12-0067-cv

United States Court of Appeals

for the

Second Circuit

PAUL J. FROMMERT, 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, ALAN H. CLAIR, 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, IRSHAD QURESHI, RICHARD C. CRATER, GAIL J. LEVY, JOHN A. WILLIAMS, CRYSTAL THORTON, CHARLES R. DRANNBAUER, WILLIAM M. BURRITT, JANICE ROSS HEILER, JOSEPH MCNEIL,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

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Plaintiffs-Appellants,

– v. –

SALLY L. CONKRIGHT, XEROX CORPORATION PENSION PLAN ADMINISTRATOR, PATRICIA M. NAZEMENTZ, XEROX CORPORATION PENSION PLAN ADMINISTRATOR, XEROX CORPORATION, LAWRENCE M. BECKER, XEROX CORPORATION PLAN ADMINISTRATOR, XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN, LAWRENCE BECKER, XEROX CORPORATION PLAN ADMINISTRATORS,

Defendants-Appellees.

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STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 26.1

Defendant-Appellee Xerox Corporation ("Xerox") is a publicly-traded corporation (NYSE: XRX) that has no parent corporation or publicly held corporation that owns 10% or more of its stock.

COUNTER-STATEMENT OF ISSUES FOR REVIEW

1. Whether under a deferential standard of review, the District Court properly found that a Plan Administrator's interpretation of a retirement plan was a reasonable one, grounded in the terms of the retirement plan and taking into account the time value of money in a typical way.

2. Whether in determining the remedy for a notice violation arising under Section 204(h) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1054(h), the District Court correctly determined that the appropriate approach did not need to be disclosed in exhaustive detail in the retirement plan's summary plan description ("SPD").

3. Whether the District Court properly denied a belated request for additional discovery as to whether the Plan Administrator had a conflict of interest where: (i) such request is outside the scope of the Supreme Court's mandate; and (ii) Plaintiffs had several years to conduct unhampered discovery and had uncovered no evidence of bad faith or that the Plan Administrator would not fairly exercise his discretion to interpret the terms of the retirement plan.

COUNTER-STATEMENT OF THE CASE

This case is before the Court on remand from a decision of the Supreme Court, and follows a decision of the District Court resolving all remaining issues in this case. The initial lawsuit was filed in November 1999. In their First

Consolidated and Amended Complaint ("Complaint"), Plaintiffs-Appellants ("Plaintiffs"), current and former Xerox employees, contend that the Plan Administrator could not calculate their retirement benefits under the Xerox Retirement Income Guarantee Plan ("RIGP" or "Plan") using the offset mechanism specified in the Plan for their prior distribution of benefits because Plaintiffs were not provided with adequate notice of the specific details of that offset mechanism as required by Section 204(h) of ERISA, 29 U.S.C. § 1054(h). (A-201-214).[1]

A. The District Court's Initial Decision

Following the completion of discovery, two Plaintiffs, Alan Clair and Paul Frommert, moved for summary judgment, seeking a clarification of their rights to future benefits under the terms of the Plan. (*Id.*). Defendants opposed the motion and cross-moved for summary judgment dismissing all claims.

The District Court granted Defendants' cross-motion for summary judgment, and denied Plaintiffs' motion. *Frommert v. Conkright*, 328 F. Supp. 2d 420, 439 (W.D.N.Y. 2004) ("*Frommert 2004*"). Plaintiffs appealed.

B. *Frommert I*

The primary issue on the 2006 appeal was whether the SPD adequately disclosed the manner in which rehired employees' previous benefit distributions

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[1] References to the Joint Appendix are designated as "A-[page number]." References to the Special Appendix are designated as "SPA-[page number]."

were to be factored into the calculation of their retirement benefits after returning to employment at Xerox. (A-735-736). This Court concluded that, although the SPD had notified participants that there would be an offset for prior distributions, the pre-1998 SPDs did not adequately describe the details of the "phantom account" offset mechanism for prior distributions in violation of Section 204(h) of ERISA, 29 U.S.C. § 1054(h), which requires advance notice of certain plan amendments.[2] *Frommert v. Conkright*, 433 F.3d 254, 262 (2d Cir. 2006) ("*Frommert I*").

As a remedy for the notice violation, this Court invalidated the phantom account provision of the Plan for those Plaintiffs who were rehired before the issuance of the 1998 SPD. *Id*. This Court then remanded the case to the District Court for a determination of the benefits due to Plaintiffs under the "pre-amendment" terms of the Plan - *that is,* the terms of the Plan as they existed before the issuance of the 1998 SPD. *Id.* at 268. In doing so, this Court specifically directed the District Court to "utilize an appropriate pre-amendment calculation" to determine benefits. *Id.*

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[2] Section 204(h) of ERISA provides, in pertinent part, that a pension plan "may not be amended so as to provide for a significant reduction in the rate of future benefit accrual unless the plan administrator provides . . . sufficient information to allow individuals to understand the effect of the plan amendment." 29 U.S.C. § 1054(h)(1)-(2).

C. The District Court's 2007 Decision and Order

Although the Plan's offset provision had been invalidated, the parties agreed that some sort of offset against current benefits was necessary to reflect Plaintiffs' earlier distribution of benefits to avoid duplication of benefits. *Frommert v. Conkright*, 472 F. Supp. 2d 452, 455 (W.D.N.Y. 2007) ("Frommert 2007"). The parties disagreed, however, as to the methodology to be used for offsetting those prior distributions. *Id.* As a result, the District Court held a hearing on remedies and invited the parties to submit evidence to support their respective positions. (A-272-512).

(i) The Evidence Submitted at the Hearing

Defendants' evidence included an affidavit of the Plan Administrator, Lawrence Becker, construing the terms of the RIGP in light of this Court's 2006 opinion. (A-85-93). Relying on the terms of the RIGP, but excluding any phantom accounting, the Plan Administrator proposed an actuarial equivalence approach (the "Actuarial Equivalence" approach), based on the actuarial equivalent assumptions then applicable, to perform the offset. (*Id.*).

At the hearing, Lawrence Sher, the chief actuary with Buck Consultants, testified that he had reviewed the Plan Administrator's interpretation of the Plan and that in his expert opinion, it was logical and equitable because it was a typical approach used for offsets under comparable plans, was consistent with the terms of the RIGP, used applicable Treasury Regulations and Pension Benefit Guaranty Corporation ("PBGC") assumptions to determine a standard interest rate, and was in compliance with IRS Revenue Ruling 76-259. (A-421-504).

The evidence submitted by Plaintiffs included the testimony of two witnesses: Plaintiff Clair and Philip Cofield, an actuary with Abar Consulting. (A-272-377). Cofield agreed that the most desirable and equitable approach to use to offset for a prior distribution was one that accounted for the time value of money. (A-312-376). He proposed a different method for doing so than did the Plan Administrator, one of which Plaintiffs now refer to as the "Actual-Annuity-Offset" approach. (Pl. Br. at 17).[3] This approach was challenged both on cross examination and by Sher because, although it purported to account for the time value of money, the methodology involved offsetting for only a small fraction of the actual amount of benefits previously received by Plaintiffs. (A-674-682).

Cofield also testified that another option would be to simply offset the lump sum amount of the prior distribution with no appreciation (the "Nominal Offset" approach). (A-80). In addition, Cofield was of the opinion that using a "new hire" methodology (the "New Hire" approach), which would treat Plaintiffs in the same manner as newly-hired employees, would *not* comport with equitable principles

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[3] References to the Plaintiffs-Appellants' Brief on Appeal are designated as "Pl. Br. at [page number]."

and was inconsistent with the terms of the Plan. (A-81).

At the conclusion of the hearing, Plaintiffs abandoned the Actual-Annuity-Offset and New Hire approaches, and instead only asked the Court to adopt the Nominal Offset approach. (A-297-298). Defendants contended that the Court should defer to and adopt the Plan Administrator's Actuarial Equivalence approach. (A-422-424).

(ii) The District Court's Determination

The District Court issued a Decision and Order, dated January 24, 2007. *Frommert 2007,* 472 F. Supp. 2d 452. The District Court refused to defer to or consider the Plan Administrator's interpretation of the terms of the Plan. *Id.* at 458-59. Instead, the District Court adopted the Nominal Offset approach urged by Plaintiffs. (SPA-2); *Frommert 2007,* 472 F. Supp. 2d at 458-59. Defendants appealed.

D. *Frommert II*

In a Decision dated July 24, 2008, this Court upheld the District Court's decision not to apply a deferential standard of review to the Plan Administrator's interpretation, and it affirmed the District Court's decision on the remedy to be imposed for the Section 204(h) notice violation. *Frommert v. Conkright*, 535 F.3d 111 (2d Cir. 2008) ("*Frommert II*").

