

employees of Texaco, but rather, employees of the third-party leasing agencies.³ Having failed to conduct any such inquiry, and realizing that any such inquiry would have lead to the inescapable conclusion that Plaintiffs could *not* be excluded from participation by Texaco as Leased Employees, Ms. Stoner then attempted to assert, (without any factual basis or support), that Plaintiffs were somehow “characterized by or under contract with Texaco as independent contractors.”⁴

The Court, presented with this argument, determined that it was not ripe for adjudication because the Plan Administrator never actually interpreted or applied the controlling “characterized by or under contract with Texaco as an independent contractor” language from the Formal Plan Texts, and therefore remanded the matter to the current Plan Administrator.⁵

On remand, the ChevronTexaco Legal Department, acting as the “Plan Administrator”, submitted a Position Paper, advocating yet a third position – *i.e.* that the Plaintiffs were never “employed by” Texaco in the first instance, because they were paid by a third-party leasing agency.⁶ This position, (in addition to never having been advanced by Defendant Stoner or her Counsel), is irreconcilable with the Definition of “Employee” under the Plans – which expressly *includes* “Leased Employees.” Logic dictates that, under the Plans’ Definition, there must be some workers who are *both* “employed by” Texaco, and yet also paid through third-party staffing agencies, (or else “Leased

³1994 TEXACO EMPLOYEES THRIFT PLAN [Plaintiffs’ Exhibit 6], §§1.46, 2.02; 1994 TEXACO RETIREMENT PLAN [Plaintiffs’ Exhibit 7] §§1.46, 2.02; INTERNAL REVENUE CODE, 26 U.S.C. §414(n); Burrey v. Pacific Gas & Electric, 159 F.3d 388, 393 (9th Cir. 1998); Professional and Executive Leasing v. Commissioner, 89 T.C. 225 (T.C. 1987), *aff’d*, 862 F.2d 751 (9th Cir. 1988). *See also*: AFFIDAVIT OF A.D. “GUS” FIELDS [Plaintiffs’ Exhibit 17], ¶7.

⁴STONER DEPO [Plaintiffs’ Exhibit 5], pp.38, 58-63, 81-87, 112-115, 128-134, 139-140.

⁵OPINION AND ORDER, March 8, 2004, pp.22-27, (Schultz v. Stoner, 308 F.Supp.2d 289, 304-308 (S.D.N.Y. 2004)).

⁶*See* POSITION STATEMENT OF THE PLAN ADMINISTRATOR [Plaintiffs’ Exhibit 24], pp.7-10. *See also*, REVIEW PANEL REPORT OF FINDINGS [Plaintiffs’ Exhibit 27], p.4; DEPOSITION OF JOHN F. HUEY [Plaintiffs’ Exhibit 29], pp.21-24, 28-31; DEPOSITION OF RHONDA MORRIS (30(b)(6)) [Plaintiffs’ Exhibit 31], pp.28-45, 77-78, 82-85.

Employees” could not be included as workers “employed by” Texaco in the first place).⁷ Moreover, the payment of compensation by a third-party does not determine employee status. Rather, the question of whether Plaintiffs are “employees” of the leasing organization, (and/or the recipient), is determined by an examination of control and other relevant factors. The law, in this respect, refuses to recognize a contract purporting to create an employer-employee relationship between the worker and the staffing agency when, as here, “the objective economic reality of the relationship is that [the leasing agency] merely performs a bookkeeping and payroll service function.”⁸

The reality is that Texaco could have, in its 1994 Plans, defined a “leased employee” very broadly and expansively to exclude workers such as Mr. Schultz, Ms. Jackson, Mr. Weber, and Ms. Criddle.⁹ For whatever reason, however, Texaco chose not to do this. The company, instead, extended eligibility to all workers providing services to Texaco, excluding only: (i) individuals who were independent contractors, and (ii) “*leased employees*” as defined by Section 414(n) of the *Internal Revenue Code*. Knowing full well that the plaintiffs cannot be excluded as “leased

⁷Plaintiffs 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 an overlap between “Leased Employee” and workers “employed by” Texaco, or else the Definition of Employee in the Plans would make no sense: The very same workers would be simultaneously included and excluded.

⁸Professional & Executive Leasing, *supra*, 89 T.C. at 234.

⁹*See, e.g.*, 2002 CHEVRONTEXACO RETIREMENT PLAN [Plaintiffs’ Exhibit 21], §§ 1, 2(a) and (b); 2002 CHEVRONTEXACO EMPLOYEES SAVINGS INVESTMENT PLAN [Plaintiffs’ Exhibit 22], §1. *See also, e.g.*, Montesano v. Xerox, 177 F.Supp.2d 147, 153 n.2 (D.Conn. 2000), *aff’d*, 256 F.3d 86 (2d Cir. 2001) (excluding not only Leased Employees under Section 414(n) of the Internal Revenue Code, but also “leased employees”, “contract workers”, and “other third party personnel”, “regardless of whether such persons may constitute employees under the common law”); Casey v. Atlantic Richfield, 2000 U.S. Dist. LEXIS 6836, at *22 (C.D.Cal. March 30, 2000) (defining a “leased employee” as defined in Section 414(n) of the Internal Revenue Code *or* “with whom the Company has entered into an arrangement either directly or through a third party, where the individual is deemed by the Company an independent contractor or an employee of a third party, regardless of whether any governmental entity shall determine that such individual should have been classified as a common law employee of the Company or a joint employee of the Company and a third party”); Administrative Committee of Time Warner v. Biscardi, 2000 U.S. Dist. LEXIS 16707 (S.D.N.Y. Nov. 17, 2000) (limiting participation to “employees that are paid on the ‘regular payroll’” of Time Warner or “regular employees”).

employees” because they do not meet the statutory definition – which is also the *Plan’s* definition – of a “leased employee,”¹⁰ the Plan Administrators continue to manufacture alternative, baseless, pretexts for exclusion.

With respect to the statute of limitations, (twice rejected with regard to the breach of fiduciary duty claims), the central fallacy with Defendants’ position is the failure to distinguish between the actions of Texaco, the Employer, as Plan Sponsor, and the continuing duties, and breaches thereof, by Ms. Stoner, the Plan Administrator, as Plan Fiduciary. Benefits under the 1994 Plans, moreover, were never “repudiated” until Ms. Stoner formally denied Plaintiffs’ requests in 1999; and ***could not have been*** repudiated until, at the earliest, December 31, 1994 – within six years of the filing of suit in this case.

