not purport to address the manner in which these four specific Plaintiffs were “characterized” by Texaco, or TEPI. He simply states, in conclusory fashion, that contract workers retained through third parties were sometimes referred to as “independent contractors” within Texaco.<sup>76</sup> Because Defendants apparently treated the remand by the Court as an *appeal* of a previous denial of benefits by Ms. Stoner, the authority for the “Plan Administrator” (*i.e.* ChevronTexaco Legal Department) to submit additional evidence is unclear.<sup>77</sup> The Affidavit, nevertheless, is completely unreliable, unsupported, and unconvincing in light of the record as a whole. Testifying as the designated 30(b)(6) Representative for the Review Panel,<sup>78</sup> Mr. Huey testified that:

---

<sup>74</sup>METRO CONTRACT, ¶2, (emphasis supplied). *See also*: KELLY AGREEMENT, ¶¶ 2(a), (i) and (j), 21, 22; PROFESSIONAL TEMPORARIES AGREEMENT, ¶¶ 2(a), (i) and (j), 16(a), 22, 23.

<sup>75</sup>PROFESSIONAL TEMPORARIES AGREEMENT, ¶16(a). Under Louisiana Law, an employee of a sub-contractor is the “statutory employee” of the principal when the employee is engaged in the “trade, business, or occupation” of the principal. The purpose of the doctrine was to “prevent principals [i.e. Texaco] from evading their compensation responsibilities by interposing a ‘straw man’ [i.e. Metro, Kelly, Professional] between them and those ‘employees’ who are doing all or a part of their trade business or occupation.” Rowe v. Northwestern National, 471 So.2d 226 (La. 1985) (Lemmon, J., concurring); Lewis v. Exxon Corp., 441 So.2d 192 (La. 1983). Traditionally, the test focused on whether the work being performed was “skilled”, and was similar to the *Darden* test for “common law employees”. See generally: Kirkland v. Riverwood International, No. 95-1830 (La. 9/13/96), 681 So.2d 329; Berry v. Holston Well Service, 488 So.2d 934 (La. 1986). In 1997, the law was amended to create a presumption that the workers are “statutory employees” where, as here, the contract recognizes a statutory employer relationship. LA. REV. STAT. 23:1061.

<sup>76</sup>*See* POSITION STATEMENT OF THE PLAN ADMINISTRATOR, p.12.

<sup>77</sup>HUEY DEPO, pp.23-30; *see also*, LETTER FROM J.F. HUEY TO PLAINTIFFS’ COUNSEL ENCLOSING REVIEW PROCESS PROVISIONS [Plaintiffs’ Exhibit 19].

<sup>78</sup>While Ms. Morris testified as the 30(b)(6) Representative of the Review Panel on most issues, Mr. Huey testified for the Panel with respect to the “policies, procedures, rules, and/or protocols governing or otherwise pertaining to administrative appeals, reviews, recommendations, and/or decisions, including, but not limited to the investigation and/or recommendation by the Review Panel regarding Plaintiffs’ eligibility.” HUEY DEPO, p.7.

Q. In your research of this claim, if any, did you have occasion to speak to Glenn Phillips?

A. No, I did not.

\* \* \*

Q. How did you come to get his Affidavit?

A. I was provided that information.

Q. By ChevronTexaco in-house counsel?

A. Correct.

Q. And do you know why whoever assembled these affidavits decided to speak to Glenn Phillips, Rex Iacurci and/or Peter Stathis as opposed to anybody else?

A. No, I do not.

Q. Do you know if they interviewed or got statements from anyone else that, for whatever reason, was not provided to the review panel?

A. No, I do not.

\* \* \*

Q. .... [From the Position Statement Plan Administrator:] “Contract workers retained through third parties (such as Claimants) were commonly referred to as ‘independent contractors’ and so referenced within Texaco....” What is the basis for that statement or position?

A. I really do not know.

Q. Do you know if it has any factual basis at all?

A. No, I don’t.

\* \* \*

Q. Are you aware of whether Glenn Phillips ever worked for TEPI?

A. No, I do not.<sup>79</sup>

Q. Do you know whether he ever worked in the New Orleans office?

---

<sup>79</sup>From the face of Mr. Phillips’ Affidavit, it would appear that he never worked for TEPI.

- A. No, I don't.<sup>80</sup>
- Q. Are you aware that Janet Stoner worked for TEPI in the New Orleans office?<sup>81</sup>
- A. I did not.
- Q. Okay. Well, if we assume hypothetically that Janet Stoner worked for TEPI in the New Orleans office at the same time as the claimants,<sup>82</sup> and Glenn Phillips worked for some other branch of Texaco, do you know why the Plan Administrator would favor Glenn Phillips' affidavit over Janet Stoner's testimony?
- A. I really do not.
- Q. .... [From the Plan Administrator's Position Statement:] "As this matter has been remanded back to the administrative process for a new consideration, what Ms. Stoner concluded in her original consideration or what she may have said in her deposition are in no way binding on this Review Panel and have minimal (if any relevance) remaining relevance." Do you know what the basis is for that statement?
- A. No, I do not.
- \* \* \*
- Q. If the reason why this claim was submitted to a review panel is because Janet Stoner already denied the claim, then why would the plan administrator or a plan administrator or ChevronTexaco's legal department take the position that the prior denial should be ignored by the review panel?
- A. I have no idea.<sup>83</sup>

The contention that all "leased employees" were also "characterized" by Texaco as "independent contractors" is not only inconsistent with Texaco's own contemporaneous business

---

<sup>80</sup>From the face of Mr. Phillips' Affidavit, there is nothing to suggest that he ever worked in the New Orleans office, with these Plaintiffs or otherwise.

<sup>81</sup>STONER DEPO, pp. 74, 88-92.

<sup>82</sup>See STONER DEPO, pp. 74, 88-92.

<sup>83</sup>HUEY DEPO, pp.32-35.

records and unsupported by Ms. Stoner’s testimony, but is also contradicted by the Plan Documents themselves. **If all “Leased Employees” were characterized by Texaco as “Independent Contractors,” then why does the Definition of an “Employee” (which *excludes* those characterized by or under contract with Texaco as “independent contractors”) specifically *include* Leased Employees?** Plaintiffs understand that the *reason* Leased Employees are included in the Plans’ Definition of Employees (and excluded elsewhere) is to satisfy the Code’s testing requirements. *However*, there must be a distinction between a “Leased Employee” and a worker “characterized by or under contract with Texaco as an independent contractor,” or else the Definition of Employee in the Plans would make no sense: The very same workers would be simultaneously included and excluded.<sup>84</sup>

For these or other reasons, the Review Panel did not find the Phillips Affidavit significant,<sup>85</sup> nor did the Review Panel make any type of factual finding that Plaintiffs were “characterized by” Texaco as “independent contractors”:

- Q. .... [From the Response of the Plan Administrator] [Plaintiffs’ Exhibit 26]: “Workers retained through third party contracting agencies were commonly characterized and referred to throughout Texaco as ‘independent contractors’ (see affidavit of Glenn Phillips).” And I just want to make sure that the review panel did not make that finding; correct?
- A. Did not make what finding?
- Q. **That workers retained through third-party contracting agencies were commonly characterized or referred through throughout Texaco as “independent contractors.”**

---

<sup>84</sup>Similarly, there must be an overlap between workers “employed by” Texaco and “Leased Employees,” or else those workers being specifically included as Leased Employees could never qualify as employed by Texaco in the first place.

<sup>85</sup>REVIEW PANEL FINDINGS, p.1. *See also*, MORRIS DEPO, p.27.

**A. We couldn't have made that finding.**

**Q. And you didn't exclude the participants or the claimants on that basis; correct?**

**A. No....**<sup>86</sup>

There is no genuine issue of material fact: These four Plaintiffs were not characterized as "independent contractors" by Texaco.