Defendants successfully petitioned for and obtained a writ of certiorari from the United States Supreme Court. *See Conkright v. Frommert*, 130 S. Ct. 1640, (2010) ("*Conkright*").

E. The Supreme Court's 2010 Decision

In an Opinion dated April 21, 2010, the Supreme Court held that "the Court of Appeals erred in holding that the District Court could refuse to defer to the Plan Administrator's interpretation of the Plan on remand simply because the Court of Appeals had found a previous interpretation by the Administrator to be invalid." (SPA-2); *Conkright,* 130 S. Ct. at 1651. The Supreme Court reasoned that "a single honest mistake" does not provide a basis for "stripping the administrator" of "deference for subsequent related interpretations of the plan." *Conkright,* 130 S. Ct. at 1644, 1647.

The Supreme Court also emphasized the importance of the time value of money in the administration of pension plans. *Id.* at 1650. Citing an *amicus* brief filed by a prominent group of senior actuaries, the Supreme Court observed that it would be "heresy" and "highly unforeseeable" to interpret the Plan in a way that failed to take into account the time value of money. *Id*. The Supreme Court further recognized that the Nominal Offset approach put Plaintiffs "in a better position than employees who never left" Xerox because Plaintiffs "were able to use their past distributions as they saw fit for over 20 years." *Id*.

The Supreme Court remanded the case to the Second Circuit for further proceedings consistent with its decision, *id.* at 1652, and this Court remanded the case back to the District Court. (SPA-3).

F. The Decision Below

Following remand, Plaintiffs filed a motion to reenter judgment, seeking the entry of a judgment based on the exact same Nominal Offset approach criticized by the Supreme Court as "heresy" and "highly unforeseeable." (A-628). Plaintiffs claimed that using the Plan Administrator's interpretation of the Plan's terms as a remedy would violate the notice provisions contained in Section 102 of ERISA, 29 U.S.C. § 1022.[4] (A-628-651). Alternatively, Plaintiffs urged the District Court to adopt the New Hire approach, which would in effect ignore the terms of the Plan entirely and result in Plaintiffs being treated as new hires without prior years of service. (A-648-650). In a letter brief dated May 24, 2011, after the Supreme Court's decision in *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011) ("*Amara*"), Plaintiffs further requested that the court "reform" the Plan as a remedy for the notice violation – without submitting any evidentiary support for their request or seeking any discovery pertinent to the reformation issue. (A-71, *Dckt. No.* 226).

Defendants filed a cross-motion for an order affirming the Plan Administrator's interpretation of the Plan, authorizing the Plan Administrator to

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[4] Section 102 of ERISA provides, in pertinent part, that an SPD must contain a description of "the circumstances which may result in . . . loss of benefits." 29 U.S.C. § 1022(b).

calculate and pay benefits in accordance with that interpretation, and dismissing the Complaint. (A-652-758). Defendants also submitted a letter brief, dated May 27, 2011, responding to Plaintiffs' contentions regarding *Amara* and why that decision did not support Plaintiffs' position. (A-71, *Dckt. No.* 227).

Plaintiffs then argued that the "Actuarial Equivalence" approach was "unreasonable." In the alternative, Plaintiffs sought discovery regarding the Plan Administrator's alleged "conflict of interest," *citing Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008) (*"Glenn"*). (A-768, 774-75).

Following oral argument, the District Court issued a Decision and Order dated November 14, 2011. (SPA-1-26). After reviewing voluminous submissions in this case, the District Court concluded that the Plan Administrator's interpretation was reasonable, equitable, and entitled to deference. (SPA-9). In accepting the Plan Administrator's interpretation, the District Court found that "[t]he [Plan] Administrator's approach takes into account the time value of money, which the Supreme Court has indicated is proper to do, *see Conkright*, 130 S. Ct. at 1650, and it also falls within the scope of the notice that was given to Plaintiffs concerning the effect of prior distributions, at least as far back as the 1989 Restatement of the Plan." (SPA-9).

The District Court further held that the interest rates used to calculate the offset for prior distributions under the Plan Administrator's approach were reasonable because they: (i) were "derived from market data" by the U.S. Government; and (ii) are the rates "specified" by the Plan for use in converting lump sum "benefits to annuities." (SPA-11-12). In addition, the Court expressly found Plaintiffs' Nominal Offset approach to be "*un*reasonable" because it failed to take into account the time value of money and "would, as the Supreme Court has pointed out, grant a windfall to plaintiffs by placing them in a better position than employees who never left Xerox in the first place." (SPA-18-19) (emphasis in original).

The District Court also exercised its discretion to reject as untimely Plaintiffs' request for conflict of interest discovery. (SPA-20-22). As the District Court explained, although it has long been the law in the Second Circuit that plan participants may seek discovery regarding alleged conflicts of interest on the part of plan administrators, during "extensive discovery in this case . . . plaintiffs never requested discovery on any purported conflicts issue," including after the Plan Administrator submitted his interpretation of the pre-amendment Plan terms to the court in 2006. (SPA-20-21). Accordingly, the District Court rejected Plaintiffs' belated request for conflict of interest discovery. (SPA-21). This appeal ensued.

COUNTER-STATEMENT OF THE FACTS

A. The Plaintiffs

Plaintiffs are present and former Xerox employees, each of whom left the company, and were later rehired. *Frommert I,* 433 F.3d at 257. During their initial period of employment, each Plaintiff was a participant in the RIGP. *Id.* Upon the initial termination of employment, each Plaintiff received a lump sum distribution of retirement benefits. *Id.* Each Plaintiff was later rehired by Xerox and again became a plan participant in the RIGP. *Conkright*, 130 S. Ct. at 1645.

B. The RIGP's Floor-Offset Arrangement

The RIGP is a "floor-offset" arrangement. (A-98). In a typical "floor-offset" arrangement, a defined benefit plan coordinates with a defined contribution plan.[5] *White v. Sundstrand Corp.,* 256 F.3d 580, 581 (7th Cir. 2001). The primary purpose of a "floor-offset" arrangement is to reduce an employee's exposure to investment risk under a defined contribution plan by linking benefits provided by a defined benefit plan, which guarantees employees a minimum level of retirement benefits (*i.e*., the "floor"). *See generally Lunn v. Montgomery Ward & Co*., 166 F.3d 880, 883 (7th Cir. 1999) ("The purpose of [a floor-offset arrangement] is to provide, in the [defined benefit] component, insurance against the vagaries of

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[5] Defined contribution plans, also known as individual account plans, guarantee only that the employer will contribute a certain amount to that account value, without providing any guarantee as to the amount in that account at the time of retirement. In contrast, a defined benefit plan consists of a general pool of assets and generally guarantees a specific benefit upon retirement without regard to how the market performs. *Lonecke v. Citigroup Pension Plan*, 584 F.3d 457, 461-62 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3506 (2010); 29 U.S.C. §§ 1002(34)-(35).

securities investments [in the defined contribution] component. . . .").

C. The Plan's Alternative Calculation Methods

Under the RIGP, a plan participant's benefits are determined by looking at the highest of three alternative calculation methods. (SPA-8); *Frommert I*, 433 F.3d at 257. The first method is the defined benefit component of the Plan and is referred to in the Plan as the Highest Average Plan ("HAP") formula. (A-106-186). Under the HAP formula, a plan participant's benefits are determined by multiplying the years of service (up to 30) by 1.4% of the highest-average yearly pay. (*Id.*).

For rehired employees, the years of service includes all of their years of service at Xerox and not just the period of employment following rehire. (A-85-93). The HAP formula provides benefits in the form of a single life annuity commencing at normal retirement age.[6] (*Id.*). As the defined benefit component of the RIGP, the HAP formula sets the minimum or "floor" benefit that is guaranteed to be paid to plan participants. (*Id.*).

The Plan compares the benefits calculated under the HAP benefit to the amount of the plan participant's defined contribution portion of the Plan as reflected in two different accounts. (A-106-186). The first account is the

[6] A single life annuity commencing at normal retirement age is a stream of fixed monthly payments (for example, $2,000 a month) beginning at age 65 and ending when the participant dies.

employee's Cash Balance Retirement Account ("CBRA"), which consists of yearly contributions by Xerox of five percent of the employee's salary. (*Id.*). The "account" accrues interest at a rate of one percent above the one-year Treasury Bill rate. (*Id.*). For employees who commenced employment before the end of 1989, the CBRA also includes the balance of a Profit Sharing Account that Xerox maintained for each plan participant prior to December 31, 1989. (*Id.*).