Finally, with respect to the appropriate remedies available under ERISA, the Defendants ignore the fact that: **(i)** Before the Court turns to the “catch-all” provisions of Section 502(a)(3) in fashioning an appropriate remedy, there are express statutory remedies available, as provided in Section 409(a);¹¹ **(ii)** Mr. Weber, separate and apart from the claims asserted in this lawsuit, is a qualified participant of the ChevronTexaco Plans based on his employment with Texaco from 1966 thru 1984;¹² and, **(iii)** Plaintiffs have never suggested that ChevronTexaco be removed as Plan Administrator and replaced by an independent fiduciary to broadly administer the ChevronTexaco

¹⁰See ORDER, pp. 8, 19 fn.11, (308 F.Supp.2d at 296, 302 n.11); STONER DEPO, pp.52-53,133-134.

¹¹See OPINION AND ORDER, p.15 fn.10, (308 F.Supp.2d at 300 n.10); COMPLAINT, ¶¶ 75, 76, 78, 82, and Prayer for Relief; AMENDED COMPLAINT, ¶¶ 99, 101-107, 109, 113, and Prayer for Relief; SECOND AMENDED COMPLAINT, ¶¶ 101-106, 114, 116, 120, and Prayer for Relief; FED. R. CIV. PRO. 8(a) (“Relief in the alternative or of several different types may be demanded”). ERISA Section 409, in this regard, expressly provides that a breaching fiduciary “shall be personally liable to make good to such plan any losses to the plan” as well as “other equitable or remedial relief as the court may deem appropriate.” 29 U.S.C. §1109(a).

¹²OPINION AND ORDER, p.17, (308 F.Supp.2d at 301); AFFIDAVIT OF HAROLD WEBER [Plaintiffs’ Exhibit 4], ¶XV; LETTER FROM DENNIS SMITHSON TO HAROLD WEBER, FEB. 3, 1999, [Plaintiffs’ Exhibit 10, at pp.D00727-729].

Plans on a prospective basis, but only that an independent fiduciary be appointed to make retrospective eligibility determinations, for the benefit of the ChevronTexaco Plans and all existing and/or otherwise eligible participants and beneficiaries.

For these reasons, and for the reasons further outlined below, Defendants’ Motion for Summary Judgment should be denied.

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PLAINTIFFS’ CLAIMS ARE NOT TIME-BARRED
(Defendants’ Points I and II)

Defendants Fail to Distinguish Between Plaintiffs’ Previously Dismissed Claims Against Texaco, as Employer and Plan Sponsor, and the Present Claims Against Ms. Stoner, as Plan Sponsor and Fiduciary

As recognized by Judge Parker in his earlier decision, the statute of limitations for a Section 510 claim against *the employer* is completely separate and distinct from the statute of limitations for a Section 502(a)(2) or 502(a)(3) claim against *plan fiduciaries* for a fiduciary breach.¹³ The former is determined by borrowing from analogous state law statutes of limitations,¹⁴ while the latter is governed by ERISA Section 413, 29 U.S.C. §1113.

Defendants may be correct that Plaintiffs became aware in the early 1990s that they had been

¹³DECISION AND ORDER, JAN. 3, 2001, pp.5-8, 14-16, (Schultz v. Texaco Inc., 127 F.Supp.2d 443, 446-447, 450 (S.D.N.Y. 2001)).

¹⁴*See, e.g., Sandberg v. KPMG Peat Marwick*, 111 F.3d 331, 333 (2nd Cir. 1997).

mis-classified as “temps” by *Texaco* in violation of 29 U.S.C. §1140; but that has nothing to do with the question of when Plaintiffs had actual knowledge that Ms. Stoner, or other Plan Administrators, failed to take appropriate steps to identify and include eligible participants and beneficiaries, in accordance with plan documents, particularly after the Plans were amended in 1994.

Defendants’ Fiduciary Duties (and Breaches thereof) Are Continuing

In addition to the fact that they are separate legal duties, owed by separate parties, subject to different limitations periods, the “mis-classification” of each Plaintiff by *Texaco* was a one-time event, while the breach of fiduciary duties by Ms. Stoner and others were ongoing and continuing.¹⁵

Plaintiffs Did Not Know, Nor Could They Have Known, Of Potential Causes of Action Until Well Within the Limitations Period

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) individuals who were independent contractors, and (ii) leased employees, *but only* “leased employees” as defined under the relevant provisions of the Internal Revenue Code.¹⁶ The 1994 Plans provide that such

¹⁵*See* 29 U.S.C. §1113(1)(A) (begins to run from the *last* act which constitutes part of that breach or violation); 29 U.S.C. §1113(1)(B) (begins to run from the *latest* date on which the fiduciary could have cured the breach or violation); *see, e.g., Martin v Consultants & Admrs., Inc.*, 966 F.2d 1078, 1087-1089 (7th Cir. 1992) (given ERISA’s imposition of a continuing fiduciary duty, past knowledge of a past violation generally should not be held to preclude a suit for a repeated or a continued violation); *Carollo v. Cement and Concrete Workers District Council Pension Plan*, 964 F.Supp. 677, 687 (E.D.N.Y.1997) (“continuing breach” theory is appropriate in determining “last act” under Section 413); *Reich v. Johnson*, 891 F.Supp. 208, 209 (D.N.J.1995); *Gruby v. Brady*, 838 F.Supp. 820, 831 (S.D.N.Y. 1993) (fiduciaries have continuing obligation to monitor funds); *Buccino v. Continental Assurance Co.*, 578 F. Supp. 1518, 1521 (S.D.N.Y. 1983) (imposing a continuing obligation upon fiduciaries).

¹⁶1994 RETIREMENT PLAN, §§ 1.30, 1.46, 2.01; 1994 THRIFT PLAN, §§ 1.29, 1.46, 2.01.

amendments “will govern a Member’s rights to Accrued Benefits on or after December 31, 1994.”¹⁷ Therefore, under the earliest possible trigger date, Plaintiffs would have had until December 31, 2000 to sue for benefits under ERISA Section 501(a)(1)(B), pursuant to the six-year limitations period.¹⁸

Similarly, under the earliest possible trigger date relating to Defendant’s failure to act reasonably and prudently in accordance with the 1994 Plan Documents, Plaintiffs would have had until December 31, 2000, pursuant to the six-year limitations period provided in Section 413.

