

No. 08-810

In The
Supreme Court of the United States

SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ,
LAWRENCE M. BECKER AND XEROX CORPORATION
RETIREMENT INCOME GUARANTEE PLAN,
Petitioners,

v.

PAUL J. FROMMERT, ET AL.,
Respondents.

*On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit*

BRIEF FOR RESPONDENTS

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**COUNTERSTATEMENT OF
THE QUESTIONS PRESENTED**

Whether the court of appeals applied correct standards of review in this denial-of-benefits case under the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. 1001 et seq., when it concluded that: (a) the administrator of an ERISA plan whose denial of benefits violated ERISA was not entitled to deference regarding its opinion on how to remedy the violation and (b) the district court’s choice of remedy should be reviewed for abuse of discretion.

PARTIES TO THE PROCEEDING

The Petitioners in this case are present or former Xerox Corporation Pension Plan Administrators Sally L. Conkright, Patricia M. Nazemetz, and Lawrence M. Becker, as well as the Xerox Corporation Retirement Income Guarantee Plan.

The Respondents in this case are Paul J. Frommert, Alan H. Clair, Donald S. Foote, Thomas I. Barnes, Ronald J. Campbell, Frank D. Commesso, William F. Coons, James D. Gagnier, Brian L. Gaita, William J. Ladue, Gerald A. Leonardo Jr., Frank Mawdesley, Harold S. Mitchell, Walter J. Petroff, Richard C. Spring, Patricia M. Johnson, F. Patricia M. Tobin, Nancy A. Revella, Anatoli G. Puschkin, William R. Plummer, Michael J. McCoy, Larry J. Gallagher, Napoleon B. Barbosa, Alexandra Spearman Harrick, Janis A. Edelman, Patricia H. Johnston, Kenneth P. Parnett, Joyce D. Cathcart, Floyd Swaim, Julie A. McMillian, Dennis E. Baines, Ruby Jean Murphy, Matthew D. Alfieri, Kathy Fay Thompson, Mary Beth Allen, Craig R. Spencer, Linda S. Bourque, Thomas Michael Vasta, Frank C. Darling, Clark C. Dingman, Carol E. Gannon, Joseph E. Wright, David M. Rohan, David B. Ruddock, Charles Hobbs, Charles Zabinski, Charles J. Maddalozzo, Joyce M. Pruett, William A. Craven, Maureen A. Loughlin Jones, Kenneth W. Pietrowski, Bonnie Cohen, Lawrence R. Holland, Gail A. Nasman, Steven D. Barley, Donna S. Lipari, Andrew C. Matteliano, Michael Horrocks, Candice J. White, Dennis E. Bains, Kathleen E. Hunter, John L. Crisafulli, Deborah J. Davis, Brenda H. McConnell, Kathleen A. Bowen, Robert P. Caranddo, Terence J. Kurtz, William J. Cheslock, Thomas E. Dalton, Lynn Barnsdale, Bruce D. Craig, Gary P. Hardin, Claudette

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 3 Austin W. Scott & William F. Fratcher, *The Law
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 Emp. Benefit Res. Inst., *Fundamentals of Employee
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INTRODUCTION

Respondents, longtime employees of the Xerox Corporation (“Xerox”), were all rehired after a break-in-service. Each continued to work at Xerox for a substantial time thereafter. This dispute is over the amount of pension benefits due to respondents upon retirement from Xerox after that post-rehire period.

Rehired employees (like respondents) have often previously received benefit payouts from a company pension plan. Accordingly, plan sponsors may provide that benefits earned during a second stint of service will be “offset” in some way by monies received during the first stint. In simple economic terms, increasing the offset is equivalent to decreasing the new pension.

Plans can, and do, impose offsets of varying sizes. For example, one plan may offset the entirety of monies previously received; another might offset only fifty percent. Generally speaking, plans are free to construct offsets in accordance with the compensation bargain they wish to strike with employees. Federal law, however, imposes several important requirements regarding the manner in which any such offset must be defined in the plan and communicated to employees.

From 1977 to 1989, Xerox included in its pension plan what it has always called a “phantom account offset.” This offset purported to allow Xerox to deduct from a rehired employee’s pension a “phantom” amount derived from hypothetical investment gains on monies paid years ago by a separate Xerox plan. This phantom offset was extraordinarily aggressive in valuing past distributions. Were it applied to

respondents, many would receive absolutely no pension for *years* of post-rehire work. As the Ninth Circuit held in 2006, the Xerox phantom account offset is illegal.

This lawsuit, however, is not about the legality of the phantom offset. That is so because, in 1989, as part of a major benefits redesign, *Xerox admittedly removed the phantom offset from its plan*. For the next five years, Xerox sent documents to respondents indicating that the company would deduct from their pensions only the *actual* monies they had previously received. In 1995, however, Xerox did an about-face. It informed respondents that the company would use the phantom offset to eliminate (or dramatically reduce) their pensions. Respondents objected, and after administrative resolution of the dispute proved unsuccessful, this lawsuit was filed.

In the district court, Xerox conceded that it had removed the phantom offset from the 1989 Plan. In moving for summary judgment, Xerox introduced extrinsic evidence regarding (i) its historical operation of the plan and (ii) post-1989 plan amendments and disclosures. Relying on this extrinsic evidence, Xerox argued that the 1989 Plan's generic "non-duplication" provision should be read to authorize imposition of the phantom account offset. The district court granted the motion and dismissed the complaint.

The Second Circuit reversed. While it agreed that the generic non-duplication provision in the plan could justify *some* offset, it rejected Xerox's attempted resurrection of the *phantom* offset as "arbitrary and capricious." This was not surprising: Xerox had *itself* removed the relevant offset language. And Xerox had

provided respondents, *for five years*, with personalized documents indicating that the offset would be limited to the monies that respondents had *actually received*.

In the aftermath of Xerox's abuse of discretion, the Second Circuit remanded the case. It did so having concluded that "rehired employees likely believed that their past distributions would only be factored into their benefits calculations by taking into account the amounts they had actually received." Pet. App. 47a. And it urged the district court "to employ equitable principles when determining the appropriate [offset] calculation." Pet. App. 51a. Xerox did not seek further review in this Court. Instead it submitted an extensive "remedial proposal," A151, which it has proceeded to unsuccessfully litigate for three years.

On remand, the district court held two days of hearings. After considering testimony and evidence submitted by the parties, the court held that Xerox could offset *no more than* the payments that respondents actually received. In its decision, the court emphasized that such an offset "most clearly reflects what a reasonable employee would have anticipated." Pet. App. 107a. The Second Circuit affirmed.

Now, Xerox urges this Court to reverse the Second Circuit and, in so doing, start this ten year old case virtually anew. It suggests two grounds for reversal. Xerox's primary argument is that the court of appeals was obligated to defer to one of the plan administrator's proposed "remedial approaches" (Xerox's words) regarding offset methodology. Alternatively, Xerox argues that the court of appeals was required to review *de novo* the remedial approach

adopted by the district court. Each of Xerox's arguments is without merit.

The Second Circuit correctly declined Xerox's invitation to expand radically the doctrine of judicial deference. Put simply, federal law does not require a reviewing court to afford deference to an administrator whose earlier position on the *same* issue was held to be arbitrary and capricious. Such "rerun deference" undermines benefit security and increases, rather than decreases, the costs of plan administration.

Nor did the Second Circuit err in reviewing the district court's selection of a remedial approach under an abuse of discretion standard. In any event, Xerox's focus on standards of review is unavailing. The offset methods proposed by Xerox are patently indefensible. And Xerox's claims of "windfall" make little sense given how wage/benefit tradeoffs and efficient labor markets actually work. As such, remand would serve no useful purpose. This Court should affirm the judgment and bring closure to an epic dispute which, sadly, has already outlived some of its original cast.¹

COUNTERSTATEMENT

In a case as complicated as this one, the temptation is strong to gloss over the record and focus on abstract principles. Xerox, regrettably, succumbs to that temptation in its opening brief, ignoring or mischaracterizing the facts and history of this 10-year litigation. Consequently, respondents must "set the

¹ Several respondents have already passed away. And respondents' original counsel died after certiorari was granted.

record straight.” To that end, this counterstatement will do three things. First, it will provide necessary statutory background. Second, it will examine the Xerox pension plan. Finally, it will review the relevant procedural history.

A. Statutory Background

No employer is required to sponsor a pension plan. In order to encourage sponsorship, however, the federal government offers significant tax benefits. See Stephen J. Krass, *The Pension Answer Book* 1 (2001) (“A qualified retirement plan is one of the best tax shelters available.”); 26 U.S.C. 402-404. These tax benefits are only available to pension plans that satisfy requirements set forth in the Internal Revenue Code (“Tax Code”). See 26 U.S.C. 401(a).

In regulating employer-sponsored pension plans, the Tax Code operates in conjunction with another important federal statute: the Employee Retirement Income Security Act of 1974 (“ERISA”).² “ERISA was Congress’s attempt to devise a comprehensive regulatory program to protect millions of American workers who looked to private pension plans for financial support in their retirement years.” James A. Wooten, *The Employee Retirement Income Security Act of 1974, a Political History* 1 (2004).

The statute explicitly distinguishes between two significantly different types of pension plans: “defined

² ERISA allocates primary responsibility for a great deal of regulation to the Internal Revenue Service. See 29 USC 1202(c).

contribution” (29 U.S.C. 1002(34)) and “defined benefit” (29 U.S.C. 1002(35)).

1. Defined contribution plans

A defined contribution plan is commonly referred to as an “individual account plan.” 29 U.S.C. 1102(34). That is because an employee who participates in such a plan is assigned an individual account within the plan to which money is contributed by the employee and/or the employer. *Id.*

The employee is the beneficial owner of the funds allocated to his or her individual account. And, at any given time, the account balance is equal to the total amount of past contributions adjusted to reflect the account’s share of: (1) any income or expenses, (2) any gains or losses, and (3) any forfeitures of other participants’ accounts. *Id.*

A defined contribution plan does not promise a specific amount of benefits at retirement. The employee’s retirement benefit is simply the balance of his or her account. See 29 U.S.C. 1002(23)(B); 26 U.S.C. 411(a)(7)(A)(ii).

2. Defined benefit plans

Unlike a defined contribution plan, a defined benefit plan is intended “to provide systematically for the payment of definitely determinable benefits to * * * employees over a period of years, usually for life, after retirement.” 26 C.F.R. 1.401-1(b)(1)(i).

The amount of the benefit is calculated pursuant to a formula that customarily takes into account the

participant's years of service and compensation. See Emp. Benefit Res. Inst., *Fundamentals of Employee Benefit Programs* 56 (5th ed. 1997).

Generally speaking, the specific formulas used by a defined benefit plan are a matter of contract. See 29 U.S.C. 1002(23)(A); 26 U.S.C. 411(a)(7)(A)(i). As explained below, however, both ERISA and the Tax Code include strict requirements regarding the manner in which the benefit must be defined in the plan and communicated to employees.