The third and final method of calculation is the plan participant's Transitional Retirement Account ("TRA"), which is available only for employees hired before 1989. A TRA consists of the balance, if any, that a plan participant had in a Retirement Account as of December 31, 1989, plus any hypothetical gains based on investment results of the funds in which the employee's Profit Sharing Retirement Account were invested as of that date. (*Id.*).

D. The Non-Duplication of Benefits Provision

The RIGP has always contained a non-duplication of benefits provision, set forth at Section 9.6 of the Plan. (A-106-186, Plan § 9.6). The non-duplication provision requires that an employee's current retirement benefit be offset by "the accrued benefit attributable" to any prior benefit distribution made to the employee, so as to avoid giving rehired employees double credit for their initial period of service with Xerox. (A-106-186, Plan § 9.6; A-85-93, ¶¶ 3, 17).

This provision is essential because when calculating the plan participant's benefits under the HAP formula, each rehired plan participant receives "credited service" for all of their years of service at Xerox, including those years for which they had already received their pension benefits. Without properly taking into account the amount of their prior distribution, as is required by the Plan's non-duplication of benefits provisions, such rehired employees would receive duplicate benefits upon their retirement from Xerox. *Frommert 2004*, 328 F. Supp. 2d at 425.

To avoid the payment of such duplicate benefits, the Plan Administrator initially interpreted the RIGP to call for the phantom account offset approach set forth in the Plan. *Id.* at 424. That method calculated the hypothetical growth that a plan participant's past distributions *would have experienced* if those distributions had remained in their CBRA and/or TRA and continued to earn investment returns there, and then reduced a plan participant's present benefits accordingly. *Id.* at 426-28.

As this Court found in *Frommert I*, because the details of such offset provision were not adequately explained to Plaintiffs before to the issuance of the 1998 SPD, the 1989 Restatement could not be read to encompass the use of the phantom account methodology to determine the amount of the offset in the calculation of their benefits. *Frommert I*, 433 F.3d at 262.

E. The Plan Administrator's Construction of Pre-1998 Plan Terms

After reviewing relevant plan provisions in light of *Frommert I,* the Plan Administrator construed the pre-1998 terms of the Plan as requiring an offset to the Plan's HAP formula. In the absence of the phantom account methodology, the Plan Administrator concluded that Section 9.6 was best construed to require that a prior lump sum distribution of benefits be offset against a participant's final retirement benefit by:

1. converting the prior lump sum benefit distribution into an actuarially equivalent annuity (*i.e.*, a stream of fixed periodic payments with the same economic value as the prior lump sum) using annuity rates established by the PBGC (a government agency created under ERISA); and then
2. offsetting that resulting annuity against the final annuity benefit otherwise available under the Plan's HAP formula.

(A-87-92, ¶¶ 7-17).

As the Plan Administrator observed, an employee's prior lump sum distribution of benefits *must* be converted into annuity form before an offset can be performed, because the Plan's HAP formula expresses a participant's accrued benefit as an annuity.[7] (A-88 ¶ 11; A-91 ¶ 18). The Plan Administrator also

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[7] The HAP formula provides benefits in the form of a single life annuity commencing at normal retirement age. (A-88, ¶ 10). The prior benefit distributions received by Plaintiffs from the defined contribution component of the Plan, by contrast, were paid out as one-time lump sums. Because these benefits are expressed in different forms, Plaintiffs' prior lump sum benefit (continued…)

observed that the Plan provides for the use of PBGC annuity rates to convert defined contribution account balances into annuities. (A-90, ¶ 15 (citing Plan § 4.3(e))). The Plan Administrator thus concluded that Plaintiffs' prior lump sum distributions of benefits – which came from defined contribution accounts – should be converted into an annuity using PBGC interest rates to make the conversion, and then offset against the participant's annuity benefit under the HAP Formula. (A-90, ¶¶ 17-19).

In determining how to take into account the participant's prior service, the Plan Administrator also relied on regulations from the Department of Treasury and the Internal Revenue Service ("IRS") which govern tax-qualified retirement plans and provide guidance on precisely how a floor-offset plan may take a prior distribution into account. (A-88, ¶ 9). Under the approach set forth in these regulations, the "accrued benefit" in the defined benefit plan is offset by the "actuarial equivalent" of the prior distribution from the defined contribution plan. 26 C.F.R. § 1.401(a)(4)-8(d)(1)(i). (A-88-89).

Thus, the Plan Administrator concluded that the Plan's terms (without any consideration of the phantom account offset provision) entitled each Plaintiff to a minimum benefit that, when expressed in the form of a single life annuity

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distributions must be converted to an annuity to offset the prior lump sum payout against the current annuity. (*Id.* ¶ 11).

beginning at normal retirement age, is equal to the greatest of:

> (a) the participant's TRA, determined without regard to the participant's prior distribution (*i.e.* excludes any amounts associated with the prior distribution) and expressed as an annuity commencing at normal retirement age; or
>
> (b) the participant's CBRA, determined without regard to the participant's prior distribution (*i.e.* excludes any amounts associated with the prior distribution) and expressed as an annuity commencing at normal retirement age; or
>
> (c) the participant's HAP formula, taking into account the participant's service prior to rehire and offset by the participant's prior distribution expressed as an annuity commencing at normal retirement age. (A-87).

This methodology was adopted by the District Court and is the subject of this appeal.

SUMMARY OF ARGUMENT

Plaintiffs' attempt to ignore the effect of the Supreme Court's decision must be rejected by this Court. *Conkright* holds that the Plan Administrator's interpretation of the pre-1998 Xerox Plan must be reviewed under a deferential standard. *Conkright*, 130 S. Ct. at 1646-51; *see also Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) ("*Firestone*"). Because the Plan Administrator's interpretation of the Plan's provisions preventing duplication of prior benefit distributions made to rehired employees is reasonable and based on substantial evidence, that interpretation is entitled to deference and was properly adopted by the District Court.

The reasonableness of the Plan Administrator's Actuarial Equivalence approach is demonstrated by the facts that it is grounded in the terms of the Plan and is equitable. Specifically, in calculating the final annuity benefit due to these rehired employees under the Plan's HAP formula, the Plan takes account of *all* of their service to Xerox – including their first period of employment. If the Plan provided these employees with a HAP benefit based on all of their service to the company, but failed to take into account the retirement benefits provided after their initial period of employment, these employees would receive double credit for their initial service to Xerox. To avoid that result, the Plan's non-duplication of benefits provision *requires* that Plaintiffs' final benefits be reduced by the "accrued benefit attributable to" the prior distributions they received.

Moreover, this approach properly takes into account the time value of money and calculates the offset for prior distributions in the "typical" way. *See* Brief for the United States as *Amicus Curiae* ("U.S. Br.") at 26 n.7, 130 S. Ct. 1640 (No. 08-0810). As another district court has properly concluded, the Actuarial Equivalence approach: (i) is a "reasonable" interpretation of the Plan; (ii) uses "fair" actuarial assumptions; and (iii) offsets Plaintiffs' final pension benefits only by the real economic value – the "actual actuarial equivalent" – of the lump sum distributions they received. *Miller v. Xerox Corp, Ret. Income Guarantee Plan,* Case No. CV 98-10389, 2010 U.S. Dist. LEXIS 144520 (C.D. Cal. Sept. 22, 2010) ("*Miller*"). Under the Supreme Court's decision in *Conkright*, this Court should defer to the Plan Administrator's reasonable interpretation of the Plan.

In contrast, Plaintiffs' contention that their benefits should be offset only by the nominal value of their prior distribution, without any adjustment to account for the time value of money (the Nominal Offset approach), lacks support in the terms of the Plan. Moreover, the Supreme Court recognized that such an interpretation would be "heresy" and "highly unforeseeable," because it fails to account for the time value of money. *Conkright*, 130 S. Ct. at 1650. The Supreme Court also recognized that the Nominal Offset approach unfairly puts Plaintiffs "in a better position than employees who never left" Xerox. *See id.* By ignoring the time value of money, the Nominal Offset approach gives Plaintiffs a large measure of double credit for their initial periods of service, thereby frustrating the purpose of the Plan's non-duplication of benefits provision.

In an *amicus* brief supporting Plaintiffs, the Department of Labor ("DOL") asserts that courts must consider factors extrinsic to the terms of the plan – including the "reasonable expectations" of plan participants based on the notice they received – in determining whether an administrator's interpretation of plan terms is reasonable. (DOL Br. at 19-20).[8] This surprising and unsupported assertion would turn *Firestone* deference on its head.