Under the three-year limitations period provided in Section 413, Plaintiffs had three years from the date upon which Plaintiffs had actual knowledge of Defendant’s fiduciary violations.¹⁹ It is undisputed that Plaintiffs did not have actual knowledge of potential violations by Defendant until the summer of 1999. *See* OPINION AND ORDER, pp.11-13, (308 F.Supp.2d at 298-299).²⁰

Defendant testified, in this regard, that none of the Plaintiffs would have been provided with any Plan documents, and that Harold Weber – who, contrary to Defendant’s recollection, received one or two summary plan descriptions as a plan participant – would have been reasonable to have

¹⁷1994 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.

¹⁸*See* DEFENDANTS’ MEMORANDUM, p.4; *citing*, Carey v. IBEW Local 363 Pension Plan, 201 F.3d 44, 46-47 (2d Cir. 1999). *See also*, Miles v. New York State Teamsters, 698 F.2d 593, 598 (2d Cir. 1983), *cert. denied*, 464 U.S. 829 (1983).

¹⁹It is well-settled that “actual knowledge” under Section 413 “requires a showing that plaintiffs actually knew not only of the events that occurred which constitute the breach or violation but also that those events supported a claim for breach of fiduciary duty or violation under ERISA.” *See, e.g.*, AMENDED DECISION AND ORDER, JAN. 3, 2001, pp.15-16, (Schultz v. Texaco Inc., 127 F.Supp.2d 443, 450 (S.D.N.Y. 2001)); OPINION AND ORDER, MARCH 8, 2004, p.12, (Schultz v. Stoner, 308 F.Supp.2d 289, 298 (S.D.N.Y. 2004)); Caputo v. Pfizer, 267 F.3d 181, 193 (2d Cir. 2001); Maher v. Strachan Shipping Co., 68 F.3d 951, 954 (5th Cir. 1995); Int’l Union v. Murata Erie North America, 980 F.2d 889, 900 (3rd Cir.1992); Gluck v. Unisys Corp., 960 F.2d 1168, 1177 (3rd Cir.1992).

²⁰Plaintiffs Schultz, Criddle, and Jackson suspected that Texaco’s actions were unlawful when they read about a similar suit by ARCO employees in June of 1999. SCHULTZ AFFIDAVIT, ¶XIX; JACKSON AFFIDAVIT, ¶XVII. *See also*: CRIDDLE AFFIDAVIT, ¶XVII. Around the same time period, Plaintiff Harold Weber discovered Texaco Land Department records, (which Magistrate Fox has deemed privileged and confidential), in the Texaco Land Department computer database. WEBER AFFIDAVIT, ¶XXV. *See also*: WEBER AFFIDAVIT, ¶¶XVIII-XXI.

relied upon the misleading language regarding eligibility in the SPD.²¹

The Defendants contend that the ongoing and continuing breach of fiduciary duty by Ms. Stoner – *who did not even become Plan Administrator until 1997*²² – should have been known to Plaintiffs in 1990 or 1991 when they began to provide services to Texaco with the knowledge that they would not be participating in the Texaco Plans.

Assuming, *arguendo*, that this is the case: How did the plaintiffs know, in 1990 or 1991, whether they should have been entitled to participate in the Texaco Plans? They didn't have the Plans. They didn't, with the possible exception of Mr. Weber, even have copies of the SPDs. They were relying on what they were told (and not told) by the Plan Administrator and others in the Texaco Human Resources Department.²³

The plaintiffs certainly didn't know, in 1990 or 1991, that the plans would be amended in December of 1994 to expand eligibility to all employees with one year of service in the United States. They never received the amended version of the plans. They were never told by Texaco or the Plan Administrator that they might be eligible. And, in fact, the SPDs that were distributed to Mr. Weber and other participants were materially misleading.

Nor could the plaintiffs have known, in 1990 or 1991, (or even in January of 2000), that the Plan Administrator or others would not make any attempt to satisfy the ongoing and continuing duty to identify eligible participants and beneficiaries.

Nor could Plaintiffs have been aware, in 1990 or 1991, of the subsequent *Microsoft* decisions

²¹ STONER DEPO, pp.38-41, 107. *See also*: SCHULTZ AFFIDAVIT, ¶¶XVIII, XX; JACKSON AFFIDAVIT, ¶XVI; CRIDDLE AFFIDAVIT, ¶XVII; WEBER AFFIDAVIT, ¶¶XVIII-XXI.

²² STONER DEPO, pp.5-6, 41, 74.

²³ STONER DEPO, pp. 7, 36-37, 81-82, 119-121. *See also*: STONER DEPO, pp. 44-46, 58-59, 82-87, 103-104.

– which weren't discovered until a similar suit filed by ARCO employees was reported in the New Orleans newspaper in 1999.

The statute of limitations is an affirmative defense; the burden of proof is on the Defendant. There is absolutely *no* evidence in the record – and Defendant has pointed to none – to support Defendant's contention that Plaintiffs had actual knowledge of the defendant's breach of fiduciary duty prior to the time this suit was filed in January of 2000. *See generally*, DECISION AND ORDER, JAN. 3, 2001, pp.14-16, (127 F.Supp.2d at 450); OPINION AND ORDER, MARCH 8, 2004, pp.11-13, (308 F.Supp.2d at 298-299).

The Time Period for Making a Claim for Benefits in Louisiana, Where Plaintiffs' Employment Services Were Provided, is Ten Years

The benefit claims by Plaintiffs, who provided all of their services to Texaco in the New Orleans office, should be governed by 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). Plaintiffs' claims under ERISA Section 501(a)(1)(B) are therefore timely, even under the Defendants' proposed trigger date of initial mis-classification by Texaco in 1990 and 1991.