**To the Extent the Plans Give Texaco Arbitrary and Unbridled Discretion to Classify Plaintiffs as "Independent Contractors" Such Provisions Violate Requirements for Qualified Plans Set Forth in the Internal Revenue Code**

Defendant Stoner has testified that initial eligibility determinations are made, not by the Plan Administrator, (nor by anyone in the Benefits Department), but by individual Texaco managers in regional offices, such as the New Orleans office. It is further clear from Ms. Stoner's testimony that there were no established criteria for making such a determination; rather, the employer was free to classify (or mis-classify) employees as "independent contractors" or "leased employees" at the employer's discretion.<sup>87</sup>

The Code, however, prohibits a plan from allowing an employer to arbitrarily exclude employees through the use of labels without reasonable and objective business criteria. I.R.S. TECHNICAL ADVICE MEMORANDUM, Sec. 410 (July 28, 1999).<sup>88</sup> If Texaco is free to simply

---

<sup>86</sup>MORRIS DEPO, pp.76-77.

<sup>87</sup>STONER DEPO, pp.36-38, 81-82, 119-120; *see also*, STONER DEPO, pp.44-46, 58-59, 82-87, 103-104, 120-126.

<sup>88</sup>*Citing*, 29 U.S.C. §§1052(a)(1) and 1102(a)(1); 26 C.F.R. §§1.401-1(a)(2); I.R.S. REVISED RULING 74-466, 1974-2 C.B. 131; *see also*, INTERNAL REVENUE CODE, 26 U.S.C. §410(b); 26 C.F.R. §§ 1.410(b)-4(b), 1.410(b)(9), 1.410(b)(4)(c)(3)(iii)(A), and 1.410(b)-4(c)(3). *See also*: State of Texas v. Alliance Employee Leasing Corp., 797 F.Supp. 542, 546 (N.D. Tex. 1992) (the Plan must have reasonably ascertainable benefits, beneficiaries, sources of financing, and procedures for receiving benefits); *citing*, Hansen v. Continental Insurance, 940 F.2d 971, 977 (5th Cir. 1991). *See also*, Vizcaino v. Microsoft, 97 F.3d 1187 (9th Cir. 1995) ("*Vizcaino I*"), *aff'd*, 120 F.3d 1006 (9th Cir.

“characterize” Plaintiffs as “independent contractors” absent any objective business reason for doing so, such plan provision fails to satisfy the definite written requirements of both ERISA and the Internal Revenue Code.

While Plaintiffs are mindful of this Court’s instruction that some of the Internal Revenue Code provisions may not be authoritative for ERISA interpretation purposes,<sup>89</sup> Plaintiffs respectfully note that regulations issued by the Secretary of the Treasury may be helpful in answering questions under ERISA. *See, e.g., Esden v. Bank of Boston*, 229 F.3d 154, 158 n.2 (2d Cir. 2000); 29 C.F.R. §2530.200a-2; REORGANIZATION PLAN NO. 4 (8-10-78). Moreover, the Preamble to the 1994 Employees Thrift Plan states that this plan is “intended to qualify under Section 401(a) . . . of the Code” and the Definition of “Leased Employee” under both the 1994 Retirement Plan and the 1994 Employees Thrift Plan incorporates not only Code Section 414(n), but also “applicable regulations.”<sup>90</sup>

To be sure, the Plaintiffs’ cause of action is based on ERISA. Plaintiffs have made no claim that the Code provides a “private right of action” against Texaco or its plan fiduciaries. Plaintiffs simply suggest that IRS interpretation is relevant to the question of how the Texaco eligibility requirements should be interpreted. Presumably, the Plan Administrator would seek to interpret and apply the Plans in such a way as to preserve tax-qualified status, and to otherwise comply with the Code.<sup>91</sup>

The facts are undisputed in this case that Texaco workers could arbitrarily be placed on or

---

1997) (en banc) (“*Vizcaino II*”), *later proceeding*, 173 F.3d 713 (9th Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000).

<sup>89</sup>See OPINION AND ORDER, pp.21-22 n.13, (308 F.Supp.2d at 304 n.13).

<sup>90</sup>1994 EMPLOYEES THRIFT PLAN, Preamble, §1.46; 1994 RETIREMENT PLAN, §1.46.

<sup>91</sup>*See, e.g.,* AFFIDAVIT OF A.D. “GUS” FIELDS [Plaintiffs’ Exhibit 17], ¶8.

taken off the “Metro list” or the “Kelly list” while other workers performing the same job functions under the same circumstances were, for some reason, placed on the “list” of Texaco “full-time employees”.<sup>92</sup> Because there is no criteria other than the selection by Texaco or TEPI of specific persons to be placed on the “temporary payroll”, the classification is nothing more and nothing less than an enumeration by name, which is expressly prohibited.

**There Is No Evidence That the Plaintiffs Were, In Fact, Providing Services to Texaco as “Independent Contractors”**

Defendants have offered nothing to substantiate a finding that Plaintiffs were, in fact, providing services to Texaco as “independent contractors” under *Darden* and its progeny. The only factor that Defendants could point to was the mere existence of a contract between Texaco and a third-party leasing agency.<sup>93</sup> Yet the contracts, (which were never even reviewed by Ms. Stoner), characterize the Plaintiffs – not as “independent contractors” – but the “employees” of the leasing agencies, who are “working on or with TEPI data, property, information, etc. and are under day to day TEPI supervision.”<sup>94</sup> Even the cases previously cited by Defendant, moreover, acknowledge that the description of the relationship between the parties in an employment contract is not controlling. *See, e.g., Wolf v. Coca Cola Company*, 200 F.3d 1337, 1340 (11<sup>th</sup> Cir. 2000); Administrative

---

<sup>92</sup>AFFIDAVIT OF ALTON SCHULTZ, JR., ¶¶ II, XVII; AFFIDAVIT OF ELAINE JACKSON, ¶¶ II, VI-VII, XV; AFFIDAVIT OF GLADYS CRIDDLE, ¶XVI; AFFIDAVIT OF HAROLD J. WEBER, JR. (Supplemental and Amended), ¶¶ IV, XXVIII; SELECTED EMPLOYMENT RECORDS, at pp.PLF000066, 129, 130, 131. *See also*: SELECTED EMPLOYMENT RECORDS, at pp.PLF000052, 82, 103, 105-106, 143-144, 169, 390. *See also*: STONER DEPO, pp.36-38, 44-46, 58-59, 81-87, 103-104, 119-126.

<sup>93</sup>STONER DEPO, pp.60-63, 112-115, 128-134, 139-140; REVIEW PANEL FINDINGS, p.4.

<sup>94</sup>METRO CONTRACT, ¶2; *see also*, KELLY SERVICE EXTRA LABOR AGREEMENT, ¶¶ 2(a), (i) and (j), 21, 22; PROFESSIONAL TEMPORARIES AGREEMENT, ¶¶ 2(a), (i) and (j), 16(a), 22, 23.