3. The regulation of pension plans

Defined contribution plans are designed to permit employees to experience the rewards (and, thus, bear the risk) of investment performance. See Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 Yale L. J. 451 (2004). See also Brief for Petitioners 4 (hereinafter "Pet. Br."). As such, the regulation of defined contribution plans is focused on ensuring that employees understand the suitability and desirability of available investment options.

By contrast, defined benefit plans are nothing more than subsidized deferred compensation arrangements. The thinking is simple: an employee will be indifferent as between (1) \$X in current salary and (2) a guaranteed future income stream (i.e., a pension) also worth \$X. But if the pension is subject to more favorable tax treatment, that same employee may well choose to forego \$X or more in current pre-tax wages in exchange for a pension whose pre-tax value is \$X. The government tax-favors pensions in order to encourage private retirement savings.

The success of this subsidized arrangement, however, requires that the guaranteed future income stream (i.e., the pension) be *secure*. Broadly speaking, there are two major risks to that security:

- A plan may not have the financial ability to pay the pension when it becomes due.
- An employee may forgo wages in exchange for a pension that turns out to be much smaller than he or she reasonably expected.

Both ERISA and the Tax Code include many provisions designed to mitigate these risks.³

In particular, ERISA requires that all plans “specify the basis on which payments are made * * * from the plan.” 29 U.S.C. 1102(b)(4). And the Tax Code makes clear that, in the case of defined benefit plans, this must be done “in a way which *precludes employer discretion*.” 26 U.S.C. 401(a)(25) (pertaining to “actuarial assumptions”) (emphasis added). See also 26 C.F.R. 1.401-1(b)(1)(i) (requiring that a plan provide “definitely determinable benefits”); Rev. Rul. 74-385, 1974-2 C.B. 130 (confirming that benefits are definitely determinable when computed via a fixed formula and “not within the discretion of the employer”).

ERISA also includes significant disclosure requirements. See, *e.g.*, 29 U.S.C. 1022 (requiring that

³ Numerous provisions in ERISA deal with the risk of plan insolvency. See, *e.g.*, 29 U.S.C. 1081-1086 (funding rules). None is directly relevant here.

all participants receive a summary plan description “written in a manner calculated to be understood by the average plan participant” which contains, among other things, “a description of the provisions providing for nonforfeitable pension benefits”).

These requirements are of particular importance in the context of *defined benefit* plans. Put simply, an employee cannot make an informed decision to forgo current wages in exchange for a pension if he or she does not know how that pension will ultimately be calculated.

B. The Xerox RIGP (Pre-1989)

Respondents began working for Xerox at various points between 1960 and 1985. JA 142a - 143a. Prior to 1989, each participated in *two* pension plans sponsored by Xerox. One is the Retirement Income Guarantee Plan (the “RIGP”).⁴ It is a defined benefit plan. The other was the Profit Sharing and Retirement Savings Plan (the “PSP”). It was a defined contribution plan.

Respondents left Xerox at various times before 1989 and received lump-sum distributions *solely from the PSP*. Pet. App. 25a. At that point, each ceased to be a participant in *any* Xerox plan. Each then had full control over the use of the proceeds received from his or her “cashed-out” individual account. Pet. App. 71a.

⁴ The RIGP was drafted by Xerox in 1977. It can be found in the Frommert I Appendix at 675-769 (hereinafter, citations to that appendix will take the form “F1A___”). It was completely “restated” (*i.e.*, updated and reprinted in full form) in 1981, 1983, 1985, 1987, 1989, 1993, 1996, 1998, and 1999. F1A771-1451.

Respondents were subsequently rehired by Xerox. Pet. App. 25a. Upon rejoining the company, each was reinstated as a participant *in the RIGP*. Pet. App. 71a. This lawsuit is a dispute over the amount of benefits each respondent is now due from that plan. Its resolution must begin with a basic understanding of the RIGP and its pre-1989 coordination with the PSP.

1. The accrued benefit

Because the RIGP is a defined benefit plan, it must include a definition of the term “accrued benefit.” 29 U.S.C. 1002(23)(A). That definition is, and always has been, located in the opening section of the plan:

Accrued Benefit. The normal retirement benefit which a Member has earned up to any date, and which is payable at Normal Retirement Date in an amount computed in accordance with Section 4.2 * * * *

F1A675. From 1977 until 1989, the text of that section went virtually unchanged. F1A775, 835, 892, and 970.

Section 4.2—the provision explicitly referenced in the above §1.1—provided that “an eligible Member shall be entitled to a monthly normal retirement benefit of the largest of [the formulas set forth in Section 4.2]a, [Section 4.2]b, or [Section 4.2]c below.” F1A702. The text of these sub-sections also went virtually unchanged from 1977 until 1989. See F1A702, 793, 851, 910, and 988.

The §4.2 formulas require that several calculations be performed.⁵ First, the participant's five highest years of compensation at Xerox are divided by 60. F1A702. This yields his or her "Average Monthly Compensation." F1A684. Next, the participant's Average Monthly Compensation is multiplied by 1 and 2/3%. F1A702. The resulting amount is then multiplied by the total number of years the participant worked at Xerox. F1A696-698, 702. At that point, a base RIGP monthly benefit has been established. F1A702.

To determine the participant's accrued benefit, several deductions are then calculated and subtracted from the base RIGP monthly benefit. The 1977 RIGP included six such deductions. F1A702-703. The 1981, 1983, 1985, and 1987 Restatements each included those same six deductions plus a seventh one. F1A793-794, 851-852, 910-911, and 988-989. As explained below, one such deduction – found in §4.2a(ii) of all pre-1989 Restatements – is at the center of this dispute.

2. The floor-offset arrangement

From 1977 through 1989, the RIGP made explicit mention of a *separate defined contribution plan*, the PSP (i.e., the Xerox Corporation Profit Sharing and Retirement Savings Plan). See F1A691, 782, 842, 900, 978. It did so because the RIGP and PSP coordinated benefits through a complex technique known as a

⁵ The explanation above is based on §4.2a. But §§4.2b and 4.2c do not differ from §4.2a in any way which is relevant to this case.

“floor-offset” arrangement. Generally speaking, a floor-offset arrangement works as follows:

The defined benefit plan guarantees only a minimum total benefit (i.e., a floor). It does so by utilizing formulas which provide that the accrued benefit under the defined benefit plan is merely the *net* amount (if any) after deducting (i.e., offsetting) the value of the employee’s accrued benefit under the defined contribution plan (i.e., his/her account balance). See Appendix 2b, Chart #1, “A Typical Floor-Offset Arrangement” (illustrating the mechanics).

Prior to 1989, the RIGP floor-offset was always found in §4.2a(ii) of the plan. Throughout this brief, respondents will refer to this *critical* provision as the “PSP Offset” because, generally speaking, it reduced an employee’s RIGP pension based upon that employee’s PSP account balance. Specifically, the PSP Offset reduced the base RIGP monthly annuity by:

the monthly amount which would be payable under a Life Annuity which could be purchased with the Member’s Retirement Account [i.e., *his or her individual account in the PSP*] assuming commencement of such annuity at the same time as the commencement of benefits under the Plan and using the Actuarial Factors *****

F1A702. See also F1A793, 852, 910, and 988 (the relevant 1981, 1982, 1985, and 1987 plan provisions); F1A692; 783-784, 842-843, 901-902, and 979-980 (the relevant 1977, 1981, 1983, 1985, and 1987 plan provisions each defining Retirement Account).

The combined effect of these provisions can be summarized as follows:

[I]f the RIGP provided a participant with an age 65 monthly annuity of \$1,500, and the participant's account in the PSP would provide a \$1,000 monthly annuity also commencing at age 65, the participant would receive a total benefit of \$1,500, with \$500 payable from the RIGP and the remaining \$1,000 payable from the PSP. Changing the example slightly, assume the PSP would provide a \$1,500 annuity, while the RIGP would provide only a \$1,000 annuity. In this situation, the participant would receive the same \$1,500 monthly annuity benefit, but the source of the benefit changes: the PSP pays the entire \$1,500 annuity, while the RIGP would pay no portion of the benefit.

Berger v. Nazametz, 157 F.Supp.2d 998, 1002 (S.D. Ill, 2001).

Throughout this litigation, it has been undisputed that the prior distributions received by each respondent came from the PSP. In other words, no respondent received any payment from the RIGP. F1A635. That is because the annuitized value of each respondent's PSP account exceeded his or her base RIGP monthly annuity. Put simply, no respondent had *any* accrued benefit under the RIGP. See Appendix 3b, Chart #2, "Respondents' Pre-1989 Distributions" (illustrating the process used to calculate the amount and source of funds distributed to each respondent when he or she initially left Xerox).

3. The treatment of prior distributions

As explained above, the benefit formulas in §4.2 of the RIGP are pegged to years of service with Xerox. These formulas have always given rehired employees credit for *all* years of employment (in some instances capped at 30 years). Pet. App. 63a; Pet. Br. 59.

The RIGP credit for *all* years of service necessarily means that after rehired employees rejoin the RIGP, they will accumulate benefits calculated using both their post-rehire *and pre-rehire* years of employment. But some of these rehired employees may have previously received pension benefits *from the RIGP*; others may (like respondents) have received a prior distribution *from the PSP*; still others may have previously received benefits *from both plans*. This presented an important planning question for Xerox: How, if at all, should these prior distributions be taken into account in calculating the accrued benefit of a rehired employee who rejoins the plan?

Defined benefit plans treat prior distributions in a variety of ways, depending on the compensation bargain they wish to strike with employees. In the words of two of Xerox's own *amici*:

Just as defined benefit plans include offsets for a variety of different retirement arrangements, defined benefit plans utilize a variety of different methodologies for implementing offsets. For example, some plans include a complete offset, i.e., offset for 100% of the value of the coordinated retirement arrangement, while other plans provide for a partial offset,

e.g., offset for 50% of the value of the coordinated retirement arrangement.

Brief Amici Curiae of the American Benefits Council and the ERISA Industry Committee in Support of the Petitioner 10, Supreme Court docket #06-962 (brief filed in support of petition for writ of certiorari filed in *Miller et al. v. Xerox Corporation Retirement Income Guarantee Plan et al.*, 464 F.3d 871 (CA9 2006), cert. denied, 549 U.S. 1280 (2007)).

Xerox was aware of this important consideration. Prior to 1989, the RIGP included two provisions designed to address the effect of a rehired employee's prior distributions.

The Non-duplication Provision. The first relevant section of the pre-1989 RIGP was a stand-alone "non-duplication" provision. Found in §9.6 of the plan, it read as follows:

Nonduplication of Benefits. In the event any part of or all of Member's accrued benefit is distributed to him prior to his Normal Retirement Date, * * * and such Member at any time thereafter recommences active participation in the Plan, the accrued benefit of such Member based on all Years of Participation shall be offset by the accrued benefit attributable to such distribution.

F1A720. See also F1A810, 867, 931, and 1009 (the relevant 1981, 1983, 1985, and 1987 plan provisions). Put simply, the non-duplication provision disclosed a general principle: prior distributions would be

deducted (i.e., offset) in calculating the accrued benefit of a rehired employee under the RIGP.

The PSP Offset and Phantom Account. The second relevant provision in the pre-1989 RIGP was the PSP Offset discussed above. It specified a precise method by which prior distributions from the PSP would be valued for offset purposes.