When Benefits Are Due on a Recurring Basis, Each Failure to Pay Constitutes a New and Separate Claim

To the extent that some claims for benefits might fall beyond the applicable limitations period, courts have held that the obligation to pay employment benefits is analogous to a recurring obligation

under an installment contract; and, accordingly, every periodic payment that is less than the amount due Plaintiffs constitutes a continuing and separate breach of contract, with the limitations period running from the due date of each benefit.²⁴

THE REMEDIES SOUGHT BY PLAINTIFFS ARE APPROPRIATE
(Defendants' Points III-VII)

There are three central fallacies which undercut all of Defendants' points regarding available remedies: **(i)** Before the Court turns to the "catch-all" provisions of Section 502(a)(3) in fashioning an appropriate remedy, there are express statutory remedies made expressly available, as provided in Section 409(a).²⁵ **(ii)** Mr. Weber, separate and apart from the claims asserted in this lawsuit, is a qualified participant of the ChevronTexaco Plans based on his employment with Texaco from 1966 thru 1984.²⁶ **(iii)** Plaintiffs have never suggested that ChevronTexaco be removed as Plan Administrator and replaced by an independent fiduciary to broadly administer the ChevronTexaco Plans on a prospective basis, but only that an independent fiduciary be appointed to make retrospective eligibility determinations, for the benefit of the ChevronTexaco Plans and all existing and/or otherwise eligible participants and beneficiaries.

²⁴See, e.g., Board of Trustees v. Kahle Engineering Corp., 43 F.3d 852, 857-861 (3rd Cir. 1994); Carriers Container Council v. Mobile S.S. Assoc., 948 F.2d 1219, 1223-1224 (11th Cir. 1991); Joyce v. Clyde Sandoz Masonry, 871 F.2d 1119, 1124 (D.C. Cir.), *cert. denied*, 493 U.S. 918 (1989); Jackson v. American Can Co., 485 F.Supp. 370, 374-375 (W.D. Mich. 1980).

²⁵See ORDER, p.15 fn.10, (308 F.Supp.2d at 300 n.10); COMPLAINT, ¶¶ 75, 76, 78, 82, and Prayer for Relief; AMENDED COMPLAINT, ¶¶ 99, 101-107, 109, 113, and Prayer for Relief; SECOND AMENDED COMPLAINT, ¶¶ 101-106, 114, 116, 120, and Prayer for Relief; FED. R. CIV. PRO. 8(a) ("Relief in the alternative or of several different types may be demanded").

²⁶OPINION AND ORDER, p.17, (308 F.Supp.2d at 301); AFFIDAVIT OF HAROLD WEBER [Plaintiffs' Exhibit 4], ¶XV; LETTER FROM DENNIS SMITHSON TO HAROLD WEBER, FEB. 3, 1999, [Plaintiffs' Exhibit 10, at pp.D00727-729].

The Relief Sought is Appropriate Under *Varity*, *Great-West*, and ERISA Section 409(a)

This Court has twice determined that Plaintiffs have properly stated a cause of action for equitable relief under *Varity Corp. v. Howe*, 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996). See AMENDED DECISION AND ORDER, JAN. 3, 2001, pp.16-17, (127 F.Supp.2d at 451); OPINION AND ORDER, MARCH 8, 2004, pp.13-17, (308 F.Supp.2d at 299-300).

The Court's findings have been appropriate, as Plaintiffs have alleged two separate and distinct wrongs. The first consists of the failure properly to identify participants and beneficiaries in accordance with plan documents, in order to ensure that the *Plans* received all contributions to which they are entitled.²⁷ The second consists of the failure to provide benefits – or other forms of equitable restitution or relief – from the Plans to the *employees*.

In *Great-West v. Knudson*, cited by Defendant, the Plan, (which has no standing to sue under Section 502(a)(1)), attempted to recover money damages from a participant by simply characterizing the contractual remedy as “equitable restitution” under Section 502(a)(3).²⁸

In this case, by contrast, the plaintiffs, (who, as discussed more fully *infra*, have standing under both 502(a)(2) and 502(a)(3)), have prayed for a judgment “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

²⁷See, e.g., SECOND AMENDED COMPLAINT, ¶114. See generally, *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).

²⁸“Petitioners seek, in essence, to impose personal liability on respondents for a contractual obligation to pay money.” *Great-West Life v. Knudson*, 534 U.S. 204, 210, 122 S.Ct. 708, 712-713 (2002).

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."²⁹ These remedies fall squarely within the "carefully crafted and detailed enforcement scheme"³⁰ defined in ERISA Sections 409, 502(a)(2), and 502(a)(3).³¹

In *Kishter v. Principal Life*, cited by Defendants, the plaintiff was told by his employer that insurance coverage was in force, when, in fact, it was not. The plaintiff sued to recover the funds that plaintiff would have received from the insurance company had the coverage been in place. Unlike the present case, **no losses to the plan as a whole were alleged.** *Kishter v. Principal Life*, 186 F.Supp.2d 438 (S.D.N.Y. 2002). Significantly, the court in *Kishter* recognized that "breach of fiduciary claims are proper under ERISA §502(a)(3), including breach of fiduciary claims seeking individualized remedies." *Kishter*, 186 F.Supp.2d at 443; *citing*, *Varity*, 516 U.S. at 507-515, 116 S.Ct. at 1075-1079; *Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 89 (2d Cir. 2001). The court then goes on to acknowledge a number of cases in which plaintiffs had obtained similar

²⁹PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, pp.2-3. *See also*: SECOND AMENDED COMPLAINT, ¶¶ 101-106, 114, 116, 120, and Prayer for Relief.

³⁰*Great-West*, 534 U.S. at 209, 122 S.Ct. at 712; *citing*, *Mertens v. Hewitt Associates*, 508 U.S. 248, 254, 113 S.Ct. 2063, 2067, 124 L.Ed.2d 161 (1993).

³¹ERISA Section 409 obligates a fiduciary to "make good to such plan any losses to the plan..., to restore to such plan any profits which have been made..., and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." 29 U.S.C. §1109(a). ERISA Section 502(a)(2) permits a plan participant or beneficiary to seek appropriate relief under Section 409. 29 U.S.C. §1132(a)(2). ERISA Section 502(a)(3) permits a plan participant or beneficiary to enjoin any action which violates the Plan or ERISA, and "to obtain other appropriate equitable relief." 29 U.S.C. §1132(a)(3). *See, e.g.*, *Liss v. Smith*, 991 F.Supp. 278, 312 (S.D.N.Y. 1998) ("ERISA grants to the courts broad authority to fashion remedies for redressing the interests of participants and beneficiaries); *quoting*, *Donovan v. Mazzola*, 716 F.2d 1226, 1235 (9th Cir. 1983); *Delgrosso v. Spang & Co.*, 769 F.2d 928, 937 (3rd Cir. 1985) ("A federal court enforcing fiduciary obligations under ERISA is given broad equitable powers to implement its remedial decrees").

individualized relief. *See, e.g., Dunnigan v. Met. Life*, 277 F.3d 223, 228-229 (2d Cir. 2002); *Strom v. Goldman Sachs & Co.*, 202 F.3d 138, 143-150 (2d Cir. 1999); *Fotta v. Trustees of United Mine Workers*, 165 F.3d 209, 211-214 (3rd Cir. 1998). With apparent reluctance, the court ultimately concluded that the relief was not appropriate because the action was simply a “suit to compel the defendant to pay a sum of money to the plaintiff.” *Kishter*, 186 F.Supp.2d at 445; *citing, Great-West*, 534 U.S. at 210, 122 S.Ct. at 713.