Committee of Time Warner v. Biscardi, 2000 U.S. Dist. LEXIS 16707, at \*26 (S.D.N.Y. Nov. 17, 2000).<sup>95</sup>

### **THE “LEASED EMPLOYEE” EXCLUSION DOES NOT APPLY**

Defendants apparently do not contend Plaintiffs fall under the exclusion pertaining to “Leased Employees,” which expressly incorporates the provisions of Internal Revenue Code Section 414(n).<sup>96</sup> See OPINION AND ORDER, pp.8, 19 n.11, (306 F.Supp.2d 296, 302 n.11).<sup>97</sup> Under the Internal Revenue Code, a worker who is a common law employee of the recipient cannot, by definition, be a “leased employee”. 26 U.S.C. § 414(n)(2); Burrey v. Pacific Gas & Electric, 159 F.3d 388, 393 (9<sup>th</sup> Cir. 1998); Crouch v. Mo-Kan Iron Workers Welfare Fund, 740 F.2d 805, 808-809 (10th Cir. 1984); Renda v. Adam Meldrum & Anderson Co., 806 F.Supp. 1071 (W.D.N.Y. 1992). In addition, the worker in question has to actually be an employee of the leasing company. Professional and Executive Leasing v. Commissioner, 89 T.C. 225 (T.C. 1987), *aff’d*, 862 F.2d 751 (9th Cir. 1988); State of Texas v. Alliance Employee Leasing Corp., 797 F.Supp. 542, 546-547 (N.D. Tex. 1992). In this case, the leasing arrangements with Metro, Kelly, and Professional Temporaries are a sham, designed to arbitrarily exclude employees from participating in the Texaco Employee Benefit Plans and/or to

---

<sup>95</sup>See also: Sharkey v. Ultramar Energy Ltd., 70 F.3d 226, 232 (2d Cir. 1995); Vizcaino v. Microsoft, 120 F.3d 1006, 1010-1012 (9th Cir. 1997) (en banc) (“*Vizcaino II*”); Dauhtry v. Honeywell, 3 F.3d 1488, 1492-1493 (11th Cir. 1993); Eren v. Commissioner, T.C. Memo. 1995-555, 70 T.C.M. (CCH) 1394 (T.C. 1995); *citing*, EMPLOYMENT TAX REGULATIONS, §31.3121(d)-1(a)(3).

<sup>96</sup>As noted *supra*, a “Leased Employee” is defined as: “Any individual defined in Section 414(n) of the Code. Leased Employees do not include... individuals who are not required to be treated as Employees under Section 414(n) and applicable Regulations.” EMPLOYEES’ THRIFT PLAN, §1.46; RETIREMENT PLAN, §1.46.

<sup>97</sup>See also, STONER DEPO, pp.52-53, 133-134; POSITION STATEMENT OF THE PLAN ADMINISTRATOR.

avoid tax liability.<sup>98</sup> Plaintiffs are not “leased employees” under Internal Revenue Code Section 414(n), nor Sections 1.46 and 2.02 of the Texaco Employee Benefit Plans.

#### **ELIGIBILITY UNDER THE 1989 RETIREMENT AND EMPLOYEES’ THRIFT PLANS**

The former Plan Administrators and/or other Texaco employees who were vested with discretionary authority to administer the Texaco Employee Benefit Plans breached their fiduciary duties to Mr. Schultz, Ms. Jackson, Mr. Weber, Ms. Criddle, to other workers similarly situated, and to the Plans themselves, by arbitrarily designating these workers as employees whose services would be provided under a leasing agreement with a third-party, without objective and legitimate business criteria.<sup>99</sup> Plaintiffs, however, were not, in fact, providing services under a true and legitimate “leasing agreement” as the *employees* of the “third parties” such as Metro who served as nothing more than payroll agencies.

In addition, or in the alternative, and to the extent it might be relevant, the provisions of the 1989 Pension Plans which exclude, from eligibility, those persons providing services to Texaco under a leasing agreement with a third party, should be interpreted *in pari materia* with the surrounding provisions that define both “employee” and “leased employee” in accordance with Section 414(n) of the Internal Revenue Code. Hence, a person ostensibly providing services under a “leasing agreement” would *not* be excluded if he or she were actually a “common law employee” of Texaco or TEPI.

Moreover, the previous Plan Administrator has taken the position that Plaintiffs were

---

<sup>98</sup>See generally: METRO CONTRACT; KELLY AGREEMENT; PROFESSIONAL TEMPORARIES AGREEMENT; STONER DEPO, pp.36-38, 58-59, 60-65, 81-82, 112-115, 119-120; AFFIDAVIT OF ALTON SCHULTZ, JR.; AFFIDAVIT OF ELAINE JACKSON; AFFIDAVIT OF GLADYS CRIDDLE; AFFIDAVIT OF HAROLD J. WEBER, JR.

<sup>99</sup>See Discussion at pp.17, 18-19, 23-25 and 26-27, *supra*.

excluded as “independent contractors” and *not* as “leased employees.” OPINION AND ORDER, pp.8, 19 n.11, (306 F.Supp.2d 296, 302 n.11); STONER DEPO, pp.52-53, 133-134.

#### **FAILURE TO PROVIDE PLAN DOCUMENTS AND OTHER INFORMATION**

As noted by the Court, Defendant Stoner failed to provide Mr. Weber with Retirement Plan Documents from November 9, 1999 thru January 11, 2000, as required by Section 502(c).<sup>100</sup> (Plaintiffs respectfully note that Mr. Schultz also requested a copy of the Texaco Pension Plan in September of 1999,<sup>101</sup> although this was a request made to the Human Resources Department, in person.<sup>102</sup>) In addition, Plaintiffs, through counsel, referenced all Plans in their initial Complaint, and requested copies of same in formal discovery.<sup>103</sup> However, Defense Counsel unilaterally determined that only Pension Plans were at issue. The SPDs for the Texaco Welfare Benefit Plans in effect from 1990 thru 1999 were not provided until April 15, 2004. The Master Group Policy Contracts or other prevailing Plan Documents (where applicable) have still not been provided.

Plaintiffs, on March 26, 2004, and again on April 5, 2004, April 12, 2004, April 27, 2004, and in connection with the September 2004 30(b)(6) Deposition and corresponding Document Requests,

---

<sup>100</sup>OPINION AND ORDER, pp.29-30, (308 F.Supp.2d at 308-309).

<sup>101</sup>SCHULTZ AFFIDAVIT, ¶XX.

<sup>102</sup>Plaintiffs also respectfully note that Mr. Schultz requested “all information” concerning his rights to both Pension and Welfare Benefit Plans from Janet Stoner in October 1999. [See Plaintiffs’ Exhibit 9]

<sup>103</sup>This request was included within Plaintiffs’ First Set of Requests for Production Nos. 3, 4, and 5, (dated Feb. 18, 2000). The parties agreed that discovery would be stayed pending Judge Parker’s consideration of Defendants’ initial Motion to Dismiss. After the Motion was denied, the parties exchanged Initial Disclosures on February 1, 2001. Welfare Benefit Plan SPDs were, for some reason, not provided. Plaintiff, therefore, and for other reasons, objected to the Defendant’s filing of a Motion for Summary Judgment without further discovery. See LETTER FROM STEPHEN J. HERMAN TO JUDGE PARKER, FEB. 22, 2001. In light of the admissions made by Ms. Stoner during her deposition, Plaintiffs agreed that summary judgment could move forward on the breach of fiduciary duty claims. See LETTER FROM STEPHEN J. HERMAN TO JUDGE PARKER, MARCH 30, 2001.

requested all documents, evidence, and/or other information referenced in 29 C.F.R. §§ 2560.503-1(h)(2) and/or (m)(8), including, but not limited to “the name, title, function, alignment, and capacity of any and all persons, (including, but not limited to, administrators, fiduciaries, trustees, committee members, attorneys, consultants, or employees), who were and/or will be involved in the information-gathering and/or decision-making process”<sup>104</sup> – which Defendants have, to this date, refused or otherwise failed to provide.