As explained above, the PSP Offset specifically addressed how an employee's *current* PSP balance would be taken into account in determining his or her accrued benefit under the RIGP. It did so by reducing the base RIGP monthly annuity by "the monthly amount which would be payable under a Life Annuity which could be purchased with the Member's Retirement Account." F1A702.

The PSP Offset also specifically addressed how *prior PSP distributions* would be taken into account in determining the accrued benefit of rehired employees under the RIGP. The reason for this is because of the specific language included in the plan's definition of Retirement Account. That definition read as follows:

Retirement Account. * * * Where a Member has received a distribution from his Retirement Account* * *, *it shall be assumed* that his actual Retirement Account balance at the relevant time includes an amount equal to the sum so distributed as it would have increased or decreased during the period from the time of the distribution to the relevant time if such sum had been invested in the General Fund under the Profit Sharing Plan * * * *

F1A692 (emphasis added). See also F1A783-784, 842-843, 901-902, and 979-980 (the relevant 1981, 1983, 1985, and 1987 plan provisions).

In other words, the RIGP defined each participant's PSP Account – for floor-offset purposes – as including not only the *actual* balance in the PSP account but also the *hypothetical* balance which would exist if any previously “cashed-out” funds had remained invested in the PSP. That definitional provision created what Xerox itself has for years referred to as a “phantom account.” F1A591. When the PSP Offset is applied to this phantom account it results in a “phantom account offset.”

Only in tandem can these two provisions accomplish the phantom offset. The phantom *account* is created by the definition of Retirement Account and consists of the participant's current PSP balance *plus* the hypothetical appreciated value of any prior PSP distribution had it remained in the PSP. The phantom account *offset* is then accomplished by applying the PSP Offset to the phantom account. In other words, the base RIGP monthly benefit would be reduced by the annuitized value of the *phantom* balance in the Retirement Account. See Appendix 4b, Chart #3, “The Pre-1989 Phantom Account Offset” (illustrating the mechanics of the phantom account offset).

As the United States will confirm, this phantom account offset is illegal. Among other violations, it constitutes a forfeiture of accrued benefits prohibited by ERISA. 29 U.S.C. 1053. See *Miller et al. v. Xerox Corporation Retirement Income Guarantee Plan et al.*, 464 F.3d 871 (CA9 2006) (holding that the RIGP

phantom account offset violates ERISA), *cert. denied*, 549 U.S. 1280 (2007).⁶

In this case, however, the Second Circuit assumed (without deciding) that the phantom account offset is permitted by ERISA. Pet. App. 40a n.10 (finding it unnecessary to reach the anti-forfeiture claim under 29 U.S.C. 1053). As explained below, there was no reason for the court to address the legality of the phantom account offset because Xerox admitted during the litigation that it removed the PSP Offset from the 1989 Restatement. And it is *that* offset which applies the phantom account to prior PSP distributions.

C. The 1989 Restatement

In 1989, Xerox made sweeping changes to its benefits architecture. Pet. App. 27a. The PSP was eliminated and the individual accounts contained therein were transferred to the RIGP. *Id.* At the same time, the accrued benefit under the RIGP was substantially redefined. *Id.* Changes to the RIGP were codified in a document called the 1989 Restatement. *Id.*

1. The accrued benefit

The 1989 Restatement changed the method used to determine a participant's accrued benefit. It set forth a "best of five" format. Specifically, participants were now entitled to the largest of: (1) a pension based on a

⁶ Because it held that the phantom account offset violated 29 U.S.C. 1053, the Ninth Circuit did not need to reach the other arguments raised by plaintiffs in that case.

newly-created Transitional Retirement Account (“TRA”), (2) a pension based on a newly-created Cash Balance Retirement Account (“CBRA”), or (3-5) a pension based on one of three highest-average pay (“HAP”) formulas. JA 57a.

The newly-created TRAs were *real* accounts established to receive any holdover PSP account balance of each RIGP participant. JA 33a. Once all PSP account balances were transferred, the TRAs were “frozen,” i.e., Xerox stopped making contributions. *Id.*

The newly-created CBRAs were *not* real accounts; they were merely an element of the defined benefit formula. JA 40a. They represented a promise by Xerox to pay an amount to the “account holder” based on a formula which mimics a “defined contribution” that is never actually contributed. Xerox’s application of the CBRAs was held, by Judge Richard Posner, to have illegally deprived participants of approximately \$300 million in promised benefits. *Berger v. Xerox Corp. Retirement Income Guarantee Plan et al.*, 338 F.3d 755 (CA7 2003). In the words of Judge Posner:

Xerox argues that its cash balance plan is * * * a “hybrid” * * * * But the only thing that makes it hybrid * * * is that it specifies a lump-sum entitlement that is *not* the prescribed actuarial equivalent of the pension benefit to which the plan entitles employees * * * So for “hybrid” read “unlawful.”

Id. at 762 – 763. But, again, this particular illegality is not at issue in this litigation.

In addition to creating the TRAs and CBRAs, the 1989 Restatement also modified the RIGP's existing HAP formulas. As before, the plan included three alternative formulas each based on a participant's average monthly compensation and years of participation. The 1 2/3% figure was lowered to 1.4%, but an extremely significant pre-1989 deduction (*i.e.*, a Social Security offset) was deliberately removed, thereby yielding greater benefits to employees.

2. The treatment of prior distributions

Section 9.6 of the 1989 Restatement retained the generic non-duplication language that existed in the prior plan. But the 1989 Restatement phased-out the PSP Offset beginning in 1990. It is important to understand precisely how this occurred:

The 1989 Restatement went into effect on January 1, 1989. JA 12a. But the transfer of the PSP balances to the TRAs in the RIGP did not occur until December 31, 1989. JA 33a. As such, the 1989 Restatement – for the first time – set forth the RIGP benefit formulas in two *different* sections of the plan: §§4.2 and 4.3. The former applied only to those who retired from Xerox before 1990. JA 26a – 29a. The latter applied to those (like respondents) who retired from Xerox in or after 1990. JA 29a – 31a.

Section 4.2 of the 1989 Restatement *retained* the PSP Offset. JA 26a (deducting from the base RIGP monthly annuity “the monthly amount which would be payable under a Life Annuity which could be purchased with the Member's Retirement Account

* * *”).⁷ The 1989 Plan also retained the phantom account (in §1.35). JA 19a - 20a. Working together, §§4.2 and 1.35 effected a phantom account offset for all *pre-1990* retirees.

Section 4.3 of the 1989 Restatement, however, *removed* the PSP Offset. JA 29a – 30a (no deduction for a prior PSP distribution). Accordingly, *nowhere* does the 1989 Plan tie the phantom account in §1.35 to the RIGP formulas in §4.3—the section governing the pension entitlement of rehired employees *not yet retired*.

Xerox concedes that the PSP Offset was removed from §4.3. It maintains, however, that the removal was “inadvertent.” That is possible. After all, Xerox has spent the past decade of litigation claiming that it would never deliberately treat rehired employees so generously. It is also possible, however, that removal of the offset from §4.3 was an intentional choice. It may have been removed to avoid complex legal and tax concerns articulated by Xerox’s advisors. Alternatively, it may have been removed to induce proven talent to rejoin or remain with the company.⁸

⁷ In pre-1989 RIGP documents, this offset was always contained in §4.2a(ii). In the 1989 Restatement, the offset was retained verbatim. But it is found in §4.2a(i) of the document.

⁸ Had the offset worked as Xerox has contended in this litigation, hundreds of former Xerox employees would have received no pension (or virtually no pension) for many additional years of service after being rehired. Few skilled employees would accept such a bargain.

Whatever the epistemological difficulty of ascertaining Xerox's "true" intent, respondents' pensions are governed by the *language* in the 1989 Restatement and accompanying SPDs. As explained above, federal law includes several important requirements regarding both the substance and form of such language. And, as the procedural history of this decade-long litigation powerfully illustrates, judicial enforcement of these statutory requirements is essential to the security of defined benefit plans.

D. Procedural History

1. Pre-litigation events

In 1990, Xerox prepared a summary plan description ("SPD") describing the redesigned RIGP. It boasted of how "the 1989 changes in the retirement program * * * have improved the ranking of the Xerox plans" in comparison to "benchmark companies [such as] Kodak, IBM, Digital Equipment, Hewlett-Packard, and AT&T * * * ." JA 45a. As required by ERISA, the SPD was mailed to all plan participants.

Regarding the accrued benefit under §4.3—the section applicable to respondents—the SPD provided that "[t]he amount you receive [from the new RIGP] may * * * be reduced if you had previously left the company and received a distribution at that time." JA 47a. It is undisputed that the SPD said nothing about *how* such reduction would be calculated. Similarly, there was no mention of any actuarial assumptions that could be used to adjust prior distributions to account for the "time value of money."

In 1991, 1992, 1993, and 1994, Xerox provided respondents with SPDs that, in all pertinent respects, were identical to the 1990 SPD. During these same *five years*, Xerox also sent annual *personalized* benefit statements (“Personal Statements”) calculating the dollar amount of each recipient’s “accrued benefit” that was “100% vested” under the new RIGP. The statement received in 1990 by Paul Frommert is a representative example. It stated:

If you left the company as of February 28, 1990, with a vested benefit based on your current salary level and years of service, you would be entitled at age 65 to a monthly benefit of \$1,281. This benefit will grow as your length of service (up to 30 years) and your earnings increases. *You are 100% vested in this accrued benefit.*

JA 60a (emphasis added).

The monthly benefit calculations in each Personal Statements did not include *any offset* for prior distributions received from the PSP. The Personal Statements did note, however, that “[y]our guarantee may be reduced * * * *by distributions you have already received.*”). *Id.* (emphasis added). Like the SPDs provided to respondents during the same period, it is undisputed that these Personal Statements included absolutely nothing to suggest that actuarial assumptions (i.e., interest rates, imputed earnings, etc.) would be used to adjust the recipient’s prior distributions to account for the “time value of money.” They instead simply told employees precisely what the district court ultimately held herein: that the prior distributions *themselves* would be deducted.

As the Second Circuit observed in 2006, the documents prepared and distributed by Xerox describing the 1989 Restatement led respondents to believe “that their past distributions would only be factored into their benefits calculations by taking into account the amounts *they had actually received.*” Pet. App. 47a (emphasis added).

In 1995, Xerox prepared a new SPD that *could* be read to indicate that the company intended to deduct from the RIGP benefit the cash-out amount of prior PSP distributions *plus* “phantom” appreciation. Some respondents contacted Xerox and discovered, to their shock, the dramatic effect that this undisclosed offset would have on the value of the “accrued benefit” that had been described as “100% vested” and *expressed as an actual dollar amount* in the Personal Statements. As Mr. Frommert wrote to Xerox:

I have recently become aware that [the] numbers in my value added statement do not represent my true retirement benefits. *In fact, in my case, the benefits would be \$5.31 per month vs. \$2,482.00 as stated in my 1996 value added report * * * ** The news came as a shock since I believed the number in the value added statements year over year.