In this case, by contrast, Plaintiffs seek, among other things: (i) appointment of an independent fiduciary;³² (ii) restoration of plan losses;³³ and, (iii) reinstatement, equitable restitution, or other appropriate relief for Plaintiffs and others who were denied eligibility.³⁴

The fact that these remedies might ultimately inure to the benefit of plaintiffs or other plan participants and beneficiaries does not render the relief inappropriate or unauthorized by Sections 502(a)(2) or 502(a)(3). As noted in *Herman*:

Defendants’ contention that the government’s breach of fiduciary duty claim is in reality an impermissible claim for benefits is rejected. **That misclassified employees might have been deprived of benefits does not mean that the plans themselves could not have been injured as well.** The government has alleged injury to the plans. It contends, for example, that

³²*See* OPINION AND ORDER, pp.14-15, (308 F.Supp.2d at 300); *citing, Marshall v. Snyder*, 572 F.2d 894, 901 (2d Cir. 1978). *See also, e.g., Katsaros v. Cody*, 744 F.2d 270, 281 (2d Cir.1984), *cert. denied*, 469 U.S. 1072 (1984).

³³ERISA Section 409, in this regard, expressly provides that a breaching fiduciary “shall be personally liable to make good to such plan any losses to the plan” as well as “other equitable or remedial relief as the court may deem appropriate.” 29 U.S.C. §1109(a). *See also, e.g., Central States v. Independent Fruit & Produce*, 919 F.2d 1343 (8th Cir. 1990) (injunction to enforce employers’ contributions under Section 502(a)(3)).

³⁴*See, e.g., Great-West, supra* (equitable restitution available under Section 502(a)(3)); *In re: Unisys Corp. Retiree Medical Benefits Lit.*, 57 F.3d 1255, 1269 (3rd Cir. 1995), *cert. denied*, 517 U.S. 1103 (1996) (restitutionary reimbursement of back benefits is available under Section 502(a)(3)); *DeSimone v. Transprint USA*, 1996 U.S. Dist. LEXIS 5700 (S.D.N.Y. April 29, 1996) (reinstatement of benefits constitutes traditional equitable relief under *Mertens*). *See also, Liss v. Smith*, 991 F.Supp. 278, 312 (S.D.N.Y. 1998) (“ERISA grants to the courts broad authority to fashion remedies for redressing the interests of participants and beneficiaries); *quoting, Donovan v. Mazzola*, 716 F.2d 1226, 1235 (9th Cir. 1983); *Delgrosso v. Spang & Co.*, 769 F.2d 928, 937 (3rd Cir. 1985) (“A federal court enforcing fiduciary obligations under ERISA is given broad equitable powers to implement its remedial decrees”).

employees who should have been included were not and that **as a consequence the plans suffered losses**. The government seeks relief on behalf of the plans, including, for example, removal of fiduciaries pursuant to ERISA §409 and recoupment of damages allegedly suffered by the plans.

Herman v. Time Warner, 56 F.Supp.2d 411, 418 (S.D.N.Y. 1999) (emphasis supplied). *See generally*, Varity, *supra*, 516 U.S. at 507-515, 116 S.Ct. at 1075-1079. *See also*, FED. R. CIV. PRO. 8(a) (“Relief in the alternative or of several different types may be demanded”). In this case, likewise, that the Plaintiffs may have been wrongfully deprived of benefits does not change the fact that Defendant’s breaches have caused losses to the Texaco and ChevronTexaco Plans. Plaintiffs, therefore, seek appropriate statutory and equitable relief, including the appointment of an independent fiduciary and recoupment of the losses suffered by the Plans.

Plaintiffs Have Standing

Even if Defendant were correct that Plaintiffs are not eligible participants or beneficiaries of the 1994 Texaco Plans, Plaintiff Harold Weber is nevertheless a qualified participant of the Texaco Employees Thrift Plan and the Texaco Retirement Plan based on his employment with Texaco from 1966 thru 1984.³⁵ Mr. Weber, therefore, has standing to recover *all* losses incurred as a result of Defendant’s breach of fiduciary duty to one or more of the Texaco Plans. 29 U.S.C. §§ 1132(a)(2), 1132(a)(3). *See also, generally: Varity Corp. v. Howe, supra.*

All four of the Plaintiffs, moreover, have a “colorable claim” that they are eligible to participate in the Texaco Plans. *See, e.g., Mullins v. Pfizer*, 23 F.3d 663, 668 (2d Cir. 1994). Plaintiffs, therefore, have standing to assert the present claims. OPINION AND ORDER, p.17, (308

³⁵AFFIDAVIT OF HAROLD WEBER, ¶XV [Plaintiffs’ Exhibit 4]; LETTER FROM DENNIS SMITHSON TO HAROLD WEBER, FEB. 3, 1999, [Plaintiffs’ Exhibit 10, at pp.D00727-729].

F.Supp.2d at 301).

Plaintiffs Do Not Seek Removal of ChevronTexaco as Plan Administrator To Broadly Manage and Administer Plans on a Prospective Basis, But Only to Remedy Past Harm

Plaintiffs have never suggested that ChevronTexaco be removed as Plan Administrator and replaced by an independent fiduciary to broadly administer the ChevronTexaco Plans on a prospective basis, but only that an independent fiduciary be appointed to make retrospective eligibility determinations, for the benefit of the ChevronTexaco Plans and all existing and/or otherwise eligible participants and beneficiaries. This is an appropriate equitable remedy. *See* OPINION AND ORDER, pp.14-15, (308 F.Supp.2d at 300); *citing*, Marshall v. Snyder, 572 F.2d 894, 901 (2d Cir. 1978). *See also*, Liss v. Smith, 991 F.Supp. 278, 312 (S.D.N.Y. 1998) (“ERISA grants to the courts broad authority to fashion remedies for redressing the interests of participants and beneficiaries); *quoting*, Donovan v. Mazzola, 716 F.2d 1226, 1235 (9th Cir. 1983); Delgrosso v. Spang & Co., 769 F.2d 928, 937 (3rd Cir. 1985) (“A federal court enforcing fiduciary obligations under ERISA is given broad equitable powers to implement its remedial decrees”).