Adopting a rule that an interpretation of plan terms may not be given deference unless it is consistent with the "reasonable expectations" of plan participants would effectively reintroduce the very approach that the Supreme Court rejected in this case and would undermine the important ERISA goals of efficient, predictable and uniform plan interpretation that underlie *Firestone* deference. *See Conkright*, 130 S. Ct. at 1649. In any event, the Plan Administrator's interpretation is entirely consistent with the reasonable expectations of an employee, because reasonable people understand that receiving a dollar sooner is worth more than receiving a dollar later, and the Actuarial Equivalence approach accounts for this common-sense principle in the "typical" way.

In an effort to escape the consequences of the Supreme Court's decision in *Conkright*, Plaintiffs try to make this appeal one about notice. Plaintiffs' efforts must fail. The fundamental problem with Plaintiffs' position in this regard is that they are seeking to re-litigate the issue of notice. This Court already found liability for the alleged notice violation in *Frommert I*, and the issue then became one

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[8] References to the Brief submitted by the DOL are designated "DOL Br. at [page number]."

regarding the appropriate remedy for the notice violation. Plaintiffs' notice argument also fails because the enforcement of the Plan's terms (without any consideration of the provision previously disallowed by this Court) involves no transgression of ERISA's notice requirements.

Moreover, the Plan Administrator's interpretation uses a standard, "plain vanilla" method for calculating offsets. ERISA does not require detailed disclosure of such standard offsets in an SPD; all it requires is disclosure of the circumstances in which the offset may occur – disclosures that were made in the Xerox SPD. Moreover, Plaintiffs' attempt to impose a more onerous standard of SPD disclosure would disregard the important distinction between plan documents and SPDs and effectively make deference to plan administrators the exception rather than the rule – precisely the result that the Supreme Court rejected in *Conkright*.

Even if the Actuarial Equivalence approach violated ERISA's notice requirement (and it does not), Plaintiffs *still* would not be entitled to the remedies they seek. In 2011, the Supreme Court overruled prior Second Circuit law creating a "presumption" that plan participants are harmed by ERISA notice violations. *Amara*, 131 S. Ct. at 1866, 1881-1882. The law is now clear that plan participants must prove that they suffered "actual harm" caused by the allegedly inadequate notice. Because there is no evidence of any such harm here, Plaintiffs' belated invocation of equitable remedies under Section 503(a)(3) of ERISA must be rejected.

In any event, Plaintiffs' preferred Nominal Offset remedy is inconsistent with Section 502(a)(3) of ERISA, which authorizes only "appropriate equitable relief." Because that approach does not account for the time value of the monies that Plaintiffs previously received and unfairly treats them better than employees who never left Xerox, this remedy is neither "appropriate" nor "equitable."

Plaintiffs' other proposed remedies are likewise unsupportable and inequitable because they disregard provisions of the Plan and give little to no weight to the real value of monies previously received by Plaintiffs.

There is also no basis for allowing Plaintiffs to take additional discovery as to any purported conflict that the Plan Administrator may have. Not only is Plaintiffs' belated request outside of the scope of the Supreme Court's mandate, but Plaintiffs previously had ample opportunity and incentive to conduct discovery on this topic. Yet, the Supreme Court expressly found that Plaintiffs had presented no evidence of any bad faith or other evidence that the Plan Administrator could not fairly exercise his discretion to interpret the terms of the Plan. Plaintiffs cannot revisit that determination on remand.

STANDARD OF REVIEW

Where, as here, a plan administrator has the discretionary authority to interpret the terms of an employee benefit plan governed by ERISA, this Court's standard of review is to determine if the decision was arbitrary and capricious. *See Tortora v. SBC Commc'ns, Inc.*, 446 F. App'x 335, 337 (2d Cir. 2011) (summary order); *Pagan v. NYNEX Pension Plan*, 52 F.3d 438, 441 (2d Cir. 1995). This Court's standard of review of the District Court's decision as to the appropriate remedy is for an abuse of discretion. *See Frommert II*, 535 F.3d at 118.

With regard to the District Court's refusal to reopen discovery concerning a potential conflict of interest, reversal is required only "when the action taken was improvident and affected the substantial rights of the parties." *Alto v. Hartford Life Ins. Co.*, 11-1563-cv, 2012 U.S. App. LEXIS 11938, *3 (2d Cir. 2012) (unpublished opinion) (*citing Goetz v. Crosson*, 41 F.3d 800 (2d Cir. 1994)).

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY DEFERRED TO THE PLAN ADMINISTRATOR'S REASONABLE INTERPRETATION OF THE PRE-1998 PLAN

In *Firestone,* the Supreme Court held that the proper standard for reviewing decisions of plan administrators is a deferential one where the benefit plan at issue gives the plan administrator or fiduciary the discretionary authority to construe the terms of the plan. *Firestone*, 489 U.S. at 115. The Supreme Court expanded the scope of *Firestone* deference in *Glenn*, 554 U.S. 105, holding that the proper standard of review of a plan administrator's interpretation of the terms of a plan remains a deferential one even in the face of a conflict of interest. In this case, the Supreme Court held that the Plan Administrator has the authority to construe the terms of the Plan and that a "single honest mistake" by the Plan Administrator in previously interpreting that Plan did not operate to strip the administrator of his general authority to do so. *Conkright,* 130 S. Ct. at 1644, 1647.

Under the highly deferential standard of review afforded to the plan administrator's interpretation of a plan, courts cannot substitute their own judgment for that of the plan administrator as if they were considering the issue anew; rather courts can overturn a plan administrator's interpretation only if it is "without reason, unsupported by substantial evidence or erroneous as a matter of law." *Pagan*, 52 F.3d at 442. *Accord Pickreign v. Bulman*, 337 F. App'x 18 (2d Cir. 2009) (summary order); *Celardo v. GNY Auto. Dealers Health & Welfare Trust*, 318 F.3d 142, 146 (2d Cir. 2003).

Correctly applying this deferential standard of judicial review here, the District Court properly deferred to the Plan Administrator in "conclud[ing] that the Administrator's proposed interpretation of the Plan is reasonable, and, guided by the Supreme Court's admonitions, [] accept[ing] that interpretation." (SPA-9). This decision is supported by substantial evidence, is not erroneous as a matter of law, and should be affirmed by this Court for the reasons discussed below.

A. The Plan Administrator's Interpretation is Grounded in the Terms of the Plan and Appropriately Takes Into Account the Time Value of Money

The Plan Administrator's interpretation is reasonable and supported by substantial evidence because it is grounded in the terms of the pre-1998 Plan while properly taking into account the time value of money, which the Supreme Court indicated is essential to do. *Conkright*, 130 S. Ct. at 1650. As Plaintiffs themselves acknowledge, (Pl. Br. at 41), the non-duplication provision in Section 9.6 of the pre-1998 Plan specifies that an employee's current retirement benefit must be offset by "the accrued benefit attributable" to any prior distribution made to that employee. (A-152).

Specifically, Section 9.6 states:

> In the event any part of or all of a 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*.

(A-152) (emphasis added). Section 9.6 thus requires that Plaintiffs' final pension benefits "be offset by the accrued benefit attributable to" the prior distributions they received.

The Plan defines a participant's "accrued benefit" as "[t]he normal retirement benefit" – *i.e.*, the monthly annuity – "which a [participant] has earned up to any date, and which is payable at Normal Retirement Date." (A-106, Plan § 1.1; A-128, Plan § 4.3). With certain exceptions not relevant here, the Plan defines the term "Normal Retirement Date" as the first day of the month following an employee's 65th birthday. (A-114). Thus, Section 9.6, in conjunction with the Plan's definition of "accrued benefit," requires that a rehired employee's final annuity benefit be offset by the age-65 monthly annuity attributable to the prior distribution he or she received.

Plaintiffs' prior distributions consisted of the balances in their defined contribution Retirement Accounts, which were renamed Transitional Retirement Accounts, or "TRAs," in 1990. (A-179). Through its use of the defined term "accrued benefit," Section 9.6 requires that Plaintiffs' prior distributions be converted to annuities "computed in accordance with Section 4.2 or Section 4.3." (A-106, Plan § 1.1).

As explained by the Plan Administrator and as confirmed by the actuarial expert during the hearing on remedies before the District Court, the Plan Administrator's approach for offsetting the accrued benefit by the "actuarial equivalent" of the prior lump sum distribution was for the purpose of permitting a comparison of benefits *expressed in the same form* – that is, to permit an "apples to apples" comparison. (A-85-93; 109-81). *See* 26 C.F.R. § 1.401(a)(4)-12 (definitions of "actuarial equivalence" and "actuarial present value"). Because the

HAP benefit is expressed as a single life annuity beginning at normal retirement age, the prior benefit distribution must be converted to an "actuarially equivalent" annuity beginning at normal retirement age.