JA 63a (emphasis added).

Mr. Frommert’s is a representative case. Pet. App. 34a (“The experience of plaintiff Paul Frommert demonstrates the manner in which the use of the phantom account was both disclosed and utilized.”). In fact, many respondents actually fared worse. JA 142a – 143a. Application of the phantom offset would result

in roughly one-third of the respondents receiving *no pension at all* for their entire post-rehire employment with Xerox. *Id.*⁹ And, collectively, application of the phantom account offset (as opposed to the cash-out offset described in the SPDs and Personal Statements) would reduce respondents' pensions by almost \$20 million. *Id.*

During the administrative review process that followed, Xerox took the position that the phantom account offset had continuously been in the RIGP since its inception in 1977:

As an initial matter, you should be aware that there has been no change to the offset mechanism under RIGP. There has been an offset of prior distributions along with hypothetical investment gains attributable to such amount, as though it had remained invested under the plan, going back to inception of RIGP.

JA 65a. In defending this position, the administrator cited and quoted §9.6 – the generic non-duplication provision described above. JA 77a-78a (quoting §9.6 and claiming that “there has never been any intent to provide any duplicate plan benefits where Years of Participation have been restored.”).

⁹ On this chart (prepared by Xerox), the column labeled “No Remedy” represents application of the phantom account offset. Those respondents with a dash in this column would have been left with no pension as a result of Xerox’s “interpretation.”

Amazed that Xerox could (and would) attempt to apply this phantom offset, respondents internally appealed the administrative determination. In the words of one respondent, Alan Clair, to Xerox:

I wish to appeal the determination which denies meaningful retirement benefits to me as per Arlyn B. Kaster's letter dated June 23, 1999 * * * * In describing the reasons for the denial, she has missed one overriding fact: I and possibly hundreds of other rehired employees will *never* accrue a meaningful retirement regardless of how hard we work, how much we earn or how long we remain at Xerox!

F1A610.

Once administrative appeals were fully exhausted, respondents retained an attorney to pursue litigation. Pet. App. 76a (noting that all administrative remedies were properly exhausted). In the process, respondents learned that the PSP Offset *had been entirely removed* from §4.3 of the 1989 Restatement.

2. District court (the initial proceedings)

Respondents filed this action in 1999 and challenged the phantom account offset on several grounds. Pet. App. 35a; 74a. Respondents first sought “relief under 29 U.S.C. § 1132(a)(1)(B) based on [the] allegation that Xerox’s SPDs inadequately disclosed the phantom account offset, in violation of 29 U.S.C. § 1022.” Pet. App. 75a. This legal theory would provide respondents with relief *even if* the governing Xerox Plan clearly included a phantom account offset.

Respondents also “allege[d] that [Xerox] amended the Plan to provide for the phantom account offset, in violation of 29 U.S.C. § 1054(g) * * * and without proper notice under 29 U.S.C. § 1054(h).” *Id.* This claim was predicated on the argument that (i) Xerox removed the phantom offset from its plan in 1989, Pet. App. 82a (“Plaintiffs contend that the 1989 Plan contained no ‘phantom account’ provision”), and that (ii) Xerox did not restore the phantom offset to the plan until 1998. Pet. App. 84a. This claim was significant to respondents’ rights under 29 U.S.C. 1132(a)(1)(B) because respondents maintained that their claims were governed by the 1989 Restatement. Pet. App. 79a.

Finally, respondents alleged that the phantom account was prohibited by 29 U.S.C. 1053 – ERISA’s anti-forfeiture provision. Pet. App. 75a. This claim did not require any judicial determination regarding the clarity of the Xerox Plan or the sufficiency of Xerox’s disclosures.

In 2004, Xerox “moved for summary judgment dismissing the complaint.” Pet. App. 64a. Two respondents “cross-moved for summary judgment [seeking] declaratory and injunctive relief.” *Id.* In the eyes of the district court, the relief sought by those two respondents (i.e., an order prohibiting Xerox from continuing to apply the phantom offset) “would seemingly inure to the benefit of all the plaintiffs.” *Id.*

In its papers, Xerox argued that the 1998 Restatement of the RIGP should govern respondents’ claims because it was the plan in effect when respondents applied for benefits. Xerox relied on the 1998 Restatement for two important reasons: The

1998 Plan, for the first time in nine years, expressly applied a phantom offset to prior PSP distributions. Pet. App. 86a – 87a (“Unlike the 1993 and 1996 Restatements, the 1998 Restatement expressly provided for a phantom account offset for prior distributions * * * from the Retirement Account.”). And there was no dispute that the 1998 SPD clearly disclosed the phantom offset. Pet. App. 81a. The district court agreed with Xerox. Pet. App. 92a (“[T]he operative plan here is not the 1989 Restatement of the Plan. Rather, the governing Plan is the one in effect when the relevant decision is or was made * * *”).

In the alternative, Xerox argued that it did not matter if the 1989 Restatement governed respondents’ claims because, according to Xerox, the phantom offset has been in every version of the plan since its inception, including the 1989 Restatement.

Xerox took this position even while acknowledging that it had omitted “the phantom account principle” from the 1989 Restatement. Pet. App. 84a. It argued that “the 1989 Restatement continued to contain a nonduplicaton-of-benefits provision at §9.6.” *Id.* And it introduced voluminous extrinsic evidence to support its claim that the meaning of §9.6 – which permits the offset of “accrued benefits attributable to such [prior] distribution” – should be read to permit a phantom account offset. See, *e.g.*, Pet. App. 83a (discussing the 1983 Restatement and other pre-1989 restatements); 66a – 67a (discussing several 1990 plan amendments); *id.* at 68a (discussing the 1993, 1996, and 1998 Restatements); *id.* at 82a (discussing the 1999 Restatement).

The district court agreed with Xerox. It noted that:

Plaintiffs may believe that the 1989 Restatement did not provide for such an offset, but it is important to remember here that * * * the administrator's interpretation of the Plan can only be overturned if it is arbitrary and capricious * * * * *Given the history of the Plan*, I do not believe that the administrator's consistent application of the phantom account offset can be said to be arbitrary and capricious.

Pet. App. 85a (emphasis added).

The court granted the motion for summary judgment filed by Xerox. Pet. App. 61a – 98a.

3. 2006 court of appeals (*Frommert I*)

Before the Second Circuit, Xerox defended its position that later amendments to the 1989 Restatement – particularly the 1998 Restatement – applied retroactively to respondents. The Second Circuit disagreed. Pet. App. 37a – 40a; 45a – 49a. It applied well-settled law noting that “a later-adopted plan cannot be applied to reduce already-earned pension benefits [because] these benefits are protected by ERISA’s vesting and accrual provisions.” Pet. App. 41a (citing 29 U.S.C. 1053-1054). Xerox does not challenge that holding in this Court.

Xerox also defended its position that the non-duplication provision in the 1989 Restatement could be read as authorizing a phantom account offset

notwithstanding the 1989 Restatement’s omission of the PSP Offset in §4.3. As the court of appeals noted:

[D]efendants contend, and the district court agreed, that the phantom account has always been part of the Plan. Despite its absence from the 1989 Restatement, which both the defendants and district court acknowledge, the defendants argued that the Plan contained the phantom account both before and after the 1989 Restatement.

Pet. App. 42a

To be clear, Xerox’s litigation position proceeded in two steps: first, Xerox admitted that the relevant provision was “inadvertently” omitted from the 1989 Restatement. Pet. App. 28a – 29a (noting concession “at oral argument, as well as in their submissions to the Court”); Pet. Br. 11 n.3 (“inadvertently omitted”).

Then, Xerox maintained that introduction of extrinsic evidence was needed in order to give content to the phrase “attributable to such [prior] distribution” in section 9.6. As the court of appeals noted:

[D]efendants contend that the phantom account was present in versions of the Plan prior to the 1989 Restatement and that its omission from the 1989 Restatement was rectified by [later amendments]. Further, the defendants argue that because the 1989 Restatement contained a nonduplication provision, its only flaw was that it lacked sufficient details concerning how this

nonduplication would occur-through the phantom account.

Pet. App. 42a

In reviewing Xerox' proposed interpretation of the 1989 Restatement, the court of appeals in *Frommert I* made several important findings. First, it *accepted* Xerox's contention that §9.6 of the 1989 Restatement could justify *some* offset in this case. Similarly, it accepted Xerox's contention that the 1989 Restatement – due to Xerox's omission of a key term – did not address *how to calculate* that offset. As the United States explained in its petition-stage brief:

The court of appeals found that, although the Plan has always contained a non-duplication provision stating that benefits will be offset by prior distributions, [citing Pet. App. 26a-28a], until 1998, the Plan did not address *how to calculate* the offset for the distributions received by the plaintiff employees. See *id.* at 28a-29a (“[T]he 1989 Restatement” of the Plan “did not specify how the Plan would account for the prior distributions.”).

U.S. Inv. Br. 3.

Next, the court of appeals *rejected* Xerox's contention that §9.6 of the 1989 Plan could be interpreted to authorize a *phantom* offset. In rejecting Xerox's use of extrinsic evidence to fill the confessed gap in the 1989 Restatement, the Second Circuit reviewed Xerox's interpretation of the 1989 Plan under a deferential standard. It concluded:

It is clear, under either an arbitrary or capricious standard or as a matter of law, that the Plan Administrator's conclusion that the Plan always included the phantom account is unreasonable.

Pet. App. 44a. The extrinsic evidence introduced by Xerox was inconclusive. But, more importantly, there was a major disclosure problem. The court of appeals concluded that "the terms of the phantom account were neither included in the 1989 Restatement nor included in the Plan's SPDs up through 1994 * * *" *Id.* The court also concluded that because of "[t]he prolonged absence of any mention of the phantom account from Plan documents," *id.* at 47a, "rehired employees likely believed that their past distributions would only be factored into their benefits calculations by taking into account the amounts they had actually received." *Id.*

As a result of these findings, the Second Circuit remanded the case to the district court. In so doing, it suggested that the court "employ equitable principles when determining the appropriate calculation and fashioning the appropriate remedy." Pet. App. 51a.

4. District court (remand proceedings)

On remand, Xerox filed a "pre-hearing brief addressed to remedies" (A149) alongside an affidavit of Lawrence M. Becker, the administrator (A177-185) and an expert report of Lawrence Sher (A188-199).

The Administrator's Approach. In these three filings, Xerox proposed a new offset method which it

referred to as the Administrator's Approach. A149-176. Xerox described its approach as a "remedial proposal." A151. See also A189 (Mr. Sher writes: "Defendants' counsel asked me to comment on an approach * * * that the plan administrator is proposing to the Court in an Affidavit.").

Xerox did not argue that this approach was the "correct" interpretation of the 1989 Restatement. Nor could it. Xerox continued to take the position – *during the remand proceedings* – that the true interpretation of the 1989 Plan required the use of a phantom account offset. As Mr. Becker wrote to respondents' counsel less than five months *after signing his affidavit*:

[Y]ou refer to the *Frommert v. Conkright* decision * * * * As you know, the Second Circuit remanded the matter to the * * * District Court for final resolution. Therefore, until final resolution to the contrary, the plan provisions govern. Accordingly, I have concluded that your clients' RIGP benefits are being calculated correctly and according to the terms of the Plan document * * * * *The terms of RIGP specifically provide [for a phantom account offset].*

A1121 (emphasis added).