**THE FINDINGS, CONCLUSIONS, RECOMMENDATIONS, DENIALS,
AND OTHER ACTIONS AND/OR FAILURES TO ACT BY DEFENDANTS CONSTITUTE AN
ABUSE OF DISCRETION, WHETHER REVIEWED UNDER A DEFERENTIAL STANDARD OR DE NOVO
(Defendants’ Point VIII)**

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.”³⁶

³⁶DECISION AND ORDER, pp.18-19, (Schultz v. Texaco Inc., 127 F.Supp.2d 443, 451 (S.D.N.Y. 2001)).

Ms. Stoner, in this regard, had a duty to act in accordance with plan documents.³⁷ But the 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.³⁸ In fulfilling these duties, the defendant had the fiduciary responsibility to act with reasonable prudence, diligence, and care,³⁹ “solely in the interests of the participants and beneficiaries, for the exclusive purpose of providing benefits to participants and their beneficiaries.”⁴⁰

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.⁴¹ Furthermore, to her knowledge, no Plan Administrator had taken steps to identify and include participants and beneficiaries since at least 1989.⁴²

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.⁴³

³⁷29 U.S.C. §1104(a)(1)(D).

³⁸Central 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 (3rd Cir. 1995); Struble v. New Jersey Brewery Employee’s Welfare Trust Fund, 732 F.2d 325, 336-337 (3rd Cir. 1984).

³⁹29 U.S.C. §1104(a)(1)(B).

⁴⁰29 U.S.C. §1104(a)(1)(A).

⁴¹STONER DEPO, p.36.

⁴²STONER DEPO, p.36.

⁴³STONER 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,⁴⁴ 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."⁴⁵ 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."⁴⁶ 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 eligibility issue

⁴⁴OPINION AND ORDER, pp.22-27, (Schultz v. Stoner, 308 F.Supp.2d 289, 304-308 (S.D.N.Y. 2004)).

⁴⁵OPINION AND ORDER, p.22, (308 F.Supp.2d at 304).

⁴⁶OPINION AND ORDER, p.23, (308 F.Supp.2d at 305).

in question.”⁴⁷

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.⁴⁸ 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.⁴⁹ 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.”⁵⁰ Like Ms. Stoner,⁵¹ the Review Panel could shed no light on the basis of its conclusions.⁵²

Defendants’ New “Interpretations” Are Irreconcilable With the Clear and Express Language in the Plans

The “Plan Administrator” (*i.e.* the ChevronTexaco Legal Department) advanced two principle arguments for denying eligibility to Plaintiffs: **(a)** Plaintiffs were “characterized by or under contract with Texaco as independent contractors”;⁵³ and, **(b)** Plaintiffs were not “employed by” Texaco in the

⁴⁷OPINION AND ORDER, p.24, (308 F.Supp.2d at 305).

⁴⁸See POSITION STATEMENT OF THE PLAN ADMINISTRATOR [Plaintiffs’ Exhibit 24]; DEPOSITION OF JOHN F. HUEY [Plaintiffs’ Exhibit 29], pp.21-24, 28-31.

⁴⁹TRANSCRIPT OF PROCEEDINGS, JUNE 7, 2004 [Plaintiffs’ Exhibit 28], pp.4-5; DEPOSITION OF RHONDA MORRIS (30(b)(6)) [Plaintiffs’ Exhibit 31], pp.12-19.

⁵⁰REVIEW PANEL REPORT OF FINDINGS [Plaintiffs’ Exhibit 27], p.4.

⁵¹See OPINION AND ORDER, p.28, (308 F.Supp.2d at 308); STONER DEPO, pp.52-53, 58, 86.

⁵²MORRIS DEPO, pp.28-45, 77-78, 82-85.

⁵³POSITION STATEMENT, pp.11-15.

first instance.⁵⁴ The first argument is supported almost entirely by vague and unreliable statements in a newly submitted Affidavit that was not even considered by the Review Panel; the second argument is a recent assertion, which was never previously raised by Ms. Stoner or her Counsel during the initial claims process or in litigation. Both arguments are, at their essence, tortured applications of a “Leased Employee” exclusion, to the effect that any worker who is paid by a third-party payroll service is either not “employed by” Texaco and/or was characterized as an “independent contractor” by the company. Both arguments are irreconcilable with the clear and express language in the Plans.

There must be a distinction, in this regard, 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.

Similarly, there must be some workers who are both “employed by” Texaco, and yet also paid through third-party staffing agencies, or else “Leased Employees” could not be included as workers “employed by” Texaco in the first instance.

The reality is that Texaco could have, in its 1994 Plans, defined a “leased employee” very broadly and expansively to exclude workers such as Mr. Schultz, Ms. Jackson, Mr. Weber, and Ms. Criddle.⁵⁵ For whatever reason, however, Texaco chose not to do this. The company, instead,

⁵⁴POSITION STATEMENT, pp. 7-11.

⁵⁵*See, e.g.*, 2002 CHEVRONTEXACO RETIREMENT PLAN [Plaintiffs’ Exhibit 21], §§ 1, 2(a) and (b); 2002 CHEVRONTEXACO EMPLOYEES SAVINGS INVESTMENT PLAN [Plaintiffs’ Exhibit 22], §1. *See also, e.g.*, Montesano v. Xerox, 177 F.Supp.2d 147, 153 n.2 (D.Conn. 2000), *aff’d*, 256 F.3d 86 (2d Cir. 2001) (excluding not only Leased Employees under Section 414(n) of the Internal Revenue Code, but also “leased employees”, “contract workers”, and “other third party personnel”, “regardless of whether such persons may constitute employees under the common law”); Casey v. Atlantic Richfield, 2000 U.S. Dist. LEXIS 6836, at *22 (C.D.Cal. March 30, 2000) (defining a “leased employee” as defined in Section 414(n) of the Internal Revenue Code *or* “with whom the Company has entered into

extended eligibility to all workers providing services to Texaco, excluding only: (i) individuals who were independent contractors, and (ii) “leased employees” as defined under Internal Revenue Code Section 414(n).⁵⁶ Knowing full well that the plaintiffs cannot be excluded as “leased employees” because they do not meet the statutory definition – which is also the *Plan’s* definition – the Plan Administrators continue to manufacture alternative, baseless, pretexts for exclusion.