### **OTHER FIDUCIARY BREACHES**

#### **FAILURE TO REVIEW THE FACTS**

The Texaco Plans require the Plan Administrator to “review the facts of the case.”<sup>105</sup> Ms. Stoner, moreover, admitted that if Texaco had, in fact, mis-characterized Plaintiffs as “independent contractors”, she, as Plan Administrator, would have to take that into consideration in determining whether Plaintiffs were eligible under the terms of the plans.<sup>106</sup> Ms. Stoner, however, made no attempt to evaluate the propriety of Texaco’s alleged “characterizations”.<sup>107</sup>

#### **MISREPRESENTATIONS TO PLAINTIFFS**

As a fiduciary, Defendant cannot “implicitly incorporate into the policy any term that does not expressly appear.” Velez v. Prudential Health Care Plan, 943 F.Supp.2d 332, 341 (S.D.N.Y. 1996);

---

<sup>104</sup>See LETTER FROM PLAINTIFFS’ COUNSEL TO DEFENSE COUNSEL, MARCH 26, 2004 [Plaintiffs’ Exhibit 18]; LETTER FROM PLAINTIFFS’ COUNSEL TO J.F. HUEY, APRIL 5, 2004 [Plaintiffs’ Exhibit 20]; PLAINTIFFS’ SUBMISSION, p.19; PLAINTIFFS’ SUPPLEMENTAL SUBMISSION, pp.6-7; HUEY DEPO, pp.21-33.

<sup>105</sup>EMPLOYEES’ THRIFT PLAN, §16.03(C); RETIREMENT PLAN, §16.03(C).

<sup>106</sup>STONER DEPO, pp.120-128.

<sup>107</sup>STONER DEPO, pp.58-59, 60, 64-65, 112-115; *see also*, STONER DEPO, pp.61-63.

*citing*, Sheldon v. Barre Belt Granite Explorer, 25 F.3d 74 (2d Cir. 1994); Miles v. New York State Teamsters, 698 F.2d 593, 599 (2d Cir. 1983), *cert. denied*, 464 U.S. 829 (1983). In this case, Defendant made affirmative representations to the Plaintiffs regarding Plan Documents that was false and misleading.<sup>108</sup>

### **POST-LITIGATION CHANGES IN POSITION**

The Second Circuit has emphasized that: “We will not permit ERISA claimants denied the timely and specific explanation to which the law entitles them to be sandbagged by after-the-fact plan interpretations devised for the purposes of litigation.” Juliano v. HMO of New Jersey, 221 F.3d 279, 287 (2d Cir. 2000); *quoting*, Marolt v. Alliant Techsystems, 146 F.3d 617, 620 (8th Cir. 1998).

In this case, the Plan Administrator, and Defense Counsel, originally took the position that Plaintiffs were excluded as “leased employees”.<sup>109</sup> Then Defendant Stoner, in her deposition, asserted, for the first time, that Plaintiffs were excluded as “independent contractors” – *not* as “leased employees”.<sup>110</sup>

Now, upon remand by this Honorable Court, the “Plan Administrator” changed positions again – urging the Review Panel to disregard Ms. Stoner’s findings, (*i.e.* that Plaintiffs were characterized by or under contract with Texaco as “independent contractors”), and testimony, (which,

---

<sup>108</sup> Compare LETTER FROM STONER TO SCHULTZ, Dec. 6, 1999 [Plaintiffs’ Exhibit 9], and, LETTER FROM STONER TO WEBER, Jan. 11, 2000 [Plaintiffs’ Exhibit 10]; *with*, 1994 EMPLOYEES’ THRIFT PLAN, §§1.29, 1.46, 2.01, 2.02, 1994 RETIREMENT PLAN, §§1.30, 1.46, 2.01, 2.02, and STONER DEPO, pp.22-24, 110, 130.

<sup>109</sup> LETTER FROM STONER TO SCHULTZ, Dec. 6, 1999; LETTER FROM STONER TO WEBER, Jan. 11, 2000; LETTER FROM BLOOM TO THE HON. BARRINGTON PARKER, Feb. 20, 2001.

<sup>110</sup> STONER DEPO, pp.52-53.

unlike the contentions of the ChevronTexaco Legal Department, was based on first-hand personal knowledge), (*i.e.* that the classes of eligible employees designated by the Board of Directors were synonymous with the Eligible Employees defined in the Retirement Plan), and to hold, instead, either that Plaintiffs were not “employed by” Texaco in the first instance, or that they were not “eligible employees” as defined by the Board.<sup>111</sup>

**PLAINTIFFS’ SECTION 502(a)(1)(B) CLAIMS FOR BENEFITS UNDER THE 1994 RETIREMENT PLAN AND 1994 EMPLOYEES THRIFT PLAN WERE TIMELY FILED**

The Court has indicated that Plaintiffs’ would be permitted to request reconsideration of Judge Parker’s dismissal of Plaintiffs’ claims under Section 502(a)(1), (an interlocutory Order subject to revision pursuant to FED. RULE CIV. PRO. 54(b)). OPINION AND ORDER, pp.13, 32, (308 F.Supp.2d at 299, 310).

The 1989 Pension and Employees Thrift Plans arguably excluded workers, such as Plaintiffs, who were paid through third-party leasing agencies. In 1994, however, Texaco unequivocally extended eligibility to all workers assigned to service in the U.S., excluding only: (i) independent contractors, and (ii) leased employees, *but only* “leased employees” as defined under the relevant provisions of the Internal Revenue Code. The 1994 Plans provide that such amendments “will govern a Member’s rights to Accrued Benefits on or after December 31, 1994.”<sup>112</sup> Therefore, under the earliest possible trigger date, Plaintiffs would have had until December 31, 2000, pursuant to the six-

---

<sup>111</sup>*Compare* POSITION STATEMENT OF THE PLAN ADMINISTRATOR, pp.10-11 and17; *with*, STONER DEPO, pp.52-53 and 115-116; *see also*, OPINION AND ORDER, p.23, (308 F.Supp.2d at 305).

<sup>112</sup>1994 RETIREMENT PLAN, §21.07; 1994 EMPLOYEES THRIFT PLAN, §19.07. A Member is defined to include an Employee who “is either entitled *or may become entitled* to an Accrued Benefit under the Plan.” 1994 RETIREMENT PLAN, §1.49; 1994 EMPLOYEES THRIFT PLAN, §1.49.

year limitations period, as provided in Miles, *supra*, 698 F.2d at 598. In addition, Plaintiffs claims for benefits are timely under Louisiana’s 10-year prescriptive period, (*i.e.* statute of limitations), for breach of contract claims, (LA. CIV. CODE ART. 3499). *See* Hall v. National Gypsum Co., 105 F.3d 225, 230 (5th Cir. 1997); Kennedy v. Electricians Pension Plan, 954 F.2d 1116 (5th Cir. 1992). *See, e.g.,* Held v. Manufacturers Hanover Leasing Corp., 912 F.2d 1197 (10th Cir. 1990) (court looks to New York law because of New York’s significant relationship to the claims); Barnett v. IBM, 885 F.Supp. 581, 591 (S.D.N.Y. 1995) (“IBM correctly argues that because the plaintiff’s cause of action accrued in North Carolina, where she was employed, the Court should consider North Carolina’s statute of limitations”).

**THE FINDINGS, CONCLUSIONS, RECOMMENDATIONS, DENIALS, AND OTHER ACTIONS AND/OR FAILURES TO ACT BY MS. STONER, OTHER PLAN ADMINISTRATORS AND THE CHEVRON TEXACO REVIEW PANEL CONSTITUTE AN ABUSE OF DISCRETION, WHETHER REVIEWED UNDER A DEFERENTIAL STANDARD OR DE NOVO**

It is clear, from the above, that Defendants have breached their fiduciary duties under ERISA. Their determination, moreover, that Plaintiffs were not “employees” of Texaco is without reason, unsupported by substantial evidence, and erroneous as a matter of law.<sup>113</sup> Nevertheless, when there is evidence that a Plan Administrator was not only acting under a inherent conflict of interest, but that the Plan Administrator was actually influenced by the conflict, *de novo* review is appropriate.<sup>114</sup>

In this case, prior to sending denial letters to Plaintiffs, (which, as noted *supra*, include

---

<sup>113</sup>Wojciechowski v. Met Life, 75 F.Supp.2d 256, 262 (S.D.N.Y. 1999); *citing*, Miller v. United Welfare Fund, 72 F.3d 1066, 1070-1071 (2d Cir. 1995).