The fact that Xerox, in the remand litigation, was advocating a gap-filling remedial measure is also made crystal clear by the initial expert report written by Mr. Sher. In that report, Mr. Sher writes:

The approach taken in the RIGP is [the phantom account offset]. In my opinion, this is

a logical and equitable approach * * * *
However, because the Appeals Court concluded that the methodology was not properly specified under the plan until 1998, *another method must be identified for the pre-1998 years.*

A193 (emphasis added).

Rather than defend the Administrator's Approach as the "correct" interpretation of the 1989 Plan, Xerox merely argued that it was the most *equitable remedy*.¹⁰ To be sure: Xerox did argue that its approach was "consistent with * * * the Plan *as interpreted by the Second Circuit.*" A159-160 (emphasis added). But the primary focus of Xerox's arguments was certainly not to advance the "*best interpretation*" of terms in the 1989 Plan.

The PSP Cash-Out Offset. At the same time that Xerox proposed the Administrator's Approach, respondents proposed two alternative approaches that could be used by the district court to fill the gap left by Xerox in the 1989 Plan. Each of these proposals used, as a starting point, the Second Circuit's interpretation in *Frommert I* of the 1989 Restatement.

As noted above, the *Frommert I* panel accepted Xerox's argument that §9.6 of the 1989 Restatement permitted Xerox to offset some amount attributable to

¹⁰ To convince this Court to grant its petition, Xerox blatantly misrepresented its prior litigation position. See, e.g., Reply to Briefs in Opposition 4 (hereinafter "Petition Reply"). This, and many other petition-stage misrepresentations of the record by Xerox, militate heavily in favor of dismissing the writ as improvidently granted.

the PSP distributions previously received by respondents. In so doing, the court relied on the following language: “the accrued benefit of [a rehired] Member * * * shall be offset by the accrued benefit attributable to [his or her prior] distribution.” JA 32a.

Although the court of appeals held that §9.6 authorized the use of *some* offset, it had also accepted Xerox’s contention that the company had omitted any terms in the 1989 Restatement specifying what “accrued benefit” *is/was* “attributable to [respondents’ prior] distribution.”

The primary approach urged by respondents therefore adopted the most straightforward reading of the phrase “accrued benefit attributable to [the prior] distribution.” As explained above, respondents’ prior distributions came entirely from the PSP – a defined contribution plan. ERISA explicitly defines a participant’s “accrued benefit” in a defined contribution plan as the account balance. 29 U.S.C. 1002(23)(B). Accordingly, the “accrued benefit attributable to [a prior defined contribution plan] distribution” is the cashed-out account – nothing more, nothing less.

This natural reading of §9.6 of the 1989 Restatement is also the understanding that an “average plan participant” would have had of the offset in light of the disclosures provided by Xerox. 29 U.S.C. 1022(a). Put simply, here is what respondents knew:

- They had previously received their cashed-out PSP account balances with no strings attached;

- The SPDs and Personal Statements provided by Xerox respectively stated that their new pensions “*may * * * be reduced*” “by distributions you have already received.” JA 47a; JA 60a.
- No document suggested that a “time value of money adjustment” or “actuarial adjustment” would be applied to their prior distribution.

Respondents’ Actuarial Approach. As an alternative, respondents proposed a second approach based upon the analysis and testimony of their expert witness, Phillip Cofield. JA 79a – 103a. Under this approach, the phrase “accrued benefit attributable to [the prior] distribution” was given the meaning that Mr. Cofield believed a seasoned actuary would use in trying to effectuate the spirit of the non-duplication provision. See *id.* Put simply, Respondents’ Actuarial Approach would deduct from the current RIGP annuity (i.e., based on all years of service) the pre-hire monthly RIGP annuity that was “replaced” by the prior PSP distribution. See Appendix 2b, Chart #1 (Step 5 illustrates how the PSP accrued benefit “replaces” a portion of what would otherwise have been an accrued benefit under the RIGP).

Respondents’ Actuarial Approach is unquestionably a *permissible* interpretation of the terms of the 1989 Restatement. It does not comport, however, with what an average plan participant would have expected given the representations made by Xerox for five years. As such, it was not advanced by respondents as their primary approach. Instead, it was proposed in the event that the court accepted Xerox’s (erroneous) argument that a defined benefit plan offset *must*

employ actuarial assumptions when addressing prior distributions.

Like the Administrator's Approach, Respondents' Actuarial Approach incorporates actuarial assumptions and, thus, accounts for the "time value of money." Unlike the Administrator's Approach, however, Respondents' Actuarial Approach did not suffer from two fatal flaws: (i) it did not rely on self-serving and undisclosed actuarial assumptions (i.e., it used the assumptions that were actually embedded in the RIGP itself), and (ii) it did not attribute unrelated defined contribution plan assets (i.e., those above the RIGP floor replacement) to the "accrued benefit" under a defined benefit plan.

The New Hire Approach. On July 5, 2006, Xerox filed a "pre-hearing *reply* brief addressed to remedies." A281-301. The vast majority of the brief was devoted to attacking the two offset methods proposed by respondents. In the course of so doing, however, Xerox presented a second remedial proposal. This new litigation position, which Xerox called its New Hire Approach would disregard the prior distribution entirely and treat respondents like other similarly situated employees newly-hired on the same days as they were. A297-299.

Xerox's advocacy of this New Hire Approach cannot possibly be justified by the terms of the 1989 Plan. Consequently, Xerox failed to cite *a single provision* in the 1989 Restatement justifying this fallback litigation position. See A281-301. In fact, Xerox had previously argued (in its *Frommert I* brief) that treating respondents as "new hires" was *expressly foreclosed* by

the terms of the RIGP: Xerox Brief in *Frommert v. Conkright*, 433 F.3d 254 (CA2 2006) 75-76.¹¹

The Court's Decision. The district court reviewed all written submissions and conducted two days of hearings. See, e.g., A385-625 (hearing transcripts). The court then held that it would be unreasonable for Xerox to offset any more than the payments that respondents actually received. In so doing, it reasoned as follows:

Some testimony at the hearing before me focused on the appropriate economic, financial and actuarial methods for treating prior distributions. But this Court is not charged with writing a sound retirement plan. Rather, I must interpret the Plan as written *and consider what a reasonable employee would have understood to be the case concerning the effect of prior distributions. If the employee had no notice of the 'phantom account,' he also had no notice of some of the other mechanisms suggested by witnesses at the remand hearing before me.*

Pet. App. 104a (emphasis added).

¹¹ As explained below, Xerox has now repudiated its New Hire Approach. Pet. Br. 59 (conceding that the plan “tak[es] account of all of the employees’ service to Xerox, including service rendered before their rehire date.”).

5. 2008 court of appeals (*Frommert II*)

Before the court of appeals for the second time, Xerox shifted its litigation position yet again. Instead of focusing on the Administrator's Approach, Xerox's primary argument to the Second Circuit was that its *New Hire Approach* should be adopted. Appellants' Brief in *Frommert v. Conkright*, 535 F.3d 111 (CA2 2008) 33-35 (hereinafter "Xerox App. Br. in *Frommert II*"); *id.* at 36 (advancing the Administrator's Approach as "[a]nother alternative methodology").

Xerox shifted not only its litigation position but also the justification of its newly-preferred New Hire Approach. Instead of relying on an estoppel-like theory (as it had in the district court), Xerox now argued that the New Hire Approach could be justified as a reasonable "interpretation" of the 1989 Restatement based in large part upon Section 1.44(f). Xerox App. Br. in *Frommert II* 32 (CA2 2008) (arguing that "Section 1.44(f) would require that appellees' retirement benefits be calculated without inclusion of their years of prior service."). As the Second Circuit explained, Xerox's "interpretation" of §1.44(f) is untenable. As such, the court easily rejected Xerox's argument. Pet App. 9a. And, as explained below, Xerox has now repudiated its New Hire Approach. Pet. Br. 59.

Of course, Xerox did not abandon the litigation position that it preferred in the district court. Xerox App. Br. in *Frommert II* 36. In the words of Xerox:

Another alternative methodology for the recalculation of benefits was proposed by appellants [i.e., Xerox] , but was not adopted by

the District Court. It was and is referred to as the Plan Administrator's approach. This approach, like the new hire approach, is based upon a reasonable interpretation of the pre-1998 Plan * * * *

Id. (emphasis added).

Xerox argued that [the] "Court should * * *remand this matter back to the District Court * * *to order a recalculation of benefits based upon one of the two methodologies proposed by [Xerox]." Xerox App. Br. in *Frommert II* 46. The Second Circuit rejected Xerox's arguments and affirmed the district court's selection of the PSP Cash-Out Offset.

SUMMARY OF ARGUMENT

ERISA requires pension promises to be set forth in writing and summarized in a fashion comprehensible to the "average plan participant." To ensure transparency, security, fairness, and efficiency, such was Congress's explicit command.

The outcome sought by Xerox in this case is precisely what ERISA was enacted to prohibit: an undisclosed, unexplained, post-hoc reduction in accrued and vested pension benefits earned over *years* of work. Xerox has attempted – and still attempts, with its Administrator's Approach – to deduct from respondents' pensions an enormous phantom sum, i.e., money that respondents never received.

The irony is that Xerox seeks to deduct an imaginary sum based on an imaginary deal. Neither the 1989 Restatement nor the contemporaneous SPDs

disclose anywhere that respondents would face an offset greater than the one imposed by the lower courts. Totally absent from the *only* plan provision justifying offset—or the disclosures required by ERISA—is a single mention, explanation, or illustration of hypothetical investment gains, interest rates, or any other “assumption” that might be used by Xerox to reduce dramatically respondents’ pensions.

Nonetheless, Xerox believes that respondents’ pensions should be sacrificed. It advances policy arguments to change the law of deference, claims procedural error, and complains of a “windfall” to employees. Xerox is wrong on every count.

Xerox seeks deference with regard to the very same issue on which its previous position was found to be arbitrary and capricious. No court is *obligated* to extend such “rerun deference.” To make matters worse, Xerox’s second- and third-bite “interpretations” are nothing more than strategic litigation positions which directly contradict its own actual administrative practice. It impossible to believe that ERISA *mandates* judicial deference to such “interpretations.” Put simply, the rule urged by Xerox would severely undermine the fairness and efficiency of benefits administration and discourage the sponsorship of clearly written plans.

As a fallback position, Xerox argues that the Second Circuit erred in failing to examine the offset method selected by the district court under a *de novo* standard of review. This argument is mistaken, but also irrelevant. No standard of review could *possibly* change the outcome of this case. Remand on that basis

will simply prolong a 10-year litigation which has already outlived several of its participants.

Each of Xerox's asserted grounds for reversal is phrased in terms of legal argument. In truth, however, Xerox's real "argument" is nothing more than a misguided view of equity. To be blunt: Xerox appears to be convinced that several federal judges have handed respondents an undeserved "windfall" by prohibiting Xerox from applying an offset which accounts for the time value of money. In taking such a position, however, Xerox ignores basic principles of labor economics.