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.⁵⁷

Neither the original denial letters issued by Defendant Stoner,⁵⁸ nor her entire deposition testimony,⁵⁹ nor the briefs submitted by Defense Counsel,⁶⁰ suggested that Plaintiffs were not

an arrangement either directly or through a third party, where the individual is deemed by the Company an independent contractor or an employee of a third party, regardless of whether any governmental entity shall determine that such individual should have been classified as a common law employee of the Company or a joint employee of the Company and a third party”); Administrative Committee of Time Warner v. Biscardi, 2000 U.S. Dist. LEXIS 16707 (S.D.N.Y. Nov. 17, 2000) (limiting participation to “employees that are paid on the ‘regular payroll’” of Time Warner or “regular employees”).

⁵⁶See ORDER, pp. 8, 19 fn.11, (308 F.Supp.2d at 296, 302 n.11); STONER DEPO, pp.52-53,133-134.

⁵⁷See 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.

⁵⁸See 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].

⁵⁹See DEPOSITION OF JANET L. STONER, (in particular, pp.52-53, 58, and 86).

⁶⁰See MEMORANDUM IN SUPPORT OF DEFENDANT JANET L. STONER’S MOTION FOR SUMMARY JUDGMENT (dated May 1, 2001) (in particular, pp.9-10, 14).

“employed by” Texaco.

Although the Review Panel’s decision on remand is ambiguous and unclear, 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.⁶¹

While Defendants should be estopped from advancing such an argument at this point,⁶² 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”;⁶³ **(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”;⁶⁴ **(iv)** the Eligibility provisions, which refer to individuals “assigned to service” with Texaco;⁶⁵ **(v)** the evidence relating to the manner in which Plaintiffs provided services to Texaco;⁶⁶ and, **(vi)** Texaco business records which characterize the Plaintiffs as being “employed by” Texaco

⁶¹ 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.

⁶² *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”).

⁶³ 1994 EMPLOYEES THRIFT PLAN, §1.29; 1994 RETIREMENT PLAN, §1.30.

⁶⁴ Compare, for example: 1994 THRIFT PLAN §§ 1.29, 2.01, and 1994 RETIREMENT PLAN §§ 1.30, 2.01, with, 2002 CHEVRONTEXACO RETIREMENT PLAN, § 2(c), (d), and 2002 CHEVRONTEXACO EMPLOYEES SAVINGS INVESTMENT PLAN, §§ 3.3, 3.4, (as well as the Text of the 1989 Texaco Plans and the 1999 Texaco SPDs).

⁶⁵ 1994 THRIFT PLAN §2.01(A); 1994 RETIREMENT PLAN §2.01(B).

⁶⁶ See SCHULTZ AFFIDAVIT, ¶¶ III-XVII; JACKSON AFFIDAVIT, ¶¶ III-XV; CRIDDLE AFFIDAVIT, ¶¶ III-XVI; WEBER AFFIDAVIT, ¶¶ IV-XI, XIV, XXVIII-XXIX.

and/or TEPI.⁶⁷

Unlike the plans at issue in cases such as *Biscardi* and *Montesano*, the Texaco Plans do **not** have Texaco payroll requirements.⁶⁸ The Texaco Plans, rather, expand eligibility to all employees “assigned to service” in the United States.⁶⁹ There is no requirement that an “employee” be carried on the Texaco payroll.⁷⁰ Yet, significantly, employees assigned to service outside the United States must be “carried on a United States payroll.”⁷¹ 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:

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?

⁶⁷See 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.

⁶⁸*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*.

⁶⁹EMPLOYEES’ THRIFT PLAN, §2.01(A)(1); RETIREMENT PLAN, §2.01(B)(1).

⁷⁰EMPLOYEES’ THRIFT PLAN, §1.29; RETIREMENT PLAN, §1.30.

⁷¹EMPLOYEES’ THRIFT PLAN, §2.01(A)(2); RETIREMENT PLAN, §2.01(B)(3).

A. No.⁷²

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.**

* * *

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

⁷²STONER DEPO, p.30. *See also*: STONER DEPO, pp.20-22.

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.⁷³

It is well-settled, moreover, that the mere payment of compensation by a third-party leasing agency does not determine "employee" status. Rather, the question of whether Plaintiffs are

⁷³MORRIS 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.

“employees” of the leasing organization is determined by an examination of control and other relevant factors by the leasing organization as set forth in *Professional & Executive Leasing*. The court, in that case, held that individuals working for the employer under contract of employment arrangements set forth in a personnel lease contract were not “employees” of the leasing agency (and/or the recipient) even though they were compensated and characterized as such by the leasing agreement. In spite of a contractual provision purporting to create an employer-employee relationship between the worker and the leasing agency, the court found that “the objective economic reality of the relationship is that petitioner merely performs a bookkeeping and payroll service function while the Worker remains either self-employed or the employee of the Recipient.”⁷⁴

Nevertheless, the Review Panel did not engage in such an analysis, following the ChevronTexaco Legal Department’s suggestion to disregard the question of whether Plaintiffs were “common law” employees.⁷⁵ Assuming, *arguendo*, 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”.⁷⁶ A confidentiality agreement relating to Texaco’s proprietary information,

⁷⁴*Professional & Executive Leasing*, *supra*, 89 T.C. at 234.

⁷⁵POSITION STATEMENT OF THE PLAN ADMINISTRATOR, pp.2-4; REVIEW PANEL FINDINGS, p.4; MORRIS DEPO, pp.45-46.

⁷⁶*See* SELECTED EMPLOYMENT RECORDS; *see also*, PROFESSIONAL TEMPORARIES AGREEMENT, ¶16(a); METRO CONTRACT, ¶¶ 2, 5.

for example, repeatedly refers to Mr. Schultz’s “employment at Texaco.”⁷⁷ One TEPI document submitted by the “Plan Administrator” identifies Mr. Schultz as a “Contract Employee” of Texaco.⁷⁸ 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 1991.⁷⁹

Plaintiffs Were Not “Characterized” as “Independent Contractors”

Plaintiffs were never characterized by Texaco as “independent contractors.”⁸⁰ In fact, Plaintiffs were characterized by Texaco as:

- “Employees”⁸¹
- “Salaried... Employees”⁸²
- “Statutory Employees”⁸³
- “Temporary Employees”⁸⁴
- “Contract Personnel”⁸⁵
- “Contract Employees”⁸⁶

Texaco did not issue 1099s to the Plaintiffs.⁸⁷

Not even the contracts relied upon by Defendant “characterize” Plaintiffs as “independent

⁷⁷SELECTED EMPLOYMENT RECORDS, at p. PLF000041.