<sup>114</sup>Pulvers v. First Unum Life Inc. Co., 210 F.3d 89, 92 (2d Cir. 2000); DeFelice v. American International Life, 112 F.3d 61, 66 (2d Cir. 1997); Whitney v. Empire Blue Cross and Blue Shield, 106 F.3d 475, 477 (2d Cir. 1997); Sullivan v. LTV Aerospace and Defense Co., 82 F.3d 1251, 1255 (2d Cir. 1996).

material misrepresentations), Defendant sought the advice of Texaco’s Legal Department as to the denial of eligibility and the basis for same.<sup>115</sup> Ms. Stoner testified, in this regard, that she could not recall either Texaco or the Plan Administrator ever retaining outside counsel to render advice with respect to the administration of the Plans, and that no one ever “explained to [her] that there was a distinction between legal advice to Texaco and legal advice to the Plan Administrator on behalf of the plans.”<sup>116</sup>

Mr. Huey established that, upon remand, an unsigned, undated, “Position Statement of the Plan Administrator” with supporting Exhibits, was provided by the ChevronTexaco Legal Department. Like Ms. Stoner, Mr. Huey recognized no distinction between ChevronTexaco’s Legal Department in the capacity of advising the company (or acting) in the capacity of a Plan Sponsor, versus advising the company (or acting) in the capacity of a Plan Administrator.<sup>117</sup>

As in *DeFelice*, everyone who participated in making eligibility determinations was employed by Texaco or ChevronTexaco, and there existed no established criteria for making such a determination or considering an appeal of same.<sup>118</sup> Both Ms. Stoner and the members of the Review Panel were employed by Texaco or ChevronTexaco; had Texaco or ChevronTexaco stock; and got paid a bonus based on “performance”.<sup>119</sup>

Ms. Stoner’s original denial was marred by the lack of any established procedures or criteria;

---

<sup>115</sup>STONER DEPO, p.67.

<sup>116</sup>STONER DEPO, pp.56-58, 76-78.

<sup>117</sup>HUEY DEPO, pp.13-14, 19. *See also*, MORRIS DEPO, pp.22, 86-87.

<sup>118</sup>*DeFelice*, *supra*, 112 F.3d at 66. *See* STONER DEPO, pp.30-35, 102-104; HUEY DEPO; MORRIS DEPO, p.89.

<sup>119</sup>STONER DEPO, pp.30-35; HUEY DEPO; MORRIS DEPO, p.89.

the lack of any investigation into the underlying facts and circumstances; the absence of any semblance of an “administrative record”; the Defendant’s post-litigation changes in position; and denial letters which purport to quote verbatim from language which is not in any plan.

On remand, the Review Panel followed the directives of the “Plan Administrator” (*i.e.* the ChevronTexaco Legal Department) to: **(i)** not consider whether Plaintiffs were common law employees of Texaco, (nor any evidence relating to how their services were actually provided); **(ii)** not consider the prior testimony or determinations of Janet Stoner, (even though Janet Stoner, unlike the Review Panel, had personal knowledge regarding the TEPI Land Department as well as the Administration of the 1994 Texaco Plans); and, **(iii)** not consider Plaintiffs’ claims for eligibility under any Texaco Welfare Benefit Plans.<sup>120</sup>

Ms. Morris – who had absolutely no experience serving on a Review Panel or even reviewing initial Claims<sup>121</sup> – and the other members of the Review Panel do not appear to have made any attempt to consider the legal, textual, and other interpretive issues relating to the meaning and application of the eligibility provisions, as set forth by Plaintiffs and as instructed by the Court.<sup>122</sup> It is one thing, Plaintiffs respectfully submit, to say that a lay person is not held to the standard of an attorney in matters of plan administration; it is quite another to have the Legal Department of a corporate Plan Administrator vest discretion in a lay and inexperienced Review Panel as a pretext

---

<sup>120</sup> Compare POSITION STATEMENT OF THE PLAN ADMINISTRATOR, pp.2-3 and 17, and E-MAIL FROM JOHN HUEY TO REVIEW PANEL, APRIL 29, 2004 [Plaintiffs’ Exhibit 30], *with*, REVIEW PANEL FINDINGS.

<sup>121</sup> MORRIS DEPO, pp.20-21.

<sup>122</sup> Compare PLAINTIFFS’ ADDITIONAL WRITTEN COMMENTS [Plaintiffs’ Exhibit 25], pp.2-4, and, OPINION AND ORDER, pp.22-24, (308 F.Supp.2d at 304-305), *with*, REVIEW PANEL FINDINGS, and MORRIS DEPO, pp.12-19.

for completely ignoring the legal principles that are relevant to the interpretation of the Plans.

In addition to the legal and textual arguments advanced by Plaintiffs, the Review Panel also apparently refused or otherwise failed to consider Janet Stoner's testimony, the Texaco Business Records submitted by Plaintiffs, the Fields Affidavit, and internal Texaco business records which (may have contained non-privileged underlying factual information even though the communications themselves) had been ruled "privileged" by the Court.<sup>123</sup>

Defendants, in essence, sought to "have their cake and eat it too." They treated the remand Order by the Court as a "Claim" in order to develop new evidence and arguments in support of their position and as a basis for ignoring the findings and testimony of Ms. Stoner; but treated the Order as an "Appeal" of a claim previously denied by Ms. Stoner as a basis for refusing consider Welfare Benefit Plan claims, and to cloak the "Findings" as some sort of an "independent" review. Ms. Morris' Deposition evidences the most superficial and cursory attempt to support the conclusions desired by the ChevronTexaco Legal Department, acting as the "Plan Administrator".<sup>124</sup>

Whether reviewed under a deferential standard or *de novo*, the Plan Administrators' findings, conclusions, recommendations, and other conduct in this matter constitute a clear abuse of discretion.

---

<sup>123</sup> Compare PLAINTIFFS' SUBMISSION, pp.2-3; with, REVIEW PANEL FINDINGS, pp.1-2.

<sup>124</sup> See, e.g., TRANSCRIPT OF PROCEEDINGS, JUNE 7, 2004 [Plaintiffs' Exhibit 28], pp.4-5. See also, MORRIS DEPO, pp.22, 86-87.

## CONCLUSION

For these reasons, the Court should enter Judgment in favor of Plaintiffs, Alton Schultz, Jr., Elaine Jackson, Gladys Criddle, and Harold Weber, Jr., and against Defendants, Janet Stoner and ChevronTexaco Corp., appointing an independent fiduciary to make eligibility determinations in accordance with Plan documents and to calculate the losses to the ChevronTexaco Employee Benefit Plans; declaring that Plaintiffs were, at all pertinent times, eligible to participate in the Texaco and/or ChevronTexaco Employee Benefit Plans; ordering Defendant, Janet Stoner, to make restitution to the ChevronTexaco Employee Benefit Plans for any and all losses incurred as a result of her fiduciary breaches; and awarding benefits, or the value of same, legal interest, the costs of these proceedings, statutory penalties, reasonable attorneys' fees, and any and all other general or equitable relief to which the Plaintiffs, others similarly situated, and/or the Plans are entitled.

Respectfully submitted,

---

**STEPHEN J. HERMAN** (*Pro Hac Vice*)  
**SIDNEY A. COTLAR** (*Pro Hac Vice*)  
**Herman Mathis Caset Kitchens & GerelLLP**  
820 O'Keefe Avenue  
New Orleans, Louisiana 70113  
Telephone (504) 581-4892  
Fax No. (504) 561-6024

**Attorneys for Alton C. Schultz, Jr.,  
Elaine B. Jackson, Gladys Criddle, and  
Harold J. Weber, Jr., Plaintiffs.**

**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that the above and foregoing Motion, Memorandum, Statement of Uncontested Facts, and Exhibits, have been served upon Counsel for Defendant, BY OVERNIGHT DELIVERY, this 13th day of October, 2004.