Subsection 4.3(e) is that portion of the Plan that specifies how to convert the defined contribution TRA account balances into annuities and provides that such conversions should be made "*using annuity rates established by the PBGC*." (A-130, Plan § 4.3(e) (emphasis added).[9] Accordingly, the Plan Administrator relied on the annuity rates established by the PBGC to determine the age-65 annuity that is the actuarial equivalent of Plaintiffs' prior lump sum distributions. (A-90, ¶ 15).

Thus, Plaintiffs' contention that the Actuarial Equivalence approach is not grounded in the terms of the pre-amendment Plan, and their assertion that the Plan "does not specify . . . any procedure for applying an interest rate to [their] past distributions" (Pl. Br. at 48), is baseless and was properly rejected by the District Court. As the District Court correctly determined, the Plan "specified the use of [PBGC] rates for converting [TRA] benefits to annuities." (SPA-11-12).

B. The Actuarial Equivalence Approach is Materially Different From Phantom Accounting

Plaintiffs also suggest that the Actuarial Equivalence approach is unreasonable because it is not materially different from the phantom account

[9] Section 4.2 of the Plan concerns pre-1990 retirements, and thus is not relevant here.

offset. (Pl. Br. at 16) ("The PPA is a slightly less aggressive appreciated offset than the phantom account."). This is not the case. As found by the District Court, unlike the phantom account methodology, the Actuarial Equivalence approach does not attribute hypothetical earnings to the employee's prior distribution and then convert that amount to an annuity years later. Instead, the actual prior distribution is converted to an age 65 annuity *as of the time of the prior distribution*. The amount of the offset therefore does not depend on events that occur after the distribution is made, such as changes in interest rates or other investment experience. Rather, the offset is fixed at the time of the prior distribution.

The Plan Administrator's Actuarial Equivalence approach also avoids any subjective decisions about what the future might hold, as these rates are reflective of the then current annuity market. In addition, this procedure is consistent with the calculation that was actually prepared when the participant's initial distribution was determined, so it is not a new concept for the Plan. Moreover, the TRA and CBRA benefits are compared to the HAP benefit *without* adding back (and later subtracting) the prior distribution. Thus, the Actuarial Equivalence approach avoids "skewing" the comparison of the three formulas in a manner that this Court found to result when using the "phantom account" approach.

C. The Plan Administrator's Interpretation Applies a Non-Arbitrary Method of Calculation

Unable to successfully attack the Plan Administrator's interpretation as unreasonable based on the terms of the Plan itself or its likeness to phantom accounting, Plaintiffs erroneously contend the interpretation has arbitrary features. These contentions are without merit.

First, the Plaintiffs contend that the Actuarial Equivalence approach is arbitrary and capricious because the interest rates used are purportedly "confiscatory." (Pl. Br. at 28, 47-48). Yet, as the District Court correctly recognized, the PBGC rates used by the Plan Administrator are "derived from data on market interest rates." (SPA-12, *citing Berger v. Xerox Corp. Ret. Income Guarantee Plan*, 338 F.3d 755, 760 (7th Cir. 2003) (*citing* 58 Fed. Reg. 5128-01 (Jan. 19, 1993)). Specifically, the PBGC rates are based on an annual survey of the commercial market undertaken by the PBGC to determine the "price the private sector annuity market would charge to annuitize [future] benefit payment obligations."[10] In other words, the PBGC rates reflect the actual annuity purchase rates in existence at a given time and are not "skewed" in any direction. Indeed, PBGC regulations expressly state that it would be reasonable to use PBGC rates in

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[10] *See* "PBGC Procedure for Setting Interest Factors Used to Value Liabilities For PBGC Financial Statements," *available at* http://www.pbgc.gov/news/other/res/pbgc-procedure-interestfactors.html#_ftnref2.

converting annuities to lump sums, which is "the mirror image of the calculation required here." *Miller*, 2010 U.S. Dist. LEXIS 144520, at *29; *Cooke v. Lynn Sand & Stone Co.*, 70 F.3d 201 (1st Cir. 1995) (reversing grant of summary judgment to plaintiff and remanding for entry of summary judgment in favor of defendant because defendant properly applied PBGC interest rate, as provided by regulations, to determine present value of a future monthly benefit); *see also* 29 C.F.R. § 2619.26.

Second, there is IRS guidance governing how tax-qualified floor-offset plans like the RIGP should take into account prior benefit distributions. (A-88). Under a safe harbor in the Treasury's nondiscrimination regulations, a participant's "accrued benefit" must be offset by the "actuarial equivalent" of the prior lump sum distribution from a defined contribution plan. 26 C.F.R. § 1.401(a)(4)-8(d)(1)(i). For this purpose, the "accrued benefit" is expressed in the form of a "benefit commencing at normal retirement age." *Id.*; *see* 26 U.S.C. § 411(a)(7)(A)(i). The Plan Administrator's approach follows this guidance by converting the prior lump sum benefit distribution into an actuarially equivalent benefit commencing at normal retirement age. (*See* A-85-93, A-17).

Third, the Plan Administrator's approach is a standard, "plain vanilla" approach to performing an offset. The United States itself has acknowledged that the Plan Administrator's approach reflects the "typical" way of offsetting prior benefit distributions and taking account of the time value of money. U.S. Br. at 26 n.7; *Conkright*, 130 S. Ct. at 1650.

Fourth, to ensure the equitable nature of the methodology, the Plan Administrator determined that an overall interest rate cap would be appropriate, and he selected as the appropriate cap one found in the regulation referred to above, which explains the assumptions to be used when converting a prior distribution into an actuarially equivalent normal retirement annuity:

> In determining the actuarial equivalent of amounts provided under the defined contribution plan, an interest rate no higher than the highest standard interest rate must be used, and no mortality may be assumed in determining the actuarial equivalent of any prior distributions from the defined contribution plan or for periods prior to the benefit commencement date under the defined benefit plan.

26 C.F.R. § 1.401(a)(4)-8(d)(1)(i). The regulation therefore specifies the maximum interest rate that may be used (*i.e.*, the "highest standard interest rate"), and further specifies that a pension plan cannot assume that the participant will die during the period prior to retirement (*i.e.*, "no mortality may be assumed . . . for periods prior to [retirement age]"). The highest "standard interest rate" is 8.5 percent, compounded annually. 26 C.F.R. § 1.401(a)(4)-12. Imposing the interest cap acts to benefit Plaintiffs. (A-90, ¶ 16).

D. There is No Tax Code Violation

In a last-ditch attempt to get more generous benefits, Plaintiffs next claim that the Actuarial Equivalence approach violates a provision of the Internal Revenue Code ("IRC") requiring that any actuarial assumptions be "specified in the plan in a way which precludes employer discretion" in order for the plan to receive favorable tax treatment. 26 U.S.C. § 401(a)(25). Contrary to Plaintiffs' claim, however, the Plan does specify the actuarial assumptions underlying the Actuarial Equivalence approach. As explained above, the Plan terms support the Plan Administrator's use of PBGC interest rates in calculating the offset for prior distributions.

Even if the Plan failed to satisfy IRC Section 401(a)(25)'s tax-qualification requirement, which it does not, that would have no relevance here. Section 401(a)(25) prohibits only *employer* discretion in setting actuarial assumptions. It is inapplicable to cases – like this one – where a *plan administrator* exercises discretion to resolve ambiguous plan terms in the course of resolving a litigated claim for ERISA benefits. *See McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1117-18 (9th Cir. 2000) (holding that a plan administrator's interpretation of ambiguous plan terms is entitled to deference even where the plan terms at issue fail to satisfy Section 401(a)(25)'s tax-qualification requirements).

Moreover, it is well-established that plan participants do not have standing to bring claims arising out of alleged failures by their pension plans to satisfy IRC tax-qualification requirements. *See, e.g.*, *Reklau v. Merchs. Nat'l Corp.*, 808 F.2d

628, 631 (7th Cir. 1986). Unlike a number of other tax provisions relating to pension plans, Congress decided *not* to import the "employer discretion" rule codified in Section 401(a)(25) into ERISA. *See, e.g.*, *id.*; *Stamper v. Total Petroleum, Inc. Ret. Plan*, 188 F.3d 1239, 1239-40 (10th Cir. 1999).

E. Another Court Has Upheld the Plan Administrator's Approach As Reasonable

The conclusion that the Plan Administrator's approach is reasonable is further demonstrated by the fact that other courts have sanctioned the use of benefit offsets in general, and one court has specifically approved the use of the approach taken by the Plan Administrator in this case. (SPA-9). In a case involving the Xerox Plan that "present[ed] no different scenario from that confronted in the *Frommert* litigation," the Central District of California held that the Plan Administrator's offset proposal – which was identical to the one asserted here – was entitled to deference under *Conkright*, observing that the proposal "makes a number of reasonable and fair assumptions that broadly seek to achieve equity in this re-calculation of the appropriate offset." *Miller*, 2010 U.S. Dist. LEXIS 144520, at *24, *34. That court's carefully considered rationale was properly followed by the District Court here.