Put simply, money is fungible. Employees promised greater deferred compensation will accept less in present compensation. Because employers *directly benefit* from promising the former, both in terms of heightened access to skilled employees as well as a reduction in current salary demands, ERISA enforces those agreements. Enforcement confers no "windfall" because such a deal (i) has already benefited the employer and (ii) compensates the employee for the contemporaneous wages foregone in exchange for the promise of deferred compensation (i.e., pension).

ERISA enforces such arrangements because they are economically efficient. The Tax Code subsidizes them because private retirement saving is socially beneficial. Private saving reduces public costs in caring for retirees without adequate private assets. It is also desirable on marginal utility of money grounds because retirees generally have less available wealth than middle-aged workers. Accordingly, reductions in current compensation in exchange for greater deferred compensation are affirmatively encouraged.

When particular terms of a deferred compensation arrangement are communicated to employees—as was done here—equity compels the enforcement *of those terms*. The reason is simple: Employers benefit from their employees’ agreement to forgo wages. The extent to which employees are willing to forgo wages depends upon the value of the pension that is promised to them. Thus, ERISA wisely holds the employer to the promise *as reasonably understood by its employees*. Xerox, in essence, confuses a “windfall” with a Congressionally-sanctioned and economically efficient bargain.

We are here because Xerox does not like the terms of the bargain *it communicated*. Put simply, Xerox requests a judicial bailout. The courts below refused. So too should this Court.

ARGUMENT

I. THE SECOND CIRCUIT WAS NOT REQUIRED TO AFFORD DEFERENCE TO XEROX.

Xerox urges upon this Court a change in the law of astonishing magnitude. Specifically, Xerox argues that an ERISA plan administrator’s determination must be afforded deference by a reviewing court even if that court has already found that the administrator’s prior determination *on the same issue* was an abuse of discretion. As the Second Circuit noted, Xerox “identified no authority in support of the proposition” that such “re-run deference” is required by ERISA. JA 13a. That is hardly surprising. None exists.

Under Xerox’s view, a reviewing court is wholly divested of the power to bring closure to litigation in cases where a fiduciary has *grossly* failed in his duty to administer reasonably the plan. If the court believes that an administrator’s original—or subsequent—position on an issue is arbitrary and capricious, the court’s power is limited to (i) accepting the arbitrary position or (ii) remanding the matter back to the fiduciary for yet another exercise of discretion. Such is a recipe for frequent lawsuits, poorly drafted plans, and litigation that literally outlasts participants. This cannot possibly be required by ERISA, a statute described by its drafters as a “pension bill of rights.”

Indeed, the doctrine of administrative deference—upon which Xerox premises its assault on common sense—is nowhere codified in ERISA. Rather, as this Court has noted, it is an important judicial gloss upon the statute. In other words, it is a prudential doctrine intended to aid the smooth but *fair* operation of plans. Accordingly, courts should be – and have been – careful to prevent its abuse particularly when judicially-created deference may conflict with express statutory principles enacted by Congress.

It is hard to imagine a deference-rule with greater potential for abuse than the one urged by Xerox. In order to appreciate this point, the Court need look no further than *this case*:

- For five years, Xerox distributed *personalized* statements that made the following representation:

If you left the company [this year], you would be entitled at age 65 to a monthly benefit of [\$x,xxx]. This benefit will grow [as you work more and as your salary goes up]. You are 100% vested in this accrued benefit.” JA 60a.

- For five years, these statements and SPDs included only two brief statements about a potential “offset:”

Your guarantee may be reduced * * * by distributions you have already received.
Id.

The amount you receive may * * * be reduced if you had previously left the company and received a distribution at that time. JA 47a.

- Nonetheless, Xerox tried to apply an undisclosed – and illegal – offset that would save the company approximately \$20 million in funding obligations at the expense of respondents. JA 142a – 143a.
- In litigation, Xerox admitted that it had *removed the phantom account offset* from its 1989 Plan.
- Nonetheless, Xerox “arbitrarily and capriciously” attempted to resurrect the removed offset.
- On remand, Xerox advanced two conflicting “interpretations” of the 1989 Plan. Both violate

ERISA. Neither was ever disclosed. One has now been repudiated by Xerox. The other attempts to *again* offset an enormous phantom sum.

- Xerox has now litigated the case long enough to outlive several plaintiffs and their original counsel.

It strains credulity that, under an act designed to make pensions more secure—a court is *required* to defer to an administrator in such circumstances. Yet Xerox urges the creation of precisely such a rule.

A. The Size of the Offset Applicable to Respondents Under the 1989 Restatement Is the Same Issue on Which the Administrator’s Previous View Was Found to Be “Arbitrary and Capricious.”

Xerox here seeks deference on the same question twice, namely: what offset method does the 1989 Restatement impose? In 2006, the Second Circuit reviewed the answer to that question proposed by Xerox (i.e., a phantom account offset) under a deferential standard. And the court concluded that Xerox’s answer constituted an abuse of discretion.

Yet in every filing with this Court, Xerox has maintained that the plan provisions at issue in *Frommert I* were not the same as in *Frommert II*:

[T]he Plan terms interpreted on remand were *not* identical to those upon which the Plan Administrator made its original benefits determination. The Plan Administrator

originally construed the Plan in light of the “phantom account” offset provision that the Second Circuit later found was not properly disclosed and added to the Plan until 1998. On remand, the Plan Administrator therefore offered an interpretation of the meaning of the Plan *without* that provision.

Reply to Briefs in Opposition 6-7 (emphasis in original) (citations omitted) (hereinafter “Pet. Cert. Reply Br.”).

This claim is simply untrue. It falsely suggests that the court of appeals refused to honor (i.e., struck) a provision from the operative Xerox pension plan and then remanded to the district court for it to interpret the plan without reference to the invalidated provision (i.e., “*without* that provision”).

But the Second Circuit did not strike a single word from the 1989 Restatement.¹² It merely accepted Xerox’s own admission that Xerox had removed the relevant provision (i.e., the PSP Offset). Then it rejected Xerox’s attempt to restore the missing offset provision through “interpretation” of §9.6. Nonetheless, Xerox continues:

To be sure, the text that appears on the printed pages of the Plan document did not change between the Plan Administrator’s original interpretation and the interpretation offered on remand from *Frommert I*. In that sense, it is true that the Plan Administrator construed “the

¹² That is why Xerox has never identified *what* provision in the 1989 Restatement was allegedly removed by the court.

same [Plan] terms” on remand that were construed in the original benefits determination. Only on remand, however, was the Plan Administrator on notice that the “phantom account” offset was null and void as applied to Respondents.

Pet. Cert. Reply Br. 7.

To summarize: Xerox admits that remand involved the same issue, the same Plan document, and the same Plan provision (§9.6) that Xerox relied upon to interpret the plan. It claims things are different, however, because only on remand was Xerox informed that its preferred interpretation of the text was ‘arbitrary and capricious.’

What Xerox describes is the very definition of “re-interpretation.”

B. In the Aftermath of an Administrator’s Abuse of Discretion, ERISA Does Not Require “Rerun Deference” on the Same Issue.

Unable to credibly deny that it seeks a second bite at the same apple, Xerox asserts nonetheless that its latest positions are owed rerun deference because of this Court’s decisions in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) and *Metropolitan Life Insurance Co. v. Glenn*, 128 S.Ct. 2343 (2008). Xerox is wrong.

ERISA is a remedial statute designed to protect employee benefits. It was the expectation of Congress that the protective statute would “draw much of [its]

content from the law of trusts.” *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996).

Regarding the bounds of deference owed, black letter trust law is that “[w]here the court finds that there has been [such] an abuse of a discretionary power, the decree to be rendered is in its discretion.” George G. Bogert & George T. Bogert, *The Law of Trusts & Trustees* § 560, at 222 (rev. 2d ed. 1980) (Bogert). *Cf. Metropolitan Life Ins. Co. v. Glenn*, 128 S.Ct. 2343, 2359 (2008) (Scalia, J., dissenting) (deference not required where trustee has “acted beyond the bounds of a reasonable judgment”). That is precisely what happened here.

Xerox collects scattered authority to argue that, absent bad faith, trust law rigidly *requires* a court to repeatedly defer to the determinations of a trustee vested with discretion. Yet Xerox’s doctrinal claim—that trust law imposes an ironclad rule of “rerun deference”—is facially implausible. Trust law is rooted in equity and accordingly sensitive to circumstance. *Cf. Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (“the essence of equity jurisdiction” is the power “to mould each decree to the necessities of the particular case.”); *Lemon v. Kurtzman* 411 U.S. 192, 201 (1973) (“In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities”).

In some cases, rerun deference may have been appropriate; in others not. Xerox would have this Court believe that trust law was so inflexible that it only permitted judges sitting in equity the *sole* option of the former. That is simply not so.

In the wake of discretionary abuse, trust law has for centuries empowered the reviewing court to resolve the dispute itself or remand for further proceedings consistent with particular instructions. Restatement (Second) of Trusts § 187, cmt b (“When the court controls the exercise of a power by the trustee, it may do so by directing him to act or refrain from acting.”).

No rigid trust law rule binds a reviewing court to extend endless deference absent bad faith. Unreasonable conduct on the part of the trustee has always been grounds for court intervention unburdened by deference. See generally *id.* § 187 cmts. h and i; 2 Restatement (Third) of Trusts § 50 & cmt. b (2003); 3 Austin W. Scott & William F. Fratcher, *The Law of Trusts* §§ 187, 187.2, 187.3 (4th ed. 1988) (courts can substitute their own judgment for that of trustee when trustee not “within the bounds of a reasonable judgment”).

Although respondents believe that Xerox mischaracterizes the relevant law of trusts, the matter need not be resolved. As this Court has explained:

Trust law does not tell the entire story. After all, ERISA’s standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection.

Varity Corp. v. Howe, 516 U.S. 489, 497 (1996). Allegedly conflicting lines of authority in the corpus of trust law regarding deference are insufficient to drown the protections of a statute whose expressed purpose is to protect beneficiaries.

Indeed, in enacting ERISA, Congress imposed several limits on benefit plan content and construction that were and are absent from private trust law. See, e.g., 29 U.S.C. 1110 (plan provisions exculpating a fiduciary from liability are void). Such reflected a Congressional determination that employees, for a variety of reasons, were unlikely to be able to negotiate appropriately protective contractual or trust terms governing benefit promises. Were they able to do so, ERISA would be largely unnecessary.

Most pertinently, the statute materially limits the extent to which administrators may construe plan documents:

[A] fiduciary shall discharge his duties with respect to a plan * * * in accordance with the documents and instruments governing the plan *insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.*

29 U.S.C. 1104(a)(1)(D) (emphasis added). This Court has interpreted the above-quoted language to mean “that trust documents cannot excuse trustees from their duties under ERISA, *and that trust documents must generally be construed in light of ERISA’s policies * * * **” *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 568 (1985) (emphasis added).