---

**STEVE HERMAN**

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

ALTON C. SCHULTZ, JR., et al,	)	<b>Civil Action No.</b>
	)	<b>00 Civ. 0439 (LTS) (MDF) WP</b>
<b>Plaintiffs,</b>	)	<b><u>PLAINTIFFS'</u></b>
	)	<b><u>STATEMENT</u></b>
<b>vs.</b>	)	<b><u>OF UNCONTESTED</u></b>
	)	<b><u>MATERIAL FACTS</u></b>
JANET L. STONER, et al,	)	
	)	
<b>Defendants.</b>	)	

Plaintiffs, Alton Schultz, Jr., Elaine Jackson, Gladys Criddle, and Harold Weber, Jr., through undersigned counsel, respectfully submit the following Statement of Uncontested Material Facts in support of their Motion for Summary Judgment:

**MAY IT PLEASE THE COURT:**

The following facts are uncontested:

1. Defendant Stoner, as Plan Administrator, did not ever take any affirmative steps to identify and include potential Texaco Plan participants and/or beneficiaries.<sup>1</sup>
2. Mr. Schultz, Ms. Jackson, Ms. Criddle, and Mr. Weber were, from August of 1991 thru January of 1999, employed by Texaco.<sup>2</sup>

---

<sup>1</sup>STONER DEPO, p.36 [Plaintiffs' Exhibit 5].

<sup>2</sup>SCHULTZ AFFIDAVIT [Plaintiffs' Exhibit 1] ¶¶ III-XVII; JACKSON AFFIDAVIT [Plaintiffs' Exhibit 2] ¶¶ III-XV; CRIDDLE AFFIDAVIT [Plaintiffs' Exhibit 3] ¶¶ III-XVI; WEBER AFFIDAVIT [Plaintiffs' Exhibit 4] ¶¶ IV-XI, XIV, XXVIII-XXIX; SELECTED EMPLOYMENT RECORDS [Plaintiffs' Exhibit 8]; METRO CONTRACT [Plaintiffs' Exhibit 14], ¶¶ 2, 4, 5, 11; KELLY SERVICE EXTRA LABOR AGREEMENT [Plaintiffs' Exhibit 15], ¶¶ 2(a), (i) and (j), 21, 22; PROFESSIONAL TEMPORARIES AGREEMENT [Plaintiffs' Exhibit 16], ¶¶ 2(a), (i) and (j), 16(a), 22, 23.

3. The Texaco Retirement Plan in effect from December 31, 1994 thru the filing of suit, does not have any payroll requirement for persons providing services to Texaco or an affiliated company within the United States.<sup>3</sup>
4. The Texaco Employee Thrift Plan in effect from December 31, 1994 thru the date of filing, does not have any payroll requirement for persons providing services to Texaco or an affiliated company within the United States.<sup>4</sup>
5. The Texaco Retirement Plan in effect from December 31, 1994 thru the date of filing, did not exclude “leased employees” who were “required to be treated as employees under Section 414(n) and applicable Regulations.”<sup>5</sup>
6. The Texaco Employee Thrift Plan in effect from December 31, 1994 thru the date of filing, did not exclude “leased employees” who were “required to be treated as employees under Section 414(n) and applicable Regulations.”<sup>6</sup>
7. At no time, from August of 1991 thru January of 1999, were any of the Plaintiffs “leased employees” as defined in Section 414(n) of the Internal Revenue Code and applicable Regulations.<sup>7</sup>
8. At no time, from August of 1991 thru January of 1999, did any plaintiff have a written contract with Texaco or TEPI.<sup>8</sup>
9. At no time, from August of 1991 thru January of 1999, was any plaintiff characterized by Texaco or TEPI as a “independent contractor”.<sup>9</sup>

---

<sup>3</sup>1994 TEXACO RETIREMENT PLAN, §§ 1.30, 1.46, 2.01, 2.02 [Plaintiffs’ Exhibit 7]; STONER DEPO, pp.20-22; DEPOSITION OF RHONDA MORRIS (30(b)(6)) [Plaintiffs’ Exhibit 31], pp.36-40.

<sup>4</sup>1994 TEXACO EMPLOYEES THRIFT PLAN, §§ 1.29, 1.46, 2.01, 2.02 [Plaintiffs’ Exhibit 6]; STONER DEPO, pp.30; MORRIS DEPO, pp.36-40.

<sup>5</sup>RETIREMENT PLAN, §1.30.

<sup>6</sup>THRIFT PLAN, §1.29.

<sup>7</sup>*See generally*: SCHULTZ AFFIDAVIT; JACKSON AFFIDAVIT; CRIDDLE AFFIDAVIT; WEBER AFFIDAVIT; STONER DEPO, pp.27, 51-54, 60-63, 58-65, 81, 112-115.

<sup>8</sup>*See generally*: SCHULTZ AFFIDAVIT; JACKSON AFFIDAVIT; CRIDDLE AFFIDAVIT; WEBER AFFIDAVIT; CONTRACT BETWEEN TEPI AND METRO CAREERS [Plaintiffs’ Exhibit 14]; KELLY SERVICE EXTRA LABOR AGREEMENT [Plaintiffs’ Exhibit 15]; PROFESSIONAL TEMPORARIES EXTRA LABOR AGREEMENT [Plaintiffs’ Exhibit 16]. *See also*: STONER DEPO, p.58.

<sup>9</sup>SELECTED EMPLOYMENT RECORDS [Plaintiffs’ Exhibit 8, authenticated at SCHULTZ AFFIDAVIT, ¶XXII]; STONER DEPO, pp.38, 58-65, 112-115, 128-133; SCHULTZ AFFIDAVIT; JACKSON AFFIDAVIT; CRIDDLE AFFIDAVIT; WEBER AFFIDAVIT; METRO CONTRACT, ¶¶ 2, 5; KELLY AGREEMENT, ¶¶ 2(a), (i) and (j), 21, 22; PROFESSIONAL

10. At no time, from August of 1991 thru January of 1999, was any plaintiff characterized as a “independent contractor” in any contract.<sup>10</sup>
11. At no time, from August of 1991 thru January 1999, did any plaintiff perform services for Texaco as a “independent contractor”.<sup>11</sup>
12. At all times, from August 1991 thru January 1999, Plaintiffs were supervised and directed on a day-to-day basis by Texaco and/or TEPI.<sup>12</sup>
13. At no time, from August 1991 thru January 1999, were any of the Plaintiffs supervised or directed on a day-to-day basis by Norrell, MetroCareers, Kelly Services, or Professional Temporaries.<sup>13</sup>
14. At all times, from August 1991 thru January 1999, Texaco and/or TEPI had the right to hire and fire Plaintiffs.<sup>14</sup>
15. At all times, from August 1991 thru January 1999, Plaintiffs were paid a fixed salary.<sup>15</sup>
16. At all times, from August 1991 thru January 1999, Texaco and/or TEPI furnished the Plaintiffs with an office, a desk, chairs, a computer, database access, a telephone, and all other supplies and resources needed to complete their work assignments.<sup>16</sup>

---

TEMPORARIES AGREEMENT, ¶¶ 2(a), (i) and (j), 16(a), 22, 23.

<sup>10</sup>See generally: METRO CONTRACT; KELLY AGREEMENT; PROFESSIONAL TEMPORARIES AGREEMENT.

<sup>11</sup>See generally: SCHULTZ AFFIDAVIT; JACKSON AFFIDAVIT; CRIDDLE AFFIDAVIT; WEBER AFFIDAVIT; STONER DEPO, pp.38, 58-65, 112-115, 128-133.