F. The Plan Administrator's Actuarial Equivalence Approach Avoids the Pitfalls of Plaintiffs' Proposals

The proposals advanced by Plaintiffs urged the District Court to do precisely what the Supreme Court said that it should not do; namely, fashion a remedy without deferring to the Plan Administrator's reasonable interpretation of the Plan. (SPA-11). Moreover, adopting the Plan Administrator's Actuarial Equivalence approach avoids the pitfalls inherent in the approaches now proffered by Plaintiffs which will result in windfalls to Plaintiffs. *See Conkright*, 130 S. Ct. at 1650 ("Deference to plan administrators, who have a duty to all beneficiaries to preserve limited plan assets…helps prevent such windfalls for particular employees.").

(i) The Nominal Offset Approach Disregards the Time Value of Money

Plaintiffs nevertheless argue that, under Section 9.6, their benefits should be offset only by the nominal account balances that they were paid after their initial departures from Xerox. (Pl. Br. at 46). In doing so, Plaintiffs depart from the terms of the Plan and invoke ERISA's definition of the term "accrued benefit" for purposes of a defined *contribution* plan, which states that a participant's accrued benefit is the balance in the participant's account. *See* 29 U.S.C. § 1002(23)(B).

Here, however, Plaintiffs are seeking additional benefits under a defined *benefit* plan – specifically, under the Plan's HAP defined benefit formula. For purposes of a defined benefit plan, ERISA defines a participant's "accrued benefit" as an annuity beginning at normal retirement age, not an account balance. *See* 29 U.S.C. § 1002(23)(A). Accordingly, offsetting Plaintiffs' defined benefit by the amount of the account balances they previously received – *i.e.*, the Nominal Offset approach – cannot be squared with the terms of the Plan.

Plaintiffs' Plan interpretation is also logically incoherent. Because the HAP formula defines a participant's "accrued benefit" as an annuity, the "accrued benefit attributable" to the prior distribution must also be stated as an annuity in order to perform an offset. Plaintiffs ignore this issue, pretending that a prior lump sum distribution can be offset against an annuity without an actuarial conversion.

More importantly, the Nominal Offset approach ignores the time value of money – which the Supreme Court has stated would be "highly unforeseeable" and "heresy." *Conkright*, 130 S. Ct. at 1650. By ignoring the time value of money, Plaintiffs' approach would defeat the purpose of the Plan's non-duplication of benefits provision, which is to *prevent* – not require – windfalls. *Id.*

As the Supreme Court recognized in *Conkright*, the failure to account for the time value of money would amount to a windfall for Plaintiffs:

> [Plaintiffs'] own actuarial expert testified before the District Court that fairness would require recognizing the time value of money in some fashion. And [Plaintiffs] and the Government do not dispute that the [nominal offset] approach, which does not account for the fact that [Plaintiffs] were able to use their past distributions as they saw fit for over 20 years, would place respondents in a better position than employees who never left the company. Deference to plan administrators, who have a duty to all beneficiaries to preserve limited plan assets ... helps prevent such windfalls for particular employees.

Conkright, 130 S. Ct. at 1650 (citations omitted).

Failing to account for the time value of money would mean that Plaintiffs' final benefits would not be offset by the real economic value of their prior distributions. This would put Plaintiffs "in a better position than employees who never left the company." *Conkright*, 130 S. Ct. at 1650. Plaintiffs' Nominal Offset approach would reward employees for interrupting their service to Xerox and treats workers who "stay[] through retirement age as suckers." *See White,* 256 F.3d at 583-84. By failing to offset for the real economic value of prior distributions, the Nominal Offset approach understates the value of the benefit previously received – thereby giving employees a large measure of double credit for their initial period of service to Xerox.

Defendants' actuary explained that, "by disregarding the time value of money," the Nominal Offset approach creates "a privileged class of employees who, as a result of reemployment, would receive greater benefits than otherwise similar employees who did not receive [prior] distributions." (A-267). Plaintiffs' own actuary likewise testified that a Nominal Offset would not be "an equitable solution" because "there is some intrinsic time value of money" that a nominal offset ignores. (A-353). Plaintiffs' actuary also agreed that, "in fairness, to account for [the time value of money], you would have to do some actuarial equivalence of th[e] lump sum to account for its value . . . today." (A-371).

(ii) The "Actual-Annuity-Offset" Approach Would Result in a Windfall Because the Offset is for a Fraction of What Plaintiffs Actually Received

Apparently recognizing that they now need to propose a remedy that incorporates the time value of money, Plaintiffs belatedly attempt to resurrect an approach they suggested at the remedies hearing in 2006 and abandoned until now—an approach that they now refer to as the Actual-Annuity-Offset approach. Plaintiffs cannot establish that such an approach bears any relation to the Plan terms or that it adheres to sound actuarial principles in calculating Plaintiffs' benefits.

The fundamental problem with Plaintiffs' Actual-Annuity-Offset approach is that it does not reflect the prior distributions actually received. (A-194). Rather, it substitutes the employee's benefit under the HAP formula on the original date of termination. (*Id.*). As justification for ignoring the amount of the actual distribution received, and substituting a lower amount, Plaintiffs' expert relied on a narrow reading of Section 9.6 of the Plan document while disregarding the other relevant – and inseparable – sections of the Plan document, Sections 4.2 and 4.3. (A-269, A-393-395).

Because the value of the defined contribution benefits that Plaintiffs actually received necessarily exceeded the value of their HAP benefits under the Plan at the time of their prior distributions, this approach systematically understates the true economic value of the benefits Plaintiffs received when they initially departed employment by Xerox. Thus, the Actual-Annuity-Offset approach is inconsistent with the Plan's definition of the term "accrued benefits" and results in a windfall to Plaintiffs. (A-152, Plan § 9.6; A-194-195; A-390-395).

By ignoring the actual value of the prior distributions that Plaintiffs actually received, as well as the time value of those distributions, and the fact that the Plan's floor-offset arrangement inextricably links the defined contribution plan benefit and the defined benefit plan benefit in calculating the offset, Plaintiffs' Actual-Annuity-Offset approach disregards this Court's prior instructions to equitably reflect the prior distributions made to Plaintiffs. *See Frommert I,* 433 F.3d at 268.

Regardless, selecting the Actual-Annuity-Offset approach suffers from the same purported notice deficiency upon which Plaintiffs rely to attack the Plan Administrator's approach. Accordingly, the District Court properly rejected the Actual-Annuity-Offset approach as the appropriate remedy to be applied here. And, as the District Court correctly held, its task was to not to determine "whether the *plaintiffs* have offered a reasonable interpretation of the Plan, but" to defer to the Plan Administrator's interpretation unless "unreasonable." (SPA-11).

(iii) The New Hire Approach Should Not be Adopted

Plaintiffs likewise would not be entitled to the New Hire approach as a remedy for any asserted notice violation. This approach, too, does not involve any attempt to take into account the time-value of the monies that Plaintiffs received decades ago. It also unfairly treats Plaintiffs – who left Xerox for a time – better than employees who spent their entire careers at Xerox.

Treating Plaintiffs as new hires would have its own adverse consequences on Plaintiffs, a fact they completely ignore. If Plaintiffs were treated in the same manner as new hires, they would not receive credit for their prior years of service. As a result, they would not automatically vest upon being rehired, and they would not qualify for the Plan's early retirement benefit at a later date (at age 62 upon the completion of 30 years of service). In addition, some Plaintiffs may actually fare better under the Actuarial Equivalence approach than the New Hire approach. (*See* A-513-514).

Adopting a New Hire approach is not warranted for yet another reason based on Plaintiffs' own rationale for opposing the Plan Administrator's approach: it too is not disclosed in the SPD. All of these reasons result in one important conclusion that is consistent with the Supreme Court determination in this case, that is, a court is not in the best position to interpret the terms of a complex pension plan and should defer to a plan administrator so long as the plan administrator's interpretation of the plan's terms is a reasonable one. *See Conkright*, 130 S. Ct. at 1651.

Plaintiffs' contend without support that the Plan "punishes experienced employees who previously worked at Xerox and treats them as 'owing' the Plan money." (Pl. Br. at 50). Plaintiffs cite no evidence whatsoever to support these groundless assertions, and the purported "examples" contained in their Brief are unsupported by anything in the record. (*See* Pl. Br. at 43, 48-50, 53). Contrary to the assertions now made in their Brief, Plaintiffs have never even alleged, must less proven, that they were actually induced to resign from a competing company to return to Xerox with misleading information about the size of their pensions. (Pl. Br. at 38). Such unsupported contentions should be disregarded by this Court.