No salutary goal is served by deferring to the fallback litigation position of an administrator who has already abused its discretion on the very same issue. The appeal of deference in the ERISA setting rests upon the presumption that a fiduciary is qualified to

accurately and efficiently construe and administer its own plan. Here Xerox spent many years defending an interpretation of the 1989 Restatement that was arbitrary and capricious. Xerox's subsequent positions regarding what offset method is permitted by the 1989 Restatement are similarly arbitrary. See *infra* at 63-66. Few administrators have more conclusively refuted the presumption of special expertise and competence.

ERISA's policies are undermined, not served, by mandatory "rerun deference." One of the statute's central aims was to make the pension promise—whether modest or generous—more *transparent*. Among other things, transparency facilitates fair negotiation over the tradeoff between wages and benefits, increases the efficiency of the labor market, and encourages appropriate investment planning on the part of individuals seeking retirement income.

Rerun deference undermines transparency by distorting incentives. Plan sponsors are not rewarded for writing clear documents. Plan administrators are not rewarded for offering clear interpretations when ambiguities present themselves. In practical terms, employers who sponsor clear plans that offer modest benefits are at a substantial competitive disadvantage in the marketplace. Such employers will lose employees to competitors who craft superficially appealing but ambiguous plans. Rerun deference, in essence, creates a race to the bottom.

If rerun deference were *required*, an administrator would have every incentive to always begin with the least generous interpretation of its plan. If it is

rejected as “arbitrary and capricious,” the administrator would then proceed seriatim through less favorable interpretations of the plan. The only non-market (i.e., non-reputational) constraint on such behavior is the possibility that a court will find such conduct to constitute “bad faith.”

Under the status quo, however, an administrator gets *one guaranteed* crack at an ambiguous issue. If that first position is rejected as unreasonable, an impartial court is free (but not required) to resolve the issue in a way disadvantageous to the employer. As such, employers are encouraged to write clear plans to protect against the possibility of judicial intervention. And to the extent that plan terms are ambiguous, fiduciaries are incented to take reasonable positions so as to capture the benefit of deference.

Of course, rerun deference is most troubling for those in vulnerable positions. It threatens the timely delivery of benefits to elderly beneficiaries—those most in need of the protections afforded by ERISA. Rerun deference prolongs litigation and – as this case illustrates – is likely to deprive retirees of their benefits *for years*. ERISA intended prompt and fair benefit determinations, not litigation for the remainder of a retiree’s lifetime.

No court of appeals has articulated a rule of mandatory rerun deference.¹³ Nor should this Court.

¹³ The ERISA cases that Xerox cites in support of remand in the aftermath of an abuse of discretion are cases, unlike this one, in which a new issue “ripens” during litigation. See, e.g., *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1014 (CA9 1997) (remand after

C. Even If ERISA Requires a Court To Grant Rerun Deference, It Surely Does Not Require Deference to Strategic Litigation Positions Which Contradict Administrative Practice.

In seeking deference, Xerox characterizes its Administrator's Approach as an "interpretation" of the 1989 Plan. Yet its proposed "interpretation" openly contradicts the one it continues to take in day to day plan administration. Specifically, Xerox has made clear that it continues to apply the phantom offset to non-plaintiff employees similarly situated to respondents, i.e., those rehired before 1998. A940; A1121. See also *supra* at 33-34.

It is precisely because Xerox's shifting litigation positions in this case *directly conflict* with the position it has taken – and continues to take – in administrative practice that the court of appeals correctly labeled these positions as "the mere *opinion* of the plan administrator." Pet. App. 13a.

Indeed, Xerox has *never* applied either of its proposed litigation "interpretations" in administrative practice. As this Court has recognized in similar circumstances, no rational purpose is served by affording deference to such litigation positions. *Bowen v. Georgetown University Hosp.*, 488 U.S. 204 (1988) (this Court has "never applied the principle of [deference] to agency litigating positions that are wholly unsupported by regulations, rulings, or

abuse of discretion warranted where there was "a wholly new issue" presented).

administrative practice”); *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 741 (1996) (“The deliberateness of such [litigation] positions, if not indeed their authoritativeness, is suspect.”); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (“[C]ourts may not accept appellate counsel’s post hoc rationalizations for agency” action).

This general principle applies with even greater force in the ERISA context. *Firestone* deference is intimately connected with the requirement that an administrator spell out, as part of the initial administrative review process, the “specific reasons” for its denial. 29 U.S.C. § 1133. See also 29 C.F.R. 2560.503-1(g).

Xerox denies strategic play. Instead, it characterizes its conduct as a mere “mistake.” Pet. Br. 38. That is simply untrue: for *years*, it adopted a strategic position regarding the “best” interpretation of the 1989 Restatement in light of its confessed omission of the PSP Offset. Even under a deferential standard of review, that interpretation (i.e., the Phantom Account Approach) was found to be arbitrary and capricious.

The competence rationale for such judicially-created deference rightly dissipates in such a circumstance. This is especially the case where, as here, the administrator *concedes* that his subsequent “alternative” approaches are not his actual beliefs about what the plan says, but merely constitute his normative assessment of what is “equitable.”

Xerox deliberately advanced only the phantom account offset as its interpretation of the plan in

Frommert I. It deliberately elected to advance no alternative interpretation in the hopes that it might successfully persuade the court to adopt the phantom offset, thereby awarding respondents no (or virtually no) pension.

That is not a “mistake”—it is a gamble. And it is a gamble that litigants, and their counsel, make every day. Parties are bound to the consequences of their strategic decisions, even if they constitute “mistakes” in retrospect. Xerox strategically elected to argue for virtually no pension benefits to employees in *Frommert I.* Only after it *lost* did it argue, in *Frommert II*, for payment of slightly less trivial benefits pursuant to the Administrator’s Approach. Indeed, only when Xerox realized that the district court would likely also reject this approach did Xerox, in its *reply* brief, ask to pay inadequate (but nontrivial) benefits pursuant to its New Hire Approach – which thereafter became its “principal” approach only after *again* losing in the district court. This type of strategic-play is not entitled to judicially-created deference.

D. The Holding Xerox Attributes to the Second Circuit Is Demonstrably False.

In its opening brief, Xerox relies heavily on the consequences that the holding *it attributes* to the Second Circuit would have for plan administrators in litigation under 29 U.S.C. 1132(a)(2) and (a)(3). Pet. Br. 35 (discussing reimbursement and subrogation

enforcement actions);¹⁴ *id.* at 35-36 (discussing lawsuits alleging a breach of fiduciary duty by the plan administrator).¹⁵ This straw man constructed by Xerox is easily exposed.

In *Firestone*, this Court held that courts must defer to reasonable determinations made by ERISA plan administrators when such courts are reviewing lawsuits brought pursuant to 29 U.S.C. 1132(a)(1)(B) challenging an administrator's denial of benefits. As the *Firestone* Court made explicit, its opinion did *not* address whether, and to what extent, a court is required to defer to an ERISA plan administrator's determinations in the context of a claim under 29 U.S.C. 1132(a)(2) or (a)(3):

The discussion which follows is limited to the appropriate standard of review in 1132(a)(1)(B) actions challenging denials of benefits based on plan interpretations. We express no view as to the appropriate standard of review for actions under other remedial provisions of ERISA.

Firestone, 489 U.S. at 108.

Whether, and to what extent, judicial deference is required in cases brought under 29 U.S.C. 1132(a)(2) and (a)(3) is an extremely important question. And, as this Court recognized in *Firestone*, it must be

¹⁴ Such actions – brought by plan fiduciaries – cannot be filed pursuant to 29 U.S.C. 1132(a)(1)(B) which only authorizes “a participant or beneficiary” to bring suit.

¹⁵ Such actions must be brought pursuant to 29 U.S.C. 1132(a)(2) or 29 U.S.C. 1132(a)(3).

addressed in a case that *actually* involves claims brought under one of those provisions.

As in *Firestone*, the only claim at issue here was brought pursuant to 29 U.S.C. 1132(a)(1)(B). In its opening brief, Xerox is quick to emphasize this point. Pet. Br. 13. Thus, the suggestion that the Second Circuit's holding applies to cases involving 29 U.S.C. 1132(a)(2) and (a)(3) is baseless.

II. THE SECOND CIRCUIT PROPERLY APPLIED AN ABUSE OF DISCRETION STANDARD IN AFFIRMING THE DISTRICT COURT.

On page 53 of their 62 page brief, Xerox offers an alternative basis for reversal: that the Second Circuit erred in reviewing the district court under an abuse of discretion standard. Xerox's argument is predicated on mischaracterization of what was actually being reviewed by the court of appeals.

A. In 2006, the Second Circuit Interpreted the 1989 Plan and Concluded That Its Plain Text Permitted a Range of Offset Methods.

Extending deference to Xerox, the *Frommert I* panel held that the 1989 Restatement permitted Xerox to offset *some* amount against respondents' post-rehire pensions. The court based its conclusion on §9.6 of the 1989 Restatement which authorized an offset equal to the "accrued benefit attributable to the [prior] distribution" of benefits. JA 32a.

The *Frommert I* panel also concluded, however, that the generic language in §9.6 of the 1989

Restatement did *not* permit Xerox to “attribute” amounts to respondents’ prior distributions that were inconsistent with an average plan participant’s expectations in light of five years of anemic SPD disclosures. In concluding that Xerox’s imposition of the phantom offset was arbitrary and capricious, the court of appeals noted:

The prolonged absence of any mention of the phantom account from Plan documents, most notably SPDs, likely, and quite reasonably, led plan participants to believe that it was not a component of the Plan. *Rather rehired employees likely believed that their past distributions would only be factored into their benefits calculations by taking into account the amounts they had actually received.*

Pet. App. 47a (emphasis added). Furthermore, the court of appeals concluded that:

Without the benefit of such information [i.e., that Xerox intended to apply an offset in an amount significantly greater than the monies *actually received*], former employees contemplating returning to Xerox were denied the opportunity to make a meaningful decision regarding whether they would accept the terms of Xerox’s pension plan * * * * Such belated disclosure of so significant a change cannot be squared with ERISA’s mandate.

Pet. App. 37a.

As such, it remanded the case to the district court to “employ equitable principles when determining the

appropriate calculation.” *Id.* The point of the remand was procedural fairness in light of an ambiguous instrument, namely, to give both sides the opportunity to present compelling argument and relevant extrinsic evidence regarding the intersection of the 1989 Restatement, the SPDs, and the offset expectation of an average plan participant given the circumstances of this case. Only then could the court fairly adjudge the expectations of an average plan participant and fashion a remedial offset matching those expectations.

B. The District Court Selected an Appropriate Offset Method.

On remand, the district court held two days of hearings in which it heard testimony from, among others, two respondents it believed were representative of the group. See, *e.g.*, A385-625 (hearing transcripts). The court also reviewed extensive written submissions from both sides, including affidavits and expert reports.

The court held that it would be unreasonable for Xerox to offset any more than the payments that respondents actually received. In so doing, the court reasoned as follows:

Some testimony at the hearing before me focused on the appropriate economic, financial and actuarial methods for treating prior distributions. But this Court is not charged with writing a sound retirement plan. Rather, I must interpret the Plan as written *and consider what a reasonable employee would have understood to be the case concerning the effect of prior distributions. If the employee had*

no notice of the ‘phantom account,’ he also had no notice of some of the other mechanisms suggested by witnesses at the remand hearing before me.