<sup>12</sup>SCHULTZ AFFIDAVIT, ¶¶ III, XV; JACKSON AFFIDAVIT, ¶¶ III, XIV; CRIDDLE AFFIDAVIT, ¶¶ IV, XV; WEBER AFFIDAVIT, ¶¶ V, VIII, X, XIV, XXVIII; METRO CONTRACT, ¶ 2.

<sup>13</sup>SCHULTZ AFFIDAVIT, ¶¶ IV, VIII, XII; JACKSON AFFIDAVIT, ¶¶ IV, X, XII; CRIDDLE AFFIDAVIT, ¶¶ III, V, X, XIII; WEBER AFFIDAVIT, ¶¶ VI, IX, XI.

<sup>14</sup>SCHULTZ AFFIDAVIT, ¶¶ I, II, XIII; JACKSON AFFIDAVIT, ¶¶ I, II, VII, VIII, XIII; CRIDDLE AFFIDAVIT, ¶¶ I, II, IX, XIV; WEBER AFFIDAVIT, ¶¶ III, IV, XII; METRO CONTRACT, ¶¶ 4, 5, 11; KELLY AGREEMENT, ¶22; PROFESSIONAL TEMPORARIES AGREEMENT, ¶23.

<sup>15</sup>See generally: METRO CONTRACT; KELLY AGREEMENT; PROFESSIONAL TEMPORARIES AGREEMENT; SCHULTZ AFFIDAVIT; JACKSON AFFIDAVIT; CRIDDLE AFFIDAVIT; WEBER AFFIDAVIT.

<sup>16</sup>SCHULTZ AFFIDAVIT, ¶¶ III, XV; JACKSON AFFIDAVIT, ¶¶ III, XIV; CRIDDLE AFFIDAVIT, ¶¶ IV, XV; WEBER AFFIDAVIT, ¶¶ V, VIII, X, XIV; METRO CONTRACT, ¶ 2.

17. At all times, from August 1991 thru January 1999, Plaintiffs' timesheets were approved by Texaco.<sup>17</sup>
18. At all times, from August 1991 thru January 1999, Plaintiffs provided their landman, spotter, lease analysis, and other related services only to Texaco.<sup>18</sup>
19. From August 1991 thru January 1999, Plaintiffs attended Texaco and/or TEPI educational training classes and programs.<sup>19</sup>
20. From August 1991 thru January 1999, Plaintiffs had their holiday schedules, vacation times, hourly work weeks, and salary increases, approved by Texaco and/or TEPI.<sup>20</sup>
21. At all times, from August of 1991 thru January of 1999, Plaintiffs performed services that were part of the ordinary trade, business, and occupation of Texaco, TEPI, and their employees.<sup>21</sup>
22. At all times, from August of 1991 thru January of 1999, Plaintiffs worked side-by-side with other workers who performed the same or substantially similar job duties, under the same or substantially similar circumstances, but were classified by Texaco and/or TEPI as "full-time employees".<sup>22</sup>
23. When Plaintiffs requested clarification as to their eligibility to participate in one or more of the Texaco Employee Benefit Plans in 1999, Defendant did not review the facts available to her at that time.<sup>23</sup>

---

<sup>17</sup>SCHULTZ AFFIDAVIT, ¶ XV; JACKSON AFFIDAVIT, ¶¶ V, XIV; CRIDDLE AFFIDAVIT, ¶¶ VI, XV; WEBER AFFIDAVIT, ¶¶ VII, IX, XIV.

<sup>18</sup>SCHULTZ AFFIDAVIT, ¶ XV; JACKSON AFFIDAVIT, ¶ XIV; CRIDDLE AFFIDAVIT, ¶ XV; WEBER AFFIDAVIT, ¶ XIV.

<sup>19</sup>SCHULTZ AFFIDAVIT, ¶ XV; SELECTED EMPLOYMENT RECORDS, at p.PLF000015; JACKSON AFFIDAVIT, ¶ XIV; CRIDDLE AFFIDAVIT, ¶ XV; WEBER AFFIDAVIT, ¶ XIV.

<sup>20</sup>SCHULTZ AFFIDAVIT, ¶ XV; SELECTED EMPLOYMENT RECORDS, at pp.PLF000052 and PLF000082; JACKSON AFFIDAVIT, ¶ XIV; CRIDDLE AFFIDAVIT, ¶¶ III, XV; WEBER AFFIDAVIT, ¶ XXIX.

<sup>21</sup>SELECTED EMPLOYMENT RECORDS; SCHULTZ AFFIDAVIT, ¶ XVII; JACKSON AFFIDAVIT, ¶ XV; CRIDDLE AFFIDAVIT, ¶ XVI; WEBER AFFIDAVIT, ¶ XXVIII; METRO CONTRACT; KELLY AGREEMENT; PROFESSIONAL TEMPORARIES AGREEMENT.

<sup>22</sup>SELECTED EMPLOYMENT RECORDS; SCHULTZ AFFIDAVIT, ¶ XVII; JACKSON AFFIDAVIT, ¶ XV; CRIDDLE AFFIDAVIT, ¶ XVI; WEBER AFFIDAVIT, ¶ XXVIII.

<sup>23</sup>STONER DEPO, pp.58-65, 112-115.

24. When Plaintiffs requested clarification as to their eligibility to participate in one or more of the Texaco Employee Benefit Plans in 1999, Defendant did not attempt to make any determination as to whether the plaintiffs were, in fact, either “independent contractors” or “leased employees” under *Darden* and/or Section 414(n) of the Internal Revenue Code.<sup>24</sup>
25. When Plaintiffs requested clarification as to their eligibility to participate in one or more of the Texaco Employee Benefit Plans in 1999, Defendant did not even review the contracts between Texaco and/or TEPI and the third-party leasing agencies.<sup>25</sup>
26. After consulting with the Texaco Legal Department, Defendant wrote denial letters to Plaintiffs Harold Weber and Alton Schultz representing that “the eligibility provisions in all of Texaco’s Benefit Plan include the following language, which explicitly excludes leased or third-party contract employees . . . ‘the Plan Administrator has sole discretionary authority to determine whether you are an employee of the company or a participating company, based only on the plan’s eligibility criteria, without regard to whether you are consider a common law employee of the company or a participating company for any other purpose. You are not eligible to join this plan if you are, in the sole discretion of the Plan Administrator . . . rendering services to the company pursuant to an agreement between the company or a participating company in a third party.’”<sup>26</sup>
27. At **no** time, from December 31, 1994 thru the filing of suit, did Texaco’s Retirement Plan include the following language: “The Plan Administrator has sole discretionary authority to determine whether you are an employee of the company or a participating company, based only on the plan’s eligibility criteria, without regard to whether you are consider a common law employee of the company or a participating company for any other purpose. You are not eligible to join this plan if you are, in the sole discretion of the Plan Administrator . . . rendering services to the company pursuant to an agreement between the company or a participating company in a third party.”<sup>27</sup>
28. At **no** time, from December 31, 1994 thru the filing of suit, did Texaco’s Employee Thrift Plan include the following language: “The Plan Administrator has sole discretionary authority to determine whether you are an employee of the company or

---

<sup>24</sup>STONER DEPO, pp.27, 51-54, 60-63, 58-65, 81, 112-115.

<sup>25</sup>STONER DEPO, p.59.

<sup>26</sup>STONER DEPO, p.67; LETTER FROM STONER TO SCHULTZ, Dec. 6, 1999 [Plaintiffs’ Exhibit 9]; LETTER FROM STONER TO WEBER, Jan. 11, 2000 [Plaintiffs’ Exhibit 10].