There is nothing arbitrary or unfair about reducing Plaintiffs' "floor" benefits by the value of the defined contribution account balances they received – that is how floor-offset plans work. Because such plans use defined benefit formulas as a kind of insurance policy, to ensure a minimum level of benefits in case the defined contribution component of a plan performs poorly, when the defined contribution component performs well – as it did for Plaintiffs here – the "insurance" component of the plan is not triggered. As a result, "many [employees] will have little or no benefit from the defined benefit plan."[11]

[11] Employee Benefit Research Institute, *Hybrid Retirement Plans: The Retirement Income System Continues to Evolve*, EBRI Special Report SR-32, at 18 (1996), *at* http://www.ebri. org/pdf/briefspdf/0396ib.pdf.

In this respect, Plaintiffs are in the same position as similarly-situated employees who never left Xerox. Just like Plaintiffs, many such employees worked for Xerox for many years without ever becoming entitled to *any* benefit under the Plan's HAP formula. The reason that these employees – like some of the Plaintiffs – receive no benefit under the Plan's defined benefit component is because the Plan's defined contribution component already places them above the Plan's floor benefit.

In essence, Plaintiffs ask this Court to require the Plan Administrator to treat them *better* than similarly-situated employees who waited until retirement age to receive a distribution. Like employees who never left Xerox, Plaintiffs want the full value of their defined contribution accounts. But Plaintiffs also seek an additional payment, under the Plan's defined benefit formula, that a similarly-situated employee who never left Xerox would not receive. That is not a fair result. *See White*, 256 F.3d at 583-84 (explaining that if early distributions are not properly taken into account, employees who leave before retirement age would "obtain a big advantage over those who stay," producing "a plan that treated workers staying through retirement age as suckers").

Plaintiffs incorrectly suggest that Defendants advocated a "new hire" approach after the District Court issued its 2007 remedies' decision. (Pl. Br. at 35). To the contrary, Defendants argued that the Plan Administrator's Actuarial

Equivalence approach was reasonable, consistent with ERISA's disclosure requirements, and entitled to deference. *See* Appellants' Brief at 45, *Frommert II*, 535 F.3d 111 (No. 07-0418); Appellants' Reply Brief at 19-20, *Frommert II*, 535 F.3d 111 (No. 07-0418). Indeed, Plaintiffs themselves acknowledged in their Supreme Court merits brief that "Xerox did not abandon" the Plan Administrator's approach on appeal from this Court's 2007 decision. *See* Brief for Respondents at 39-40, *Conkright*, 130 S. Ct. 1640 (No. 08-810).

While Defendants presented a New Hire approach in the alternative, they did so to underscore that the Nominal Offset approach far exceeded what Plaintiffs Frommert and Clair stated that they expected during the administrative process, when they first commenced this action, and up to and including their summary judgment motion – that is, to be treated no worse than new hires. (A-218-219; 220-260). In fact, no Plaintiff sought the application of the Nominal Offset approach until *after* the Second Circuit invalidated the phantom account methodology in 2006. Defendants proposed the New Hire approach as an *upper limit* on what Plaintiffs could recover, based on the equitable principle that Plaintiffs should not recover more than they ever expected to receive based on the SPDs and other communications they received before 1998. Defendants' reliance on this equitable principle, as a basis for arguing that Plaintiffs should be estopped from seeking *more* than they expected to receive, does not support Plaintiffs' assertion that they are entitled to be treated as new hires.

G. The Plan Administrator Need Not Consider the Alleged Reasonable Expectations of Plan Participants

The DOL asserts that courts must consider various factors extrinsic to the terms of the plan – including the "reasonable expectations" of plan participants and the adequacy of the notice provided to participants regarding plan terms in SPDs – in determining whether a plan administrator's interpretation of a plan is reasonable. (DOL Br. at 20-21). The DOL is mistaken, both as a legal and factual matter.

As a legal matter, the "reasonable expectations" of plan participants should not be considered in reviewing a fiduciary's plan interpretation where the fiduciary is granted discretionary power to interpret the plan. The DOL cites no case that adopts a contrary rule, and Defendants are aware of none. Instead, numerous courts of appeals have expressly declined to consider the reasonable expectations of plan participants where, as here, an ERISA plan administrator is granted the discretion to interpret ambiguous plan terms. *See Fleisher v. Standard Ins. Co.*, 679 F.3d 116, 125 (3d Cir. 2012) (concept of "reasonable expectations . . . not applicable where . . . the ERISA plan document makes the plan administrator the competent authority to interpret ambiguous plan provisions"); *Estate of Shockley v. Alyeska Pipeline Serv. Co.*, 130 F.3d 403, 407 (9th Cir. 1997) ("appl[ying] the doctrine of reasonable expectations . . . would be inconsistent with circuit and

Supreme Court precedent requiring abuse of discretion review of a retirement committee's actions").

If adopted, the rule proposed by the DOL would eviscerate *Firestone* deference. As a practical matter, if the only interpretation of an ambiguous plan provision that is entitled to deference is the interpretation that comports with the "reasonable expectation" of participants, then the plan administrator's purported discretion would be illusory. Thus, the DOL's suggestion "in practice [w]ould bring about near universal review by judges *de novo* – *i.e.*, without deference – of the lion's share of ERISA plan claims denials," which is precisely the result rejected by the Supreme Court in *Glenn*, 128 S. Ct. at 2350.

The DOL's novel suggestion is also inconsistent with recent Supreme Court decisions, including its decision in this case. In its 2007 remedies decision, the District Court held that any "doubt or ambiguity" in the Plan should be "resolved in favor of the employee," and adopted the approach that it believed "most clearly reflect[ed] what a reasonable employee would have anticipated." *Frommert 2007*, 472 F. Supp. 2d at 457. This is precisely the interpretative approach that the Supreme Court categorically rejected in its *Conkright* decision. Such an approach would also be inconsistent with the Supreme Court's holding in *Amara* that an SPD is not a part of an ERISA plan. *See Amara*, 131 S. Ct. at 1878. If plan interpretation must take into account the reasonable expectations of participants based on the notice they received in SPDs, then the meaning of pension plans would effectively be determined by the language in the SPD.

The DOL's proposed rule, moreover, would undermine the ERISA policies underlying *Firestone* deference. As the Supreme Court explained in *Conkright*, deference to plan administrators promotes ERISA's interests of "efficiency, predictability, and uniformity" in plan administration. 130 S. Ct. at 1649. These interests would not be advanced if plan administrators – or courts called upon to review the decisions of plan administrators – were required to consider the "reasonable expectations" of plan participants in order to interpret plan terms. Nor would the "expertise of the plan administrator" act as an effective check on "unexpected and inaccurate plan interpretations" by the district courts if the plan administrator's interpretation could be overturned based on a district court's views regarding the "reasonable expectations" of participants. *See id.* Thus, the Court should decline to adopt the DOL's unsupported suggestion that the reasonable expectations of plan participants play any role in the interpretation of plan terms or in determining the level of deference owed to plan administrators in interpreting plan terms.

In any event, as a factual matter, the DOL is wrong to suggest that the "reasonable expectations" of Plaintiffs would undermine the validity of the Actuarial Equivalence approach. This is because an employee would have reasonably expected that, in offsetting prior benefit distributions, the time value of money would be taken into account. As the Supreme Court recognized in *Conkright*, it would be "highly unforeseeable" and "heresy" *not* to account for the time value of money. 130 S. Ct. at 1650. The time value of money is a basic and pervasive fact of economic life. Plaintiff Alan Clair, for instance, acknowledged that he was "familiar with the time value of money concept," and admitted that he did not expect to receive a benefit as large as that provided under the Nominal Offset approach. (A-304-307; A-235 ¶ 40).[12]

Accordingly, for all of the reasons discussed above, this Court should affirm the decision of the District Court.

POINT II

THE DISTRICT COURT PROPERLY FOUND THAT THE PLAN ADMINISTRATOR'S APPROACH IS NOT PRECLUDED BY ERISA'S NOTICE REQUIREMENTS

Plaintiffs seek to avoid the consequences of the Supreme Court's decision in *Conkright* by attempting to change the subject to one of a purported lack of notice. Plaintiffs ignore the fact that the issue now before the Court now is not about liability, but about a remedy for a Section 204(h) notice violation, which remedy

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[12] An employee would reasonably be expected to know on the basis of everyday experience that a dollar received today will purchase less than a dollar could purchase 20 years ago, and that a bank will not lend money for 20 years without charging any interest. Yet, under the Nominal Offset approach, a dollar today would be treated as having the same value as a dollar paid 20 years ago.

this Court has already ruled should be based upon the pre-1998 terms of the Plan. The Plan Administrator properly interpreted the terms of the Plan without applying the offset mechanism invalidated by this Court in *Frommert I*. The Plan Administrator's approach takes into account the time value of money in a manner that is consistent with the relevant SPD, which disclosed the circumstances which may result in an offset of benefits, that is, when there is a prior distribution from the Plan.

