

No. _____

In The

Supreme Court of the United States

WILLIAM L. PENDER AND DAVID L. McCORKLE, ON BEHALF OF THEMSELVES AND ALL
OTHERS SIMILARLY SITUATED,

Applicants,

v.

Bank of America Corporation, Bank of America, N.A., Bank of America Pension
Plan, Bank of America 401(k) Plan, Bank of America Corporation Corporate
Benefits Committee, and Bank of America Transferred Savings Account Plan,

Respondents.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable John G. Roberts, Jr., Chief Justice of the Supreme Court
of the United States and Circuit Justice for the Fourth Circuit

JULIA PENNY CLARK
LEON DAYAN
(*Counsel of Record*)
Bredhoff & Kaiser, PLLC
805 Fifteenth Street, N.W.
Suite 1000
Washington, DC 20005
(202) 842-2600
jpclark@bredhoff.com

ELI GOTTESDIENER
Gottesdiener Law Firm, PLLC
498 7th Street
Brooklyn, NY 11215
(718) 788-1500
eli@gottesdienerlaw.com

Counsel for Applicants

**To the Honorable John G. Roberts, Jr., Chief Justice of the Supreme Court of the
United States and Circuit Justice for the Fourth Circuit:**

Applicants respectfully request a thirty (30) day extension of time for filing a petition for a writ of *certiorari* to the United States Court of Appeals for the Fourth Circuit seeking review of that court's judgment and decision in *Pender v. Bank of America Corporation*, 4th Cir. No. 17-1485 ("Opinion"). In support of this requested extension of time, applicants state as follows:

1. A divided panel of the court of appeals rendered the unpublished Opinion on June 5, 2018, and the court of appeals denied applicants' petition for rehearing *en banc* on July 3, 2018 (a copy of the Opinion and the order denying rehearing are attached hereto as Exhibits 1 and 2, respectively). Applicants' petition for a writ of *certiorari* is therefore presently due on October 1, 2018. This Court has jurisdiction over such a *certiorari* petition pursuant to 28 U.S.C. § 1254(1).
2. In this ERISA action, Plaintiffs-Applicants are the representatives of a certified class of participants in Defendant Bank of America 401(k) Plan ("401(k) Plan"), whose retirement funds were illegally transferred into the general account of Defendant Bank of America Pension Plan ("Pension Plan") to invest however the Bank saw fit.¹ Op. at 3-4. Under ERISA § 502(a)(3), Plaintiffs are entitled to "appropriate equitable relief" for the Bank's unlawful commingling of their funds with the Pension Plan's assets. Plaintiffs seek the traditional equitable remedy of an accounting of the profits obtained by the Bank, in the form of a proportionate share of the profits earned by the Pension Plan during the period in which Plaintiffs' funds were unlawfully commingled. Op. at 7.

¹ We refer collectively to the 401(k) Plan, the Pension Plan, and the other Defendants as the "Bank."

3. Under this Court’s ERISA § 502(a)(3) “appropriate equitable relief” jurisprudence, a plaintiff is entitled to the categories of relief available in equity courts prior to the 1938 merger of courts of law and equity, as established by “standard treatises on equity.” *Montanile v. Bd. of Trs. of the Nat’l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 657 (2016). This Court has repeatedly reaffirmed that, in determining whether a remedy is available under § 502(a)(3), courts are bound by “the conditions that equity” historically attached to a remedy, rather than their own sensibilities about what is fair and equitable. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 216-17 (2002).
4. The court of appeals’ decision flouts this Court’s § 502(a)(3) jurisprudence by relying on an analysis that departs from the historic practice of equity courts, thus raising an important question meriting a grant of *certiorari*.
5. The court of appeals recognized that “the proportionate share-of-the-whole approach advanced by Plaintiffs” is a traditional equitable remedy that “finds substantial support in Restatements, treatises and case law,” Op. at 12, as well as from “authoritative legal commentators,” *id.* at 13. Moreover, the court of appeals acknowledged that this Court has “endorsed use of the proportionate-share-of-the-whole approach to determine the profit obtained by a defendant as a result of its use of unlawfully commingled funds.” *Id.* at 13.
6. Despite this overwhelming weight of authority establishing Plaintiffs’ entitlement to the proportionate-share-of-the-whole remedy they seek, the court of appeals affirmed the district court’s wholesale denial of relief to Plaintiffs for the Bank’s unlawful commingling of their funds. Judge Wynn, writing for the majority, held that the district court “retained discretion to consider other approaches” in determining Plaintiffs’

entitlement to relief and “permissibly exercised its discretion” when it denied Plaintiffs equitable relief. *Id.* at 20. In dissent, Judge Keenan would have applied the “longstanding equitable principle” of the proportionate-share-of-the-whole approach, *id.* at 28, and would have held that the district court improperly “reject[ed] an established equitable remedy in favor of preserving the Bank’s profit margin,” *id.* at 31.

7. Because the majority’s opinion permits district courts to depart from the historic practices of equity courts at their “discretion” in determining the availability of equitable relief under ERISA § 502(a)(3), it directly conflicts with this Court’s longstanding § 502(a)(3) jurisprudence and presents an important issue for this Court to resolve.
8. Julia Penny Clark argued the case before the court of appeals and is primary counsel familiar with the appellate record before the court of appeals and this Court. Ms. Clark will draft the *certiorari* petition and will argue the case before this Court in the event *certiorari* is granted.
9. Ms. Clark is in the midst of a previously-scheduled vacation overseas (from September 5 through 22, 2018) without access to her computer or files. Ms. Clark is scheduled to be in New York for an important client meeting on September 24 and therefore will not return to the office until September 25. Upon her return to the office, Ms. Clark will need to prepare for and attend other client meetings that week. Ms. Clark is also involved in active arbitration and must prepare for three days of depositions in New York during the week of October 1. Because of these obligations, Ms. Clark requires an additional thirty days to prepare the *certiorari* petition.

For the above-stated reasons, this application for extension of time in which to file a petition for a writ of *certiorari* should be granted and the time for filing said petition be extended from October 1, 2018 to October 31, 2018.

Dated: September 20, 2018

Respectfully submitted,

s/Julia Penny Clark
Julia Penny Clark
Leon Dayan
BREDHOFF & KAISER, P.L.L.C.
805 Fifteenth Street, N.W., Suite 1000
Washington, D.C. 20005
jpclark@bredhoff.com
ldayan@bredhoff.com
(202) 842-2600

Eli Gottesdiener
GOTTESDIENER LAW FIRM, P.L.L.C.
498 7th Street
Brooklyn, N.Y. 11215
eli@gottesdienerlaw.com
(718) 788-1500

Attorneys for Applicants

CERTIFICATE OF SERVICE

I, Julia Penny Clark, a member of the bar of this Court, hereby certify that copies of the Application for an Extension of Time Within Which to File Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit were served by first-class mail, postage-prepaid, and by electronic mail on this 20th day of September, 2018 on the following attorneys, who are counsel of record for all parties required under the Rules of this Court to be served:

Carter G. Phillips, cphillips@sidley.com
Sidley Austin LLP
1501 K Street NW
Washington, DC 20005
(202) 736-8000

Anne E. Rea, area@sidley.com
David F. Graham, dgraham@sidley.com
Tacy F. Flint, tflint@sidley.com
Steven J. Horowitz, shorowitz@sidley.com
Sidley Austin LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000

Irving M. Brenner, ibrenner@mcguirewoods.com
McGuire Woods LLP
201 North Tryon Street
Charlotte, NC 28202
(704) 343-2000

Attorneys for Respondents

s/Julia Penny Clark

Julia Penny Clark
Attorney for Applicants