Pet. App. 104a (emphasis added).

C. Applying the Correct Standard of Review, the Second Circuit Affirmed the District Court.

The Second Circuit affirmed the district court’s choice of offset. In its decision, the *Frommert II* panel reiterated the fact that the *Frommert I* panel had *already* “construed and applied” the relevant terms of the 1989 Plan. Pet. App. 8a. And it reiterated the fact that the selection of an offset method was a matter of judicial discretion. Pet. App. 13a. This was so, the court of appeals explained, because (i) Xerox had violated ERISA by improperly amending its plan without sufficient notice to respondents and (ii) the *operative* plan (i.e., the 1989 Plan) addresses respondents’ circumstances “with what can only be described as ambiguity, contradiction or silence.” *Id.*

In reviewing the district court’s exercise of discretion, the Second Circuit applied the correct standard. When parties seek to give meaning to truly ambiguous written terms with reference to extrinsic evidence, judicial discretion is appropriate, and the standard of review in such cases is abuse of discretion. See, e.g., *In re Navigation Technology Corp.*, 880 F.2d 1491, 1495 (CA1 1989) (abuse of discretion review regarding meaning of ambiguous contract); *Brewer v. Muscle Shoals Board of Education*, 790 F.2d 1515, 1519 (CA11 1986); *Restaurant Operators, Inc. v.*

Jenney, 128 N.H. 708, 710, (N.H. 1986) (clearly erroneous standard). In addition, where, as here, the court is constructing a remedy in the aftermath of a statutory violation, discretion is appropriate. See, *e.g.*, *Downie v. Independent Drivers Ass'n Pension Plan*, 934 F.2d 1168, 1170 (CA10 1991) (abuse of discretion review regarding constructing of ERISA remedy).

Ultimately, the difficulty with Xerox's argument is that the Second Circuit had *already* interpreted the relevant plan documents. Simply put: no new purely interpretative task was left for the court of appeals in *Frommert II*. At issue was whether the judicial discretion needed to remediate the gap in the plan was exercised permissibly by the district court. The court of appeals held it was.

III. EVEN IF THE CHOICE OF OFFSET METHOD SHOULD HAVE BEEN REVIEWED *DE NOVO*, THE JUDGMENT MUST BE AFFIRMED.

Even if the Second Circuit applied the incorrect standard in reviewing the district court, any error was harmless. The offset method selected by the district court was the most reasonable interpretation of the 1989 Restatement. And, in any event, Xerox's litigation-inspired offset proposals are indefensible. Because remand will not change the result of this case, the Second Circuit's judgment must be affirmed.

A. The Offset Method Selected by the District Court Is the Best Approach.

The PSP Cash-Out Offset adopted by the district court is the most straightforward reading of the phrase “accrued benefit attributable to [the prior] distribution” in the 1989 Restatement.

Respondents’ prior distributions came entirely from the PSP – a defined contribution plan. And ERISA defines a participant’s “accrued benefit” in a defined contribution plan as the account balance. 29 U.S.C. 1002(23)(B). Thus, the “accrued benefit attributable to [a prior defined contribution plan] distribution” is the cashed-out account – nothing more, nothing less.

This natural reading of §9.6 of the 1989 Restatement is also the understanding that an “average plan participant” would have had of the offset in light of the disclosures provided by Xerox—which never mentioned *anything* about interest, time value of money, or actuarial assumptions.

B. Xerox Has Repudiated the New Hire Approach.

In its opening brief, Xerox has abandoned its New Hire Approach. Pet. Br. 59 (conceding that the plan “tak[es] account of all of the employees’ service to Xerox, including service rendered before their rehire date.”). This is not surprising. It was indefensible for three independent reasons.

First, it is based on an untenable construction of the 1989 Restatement. It purports to rely on 1.44(f)

which provides: “No credit shall be given for any period with respect to which a lump sum payment has been made under Section 8.5 and 8.8.” JA 25a. But respondents’ lump sum payments were made pursuant to §8.2 of the plan. As such, the Second Circuit easily rejected Xerox’s argument. Pet App. 9a.

Second, it is foreclosed by 29 U.S.C. 1022 because of the contrary representations made by Xerox in its SPDs. JA 48a (representing that “[t]he term service, as used in the formula, basically includes all your years of employment with Xerox up to a maximum of 30 years” and listing exceptions none of which apply to respondents).

Finally, it is expressly prohibited by ERISA’s buyback rules. 29 U.S.C. 1054(b)(1), (d)(1), and (e). It is undisputed that the Xerox plan did not give rehired employees the right to “buy-back” into the plan by repaying prior distributions plus statutory interest. JA 92a. Of course, Xerox was not *required* to include such a buy-back right. JA 115a. But, because Xerox chose not to include such a right, the RIGP was required to use all years of service when calculating the defined benefit of rehired employees. Xerox conceded as much before the court of appeals when it argued that:

[Plaintiffs] * * * now contend that the “new hire” methodology should not be adopted because the Plan does not contain a “buy back” provision. The issue is a red herring. The District Court is ordering a remedy for a violation of ERISA, not designing an ERISA plan. Thus, the District Court does not have to

comply with all of ERISA's other statutory provisions.

Appellants' Reply Brief in *Frommert v. Conkright*, 535 F.3d 111 (CA2 2008) 16.

C. The Administrator's Approach Is Indefensible.

The Administrator's Approach is vastly more complicated than his New Hire Approach, but similarly indefensible. First, it *again* resurrects the illegal phantom account offset – this time for the post-1998 period of service. JA 142a – 143a. Second, it relies on a host of complex assumptions which are loosely based on scattered provisions in the 1989 Restatement none of which is tied, in any way, to *PSP distributions*. As Xerox's own expert admitted, small differences in assumptions can have major effects. But yet again, Xerox unsurprisingly chooses aggressive assumptions (e.g., interest rates) when many alternatives exist (e.g., the considerably lower interest rates referenced in the statutory buy-back provision which Xerox chose to ignore).

Most importantly, however, the Administrator's Approach is indefensible because it suffers from the same disclosure problem as the phantom account. Put simply, the SPDs made no mention of *any* actuarial assumptions that would be applied to a participant's past distributions. In the exact same way that the SPDs failed to disclose the phantom account offset, they failed to disclose the offset resulting from application of the Administrator's Approach.

Indeed, it would be truly miraculous if the SPDs did disclose sufficient information to “reasonably apprise” respondents of the complicated details and actuarial assumptions of the Administrator’s Approach in *any* way, let alone “in a manner calculated to be understood by the average plan participant.” 29 U.S.C. 1022. The reason, of course, is that before 2007, Xerox never used or intended to use the Administrator’s Approach. So how could it have disclosed the terms of such an offset in the early 1990s? There is no way that a post-hoc litigation position developed in response to an appellate court’s 2006 decision could possibly have been disclosed in SPDs from over *fifteen years earlier*.

The offset method selected by the district court is the most reasonable choice given the circumstances of this case. It should be applied.

CONCLUSION

The judgment should be affirmed.

Respectfully Submitted,

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APPENDIX

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APPENDIX
Fold-Out Exhibits

Chart #1: A Typical Floor-Offset Arrangement

Chart #2: Respondents' Pre-1989 Distributions

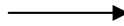
Chart #3: The Pre-1989 Phantom Account Offset

(See next 3 pages)

Chart #1: A Typical Floor-Offset Arrangement

Step #1: Calculate an employee's base monthly annuity using the formulas contained in the defined benefit plan

- Apply the defined benefit plan formulas which typically involve years of service and compensation.



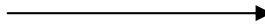
DB plan monthly annuity

Step #2: Take the employee's individual account balance.



- The picture to the left represents the actual balance in the employee's defined contribution

Step #3: Convert the account balance into a monthly annuity using specified assumptions.



DC plan monthly annuity

Step #4: Compare the two annuities

From Step #3

DC plan monthly annuity

From Step #1

DB plan monthly annuity

Step #5: Determine source of distributions

"Accrued benefit" under DB plan. Xerox calls this a "top-up."

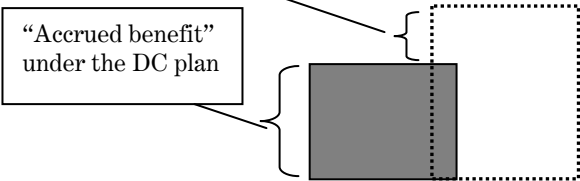
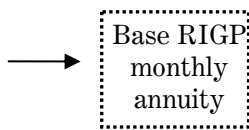


Chart #2: Respondents' Pre-1989 Distributions

Step #1: Calculate the base RIGP monthly benefit

- Add 5 highest years compensation
- Divide by 60 (= monthly average)
- Multiply by 1 2/3%
- Multiply by # of years worked

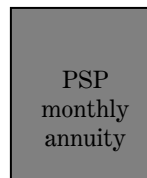
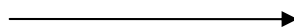


Step #2: Take the *actual* amount of the PSP account.



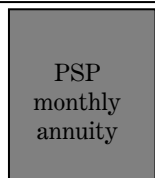
- The picture to the left represents the actual balance of the employee's PSP account.

Step #3: Convert the *actual*/PSP balance into a monthly benefit using assumptions from PSP contracts.

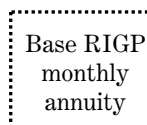


Step #4: Compare the monthly benefits

From Step #3



From Step #1



Step #5: Determine source of distributions

There is no "accrued benefit" under the RIGP

"Accrued benefit" under the PSP

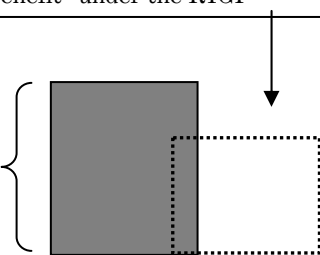
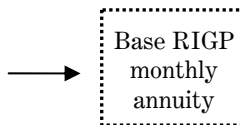


Chart #3: The Pre-1989 Phantom Account Offset

Step #1: Calculate the base RIGP monthly benefit

- Add 5 highest years compensation
- Divide by 60 (= monthly average)
- Multiply by 1 2/3%
- Multiply by # of years worked



Step #2: Take the *actual* amount of the PSP account.

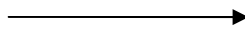
- The account balance is \$0; the PSP was already distributed.

Step #2a: Add the *hypothetical* balance of the PSP account as if the prior distribution had remained with Xerox.



- The picture to the left represents the *hypothetical* (i.e., phantom) balance of the employee's PSP account.

Step #3: Convert *hypothetical* PSP balance into a *hypothetical* monthly benefit using assumptions from PSP contracts.

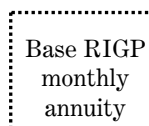


Step #4: Compare the monthly benefits

From Step #3



From Step #1



Step #5: Determine source of distributions

There is no "accrued benefit" under the RIGP. There is nothing to "top-up."

There is no PSP "accrued benefit." The *actual* account balance is \$0