⁷⁸SELECTED EMPLOYMENT RECORDS, at p.PLF000104.

⁷⁹SELECTED EMPLOYMENT RECORDS, at pp.PLF000121-122.

⁸⁰*See, e.g.*, STONER DEPO, pp.128-134; *see also, e.g.*, STONER DEPO, pp.38, 58-63, 112-115.

⁸¹*See, e.g.*, SELECTED EMPLOYMENT RECORDS, at pp. PLF000082, 105-106, 143-144, 169, and 390.

⁸²*See, e.g.*, SELECTED EMPLOYMENT RECORDS, at p.PLF000052.

⁸³*See, e.g.*, PROFESSIONAL TEMPORARIES AGREEMENT, ¶16(a).

⁸⁴*See, e.g.*, SELECTED EMPLOYMENT RECORDS, at pp. PLF000041.

⁸⁵*See, e.g.*, METRO CONTRACT, ¶¶2, 5; SELECTED EMPLOYMENT RECORDS, at pp. PLF000066, 129, 130, 131.

⁸⁶*See, e.g.*, SELECTED EMPLOYMENT RECORDS, at pp. PLF000103, 104.

⁸⁷This, 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.

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.”⁸⁸ 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 day to day TEPI supervision.*”⁸⁹ The agreement between Texaco and Professional Temporaries even stipulates that Plaintiffs are the “*Statutory Employees*” of Texaco.⁹⁰

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.⁹¹ 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.⁹² 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

⁸⁸METRO CONTRACT, ¶5.

⁸⁹METRO 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.

⁹⁰PROFESSIONAL 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.

⁹¹*See* POSITION STATEMENT OF THE PLAN ADMINISTRATOR, p.12.

⁹²HUEY DEPO, pp.23-30; *see also*, LETTER FROM J.F. HUEY TO PLAINTIFFS’ COUNSEL ENCLOSING REVIEW PROCESS PROVISIONS [Plaintiffs’ Exhibit 19].

for the Review Panel,⁹³ Mr. Huey testified that:

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.⁹⁴

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

⁹³While 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.

⁹⁴From the face of Mr. Phillips’ Affidavit, it would appear that he never worked for TEPI.

- A. No, I don't.⁹⁵
- Q. Are you aware that Janet Stoner worked for TEPI in the New Orleans office?⁹⁶
- 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,⁹⁷ 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.⁹⁸

⁹⁵From 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.

⁹⁶STONER DEPO, pp. 74, 88-92.

⁹⁷See STONER DEPO, pp. 74, 88-92.

⁹⁸HUEY DEPO, pp.32-35.

The contention that all “leased employees” were also “characterized” by Texaco as “independent contractors” is not only inconsistent with Texaco’s own contemporaneous business 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.⁹⁹ *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.¹⁰⁰

For these or other reasons, the Review Panel did not find the Phillips Affidavit significant,¹⁰¹ 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**

⁹⁹See, e.g., 26 U.S.C. §414(n)(5).

¹⁰⁰Similarly, 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.

¹⁰¹REVIEW PANEL FINDINGS, p.1. See also, MORRIS DEPO, p.27.

Texaco as “independent contractors.”

- 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....**¹⁰²

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

The Administrative Process Has Been Little More Than A Sham

The Defendants’ determination that Plaintiffs were not “employees” of Texaco is without reason, unsupported by substantial evidence, and erroneous as a matter of law.¹⁰³ Prior to sending denial letters to Plaintiffs, (which include material misrepresentations), Ms. Stoner sought the advice of Texaco’s Legal Department as to the denial of eligibility and the basis for same.¹⁰⁴ Ms. Stoner 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 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.”¹⁰⁵ 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,

¹⁰²MORRIS DEPO, pp.76-77.

¹⁰³Wojciechowski 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).

¹⁰⁴STONER DEPO, p.67.

¹⁰⁵STONER DEPO, pp.56-58, 76-78.

versus advising the company (or acting) in the capacity of a Plan Administrator.¹⁰⁶ 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.¹⁰⁷ 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”.¹⁰⁸

Ms. Stoner’s original denial was marred by the lack of any established procedures or criteria; 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.¹⁰⁹

Ms. Morris – who had absolutely no experience serving on a Review Panel or even reviewing

¹⁰⁶HUEY DEPO, pp.13-14, 19. *See also*, MORRIS DEPO, pp.22, 86-87.

¹⁰⁷*DeFelice v. American International Life*, 112 F.3d 61, 66 (2d Cir. 1997). *See* STONER DEPO, pp.30-35, 102-104; HUEY DEPO; MORRIS DEPO, p.89.

¹⁰⁸STONER DEPO, pp.30-35; HUEY DEPO; MORRIS DEPO, p.89.

¹⁰⁹*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.

initial Claims¹¹⁰ – 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.¹¹¹ 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 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.¹¹²

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

¹¹⁰MORRIS DEPO, pp.20-21.

¹¹¹*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.

¹¹²*Compare* PLAINTIFFS’ SUBMISSION, pp.2-3; *with*, REVIEW PANEL FINDINGS, pp.1-2.

desired by the ChevronTexaco Legal Department, acting as the “Plan Administrator”.¹¹³

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.

Conclusion

For these reasons, and for the reasons stated in PLAINTIFFS’ RESPONSE TO DEFENDANTS’ STATEMENT OF MATERIAL FACTS NOT IN DISPUTE, Defendants’ Motion for Summary Judgment should be denied.

Respectfully submitted,

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¹¹³*See, e.g.*, TRANSCRIPT OF PROCEEDINGS, JUNE 7, 2004 [Plaintiffs’ Exhibit 28], pp.4-5. *See also*, MORRIS DEPO, pp.22, 24-27, 86-87.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above and foregoing Opposition has been served upon Counsel for Defendant, BY OVERNIGHT DELIVERY, this 4th day of November, 2004.

STEVE HERMAN