<sup>27</sup>RETIREMENT PLAN, §§ 1.30, 1.46, 2.01, 2.02; STONER DEPO, 22-24, 110, 130.

a participating company, based only on the plan's eligibility criteria, without regard to whether you are consider a common law employee of the company or a participating company for any other purpose. You are not eligible to join this plan if you are, in the sole discretion of the Plan Administrator . . . rendering services to the company pursuant to an agreement between the company or a participating company in a third party."<sup>28</sup>

29. After suit was filed, the Texaco Retirement Plan was merged into the ChevronTexaco Retirement Plan.<sup>29</sup>
30. After suit was filed, the Texaco Employees Thrift Plan was merged into the ChevronTexaco Employees Savings Investment Plan.<sup>30</sup>
31. Defendants failed to provide Plaintiffs with Plan Documents, even after they were specifically requested.<sup>31</sup>
32. The Court instructed that "the first step of an analysis as to whether the Plan Administrator has carried out appropriately her duties in connection with the enrollment of employees and provision of appropriate benefits is interpretation of the eligibility provisions of the plans."<sup>32</sup> The Court noted that "Stoner has proffered no evidence of her consideration of [the] differences between the formal text and the SPD language, nor is there any indication that she considered the 1989 plan texts, which were apparently in effect for several of the employment years in question here, or even the 1994 SPDs."<sup>33</sup> Hence, "because, under the plans, interpretation of the disputed provisions is for the Plan Administrator in the first instance, the Court [remanded] this matter to the current Plan Administrator for a determination of the

---

<sup>28</sup>THRIFT PLAN, §§ 1.29, 1.46, 2.01, 2.02; STONER DEPO, 29-30, 105, 111.

<sup>29</sup>2002 CHEVRONTEXACO RETIREMENT PLAN [Plaintiffs' Exhibit 21], §§ 1, 2(a) and (b); DEPOSITION OF JOHN F. HUEY [Plaintiffs' Exhibit 29], p.10.

<sup>30</sup>2002 CHEVRONTEXACO EMPLOYEES SAVINGS INVESTMENT PLAN [Plaintiffs' Exhibit 22], § 1; HUEY DEPO, pp.10-11.

<sup>31</sup>REQUEST FOR CLARIFICATION OF ELIGIBILITY BY HAROLD WEBER, JR., AND DENIAL OF SAME [Plaintiffs' Exhibit 10]; WEBER AFFIDAVIT, ¶¶ XVIII-XXI. *See also*, REQUEST FOR CLARIFICATION OF ELIGIBILITY BY ATLTON SCHULTZ, JR., AND DENIAL OF SAME [Plaintiffs' Exhibit 9]; SCHULTZ AFFIDAVIT, ¶XX. *See also*, LETTER FROM PLAINTIFFS' COUNSEL TO DEFENSE COUNSEL, MARCH 26, 2004 [Plaintiffs' Exhibit 18]; LETTER FROM PLAINTIFFS' COUNSEL TO J.F. HUEY, APRIL 5, 2004 [Plaintiffs' Exhibit 20]; PLAINTIFFS' SUBMISSION, p.19; PLAINTIFFS' SUPPLEMENTAL SUBMISSION, pp.6-7; HUEY DEPO, pp.21-33. *See also*: SECOND AMENDED COMPLAINT, ¶¶38-39; SCHULTZ AFFIDAVIT, ¶XVIII; JACKSON AFFIDAVIT, ¶XVI; CRIDDLE AFFIDAVIT, ¶XVII. *See also*, STONER DEPO, 38-41.

<sup>32</sup>OPINION AND ORDER, p.22, (308 F.Supp.2d at 304).

<sup>33</sup>OPINION AND ORDER, p.23, (308 F.Supp.2d at 305).

eligibility issue in question.”<sup>34</sup>

33. An adversarial “Position Statement of the Plan Administrator” with supporting evidence was prepared by unidentified persons within the ChevronTexaco Legal Department and presented to a ChevronTexaco Review Panel.<sup>35</sup>
34. The Review Panel followed the ChevronTexaco Legal Department’s suggestion to disregard the question of whether Plaintiffs were “common law” employees.<sup>36</sup>
35. The Review Panel followed the directives of the ChevronTexaco Legal Department not to consider the prior testimony or determinations of Janet Stoner.<sup>37</sup>
36. The Review Panel followed the directives of the ChevronTexaco Legal Department not to consider Plaintiffs’ claims for eligibility under any Texaco Welfare Benefit Plans.<sup>38</sup>
37. The Review Panel did not make any attempt to consider the differences between the language in the Formal Text Plans and the SPDs, or engage in any other effort to interpret the Plans.<sup>39</sup>
38. Neither Ms. Stoner nor the Review Panel recognized or understood any clear distinction between the advice or instructions or directives of the Texaco or ChevronTexaco Legal Department as advising or acting for the Texaco Human Resources Department or ChevronTexaco as the Employer / Plan Sponsor, versus advising or acting for Ms. Stoner or Chevron Texaco as Plan Administrator, an independent fiduciary.<sup>40</sup>

---

<sup>34</sup>OPINION AND ORDER, p.24, (308 F.Supp.2d at 305).

<sup>35</sup>See POSITION STATEMENT OF THE PLAN ADMINISTRATOR [Plaintiffs’ Exhibit 24]; HUEY DEPO, pp.21-24, 28-31.

<sup>36</sup>POSITION STATEMENT OF THE PLAN ADMINISTRATOR, pp.2-4; REVIEW PANEL FINDINGS [Plaintiffs’ Exhibit 27], p.4; MORRIS DEPO, pp.45-46.

<sup>37</sup>Compare POSITION STATEMENT OF THE PLAN ADMINISTRATOR, pp.2-3 and 17, with, REVIEW PANEL FINDINGS.

<sup>38</sup>Compare POSITION STATEMENT OF THE PLAN ADMINISTRATOR, pp.2-3 and 17, and E-MAIL FROM JOHN HUEY TO REVIEW PANEL, APRIL 29, 2004 [Plaintiffs’ Exhibit 30]; with, REVIEW PANEL FINDINGS.

<sup>39</sup>TRANSCRIPT OF PROCEEDINGS, JUNE 7, 2004 [Plaintiffs’ Exhibit 28], pp.4-5; MORRIS DEPO, pp.12-19.

<sup>40</sup>STONER DEPO, pp.56-58, 76-78; HUEY DEPO, pp.13-14, 19. See also, MORRIS DEPO, pp.22, 86-87.

39. Everyone who participated in making eligibility determinations was employed by Texaco or ChevronTexaco, and there existed no established criteria for making such a determination or considering an appeal of same.<sup>41</sup>
40. Both Ms. Stoner and the members of the Review Panel were employed by Texaco or ChevronTexaco; had Texaco or ChevronTexaco stock; and got paid a bonus based on “performance”.<sup>42</sup>

Respectfully submitted,

---

**STEPHEN J. HERMAN** (*Pro Hac Vice*)  
**SIDNEY A. COTLAR** (*Pro Hac Vice*)  
**Herman Mathis Casey Kitchens & Gerel, LLP**  
820 O'Keefe Avenue  
New Orleans, Louisiana 70113  
Telephone (504) 581-4892  
Fax No. (504) 561-6024

**Attorneys for Alton C. Schultz, Jr.,  
Elaine B. Jackson, Gladys Criddle, and  
Harold J. Weber, Jr., Plaintiffs.**

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that the above and foregoing Motion, Memorandum, Statement of Uncontested Facts, and Exhibits, have been served upon Counsel for Defendant, BY OVERNIGHT DELIVERY, this 13th day of October, 2004.

---

**STEVE HERMAN**

---

<sup>41</sup>DeFelice, *supra*, 112 F.3d at 66. *See* STONER DEPO, pp.30-35, 102-104; HUEY DEPO; MORRIS DEPO, p.89.

<sup>42</sup>STONER DEPO, pp.30-35; HUEY DEPO; MORRIS DEPO, p.89.