A. Deference to the Plan Administrator's Interpretation is Consistent with ERISA's Notice Requirements

Plaintiffs' contention that the Plan Administrator's interpretation is precluded because they had no notice that the offset would include an interest factor flies in the face of the Supreme Court's decision in this case in which the Court reasoned that the failure to account for the time value of money would be "heresy" and "highly unforeseeable."

In any event, there is no violation of Section 102 of ERISA as the result of the Plan Administrator's interpretation of the Plan. As recognized by the Supreme Court in its recent decision in *Amara*, in ERISA cases, "the summary documents, as important as they are, provide communications with beneficiaries about the plan, but their statements do not themselves constitute the terms of the plan." *Amara,* 131 S. Ct. at 1878. And, ERISA's disclosure provisions require only that the Xerox SPD "identify[] circumstances which may result in . . . [an] offset . . . of any benefits." 29 C.F.R. § 2520.102-3(l).

Contrary to Plaintiffs' contention, ERISA does not require that the SPD include examples illustrating the interest rate to be used to perform an actuarial conversion. (Pl. Br. at 29). As this Court has recognized, ERISA does not "impose[] a blanket requirement under which a Summary Plan Description invariably must describe the method of calculating an actuarial reduction." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 197 (2d Cir. 2007); *see Stamper,* 188 F.3d at 1243 ("While the SPD may be silent on the actuarial reduction assumptions of 'deferred severance benefits,' it in no way contradicts the Plan regarding these benefits. As such, the Plan must control."). Pension plans typically involve numerous actuarial calculations and reductions that apply to particular participants in particular circumstances, but SPDs ordinarily do not discuss such calculations other than to identify the circumstances in which they may occur. *See, e.g., Stamper*, 188 F.3d at 1243. Plaintiffs' expert even agreed that this is not the purpose of SPDs. (A-82). If Plaintiffs were correct that SPDs are required to map out the details of every actuarial conversion and every other calculation that occurs under a complex pension plan, hundreds of pension plans across the country would be invalidated.

Such reading would also defeat the purpose of SPDs. By definition, an SPD is a *summary* of the principal provisions of a plan. "Larding the summary" with technical "minutiae" would "defeat that [summary] document's function." *Herrmann v. Cencom Cable Assocs.*, 978 F.2d 978, 983-84 (7th Cir. 1992). Accordingly, while special disclosure obligations may apply to unforeseeable provisions like a phantom account offset, there is no requirement to include the details of a "typical" calculation like the Actuarial Equivalence offset that affects only a small percentage of employees. Because the Plan Administrator's Actuarial Equivalence approach adopts a *standard* method for converting a prior distribution from a lump sum to an annuity, the heightened disclosure concerns raised by the phantom account offset do not apply. *Cf. Layaou v. Xerox Corp.*, 238 F.3d 205, 210 (2d Cir. 2001) (finding that the general language in the SPD was insufficient to provide adequate notice that an appreciated value of a prior lump sum distribution would first be added to the CBRA and TRA before making the comparison of the RIGP Formula annuity [*i.e.*, the HAP benefit] and then would be offset from the plaintiff's retirement benefits).

The DOL also attempts to distinguish *McCarthy* on the ground that the SPD does not disclose that the offset will be by an "appreciated amount." (DOL Br. at 15). This assertion fails for the simple reason that the Actuarial Equivalence approach, unlike phantom accounting, does not involve the offset of an "appreciated amount." Rather, the Actuarial Equivalence approach uses standard actuarial equivalence factors to convert the prior lump sum distribution that the employee received into an age 65 annuity *as of the time of the prior distribution*, and then deducts that amount from the employee's final HAP annuity benefit. As both the decision below and the *Miller* decision correctly recognize, this approach merely offsets a participant's annuity benefit by "the benefit actually attributable to the [prior] distributions." (*See* SPA-10-11); *Miller*, 2010 U.S. Dist. LEXIS 144520, *28.

Plaintiffs' overly strict reading of the SPD requirement would also render *Firestone's* deference largely meaningless. Plaintiffs argue, in effect, that a plan administrator's interpretation of ambiguous plan terms may only be adopted if the ambiguity is resolved in the SPD. Rarely, if ever, will language that is ambiguous in the lengthier Plan document be explicitly clarified in the shorter SPD. Thus, in the only cases in which *Firestone* deference matters – *i.e.*, cases involving ambiguous plan language – there would typically be *no deference* to plan administrators. That is precisely the result that the Supreme Court rejected in *Conkright*. *See* 130 S. Ct. at 1646-47; *see also Glenn*, 554 U.S. at 116 (rejecting a rule that would result in *de novo* review of "the lion's share of ERISA plan claims denials").

Finally, to require that the interest rate to be used to perform the necessary calculations for taking into account the time value of money be set forth in the SPD (which Plaintiffs now suggest was easily possible) defies logic and common sense.

The Plan Administrator would have no way of knowing that the offset mechanism contained in the Plan would be invalidated years later, and that the SPD should specify a particular interest rate to be used in calculating offsets just in case that eventually occurred. This flawed and circular logic illustrates why it would be inappropriate and futile to revisit liability and notice issues at this juncture. The fallacy of Plaintiffs' reasoning in this regard is readily demonstrated by the fact that *none* of Plaintiffs' alternative methods for offsetting for prior distributions are expressly set forth in illustrative examples in the pre-1998 SPDs either, nor could they be.

B. Plaintiffs Cannot Satisfy the Requirements for the "Equitable" Remedies They Now Advocate

Having attempted to preclude the Plan Administrator's interpretation with their invalid argument of inadequate notice, Plaintiffs contend that they are entitled to equitable relief. (Pl. Br. at 7). Plaintiffs' reliance on *Amara* as support for their position is misplaced.

The Supreme Court's decision in *Amara* concerned a situation in which the relief for a notice violation based on the facts of that case had to be awarded under Section 502(a)(3) of ERISA. In contrast, this Court held in *Frommert I* that Plaintiffs have an adequate remedy under Section 502(a)(1)(B) of ERISA on remand. *See* 433 F.3d at 268. Thus, *Amara*'s dictum regarding the range of equitable relief possibly available under Section 502(a)(3) of ERISA is inapposite here. *See Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996) (equitable relief under Section 502(a)(3) normally unavailable where another remedial provision of ERISA provides an adequate remedy).

Amara involved a traditional defined benefit pension plan that was frozen and later changed to a cash balance plan. *See* 131 S. Ct. at 1871. The district court found that the defendant "intentionally misled its employees" in communications announcing the adoption of the new cash balance plan, and thereby violated Section 204(h) of ERISA, requiring advance written notice of plan amendments that provide for significant reductions in future benefit accruals. *Id.* at 1874. As the *Amara* court observed, the usual remedy in this Circuit for a Section 204(h) notice violation is "the invalidation of [the] plan amendment[]" that was not properly noticed. *Id.* at 1875 (*citing Frommert I*, 433 F.3d at 263). However, because the plan in place immediately before the improperly noticed amendment was a frozen plan, the court concluded that invalidation of the amendment would harm plan participants, and so was not an available remedy. *Id.* at 1875. In light of these unique facts, the Supreme Court in *Amara* considered whether Section 502(a)(3) of ERISA might provide some other type of remedy for any harm resulting from the defendant's intentionally misleading communications.

By contrast, the "relief that the [P]laintiffs seek" here "falls comfortably within the scope of § 502(a)(1)(B)" of ERISA. *Frommert I*, 433 F.3d at 270. In

Frommert I, this Court held that: (i) Plan language specifying use of the so-called phantom account offset was omitted from the Plan for a time; (ii) notice under Section 204(h) of ERISA was required before phantom accounting could permissibly be reintroduced to the Plan; (iii) Defendants failed to provide proper notice under Section 204(h) of ERISA until 1998; and so (iv) Plan language requiring use of phantom accounting could not be applied to participants rehired before 1998. *See id.* at 266-68. Accordingly, this Court remanded the case to the District Court to interpret and apply "the pre-amendment terms of the Plan" – *i.e.*, the terms of the Plan without reference to the phantom accounting provisions – "describ[ing] how prior distributions were to be treated." *Id.* at 268.

The facts and procedural posture of this case thus differ sharply from *Amara*. The Supreme Court in *Amara* considered whether "other . . . equitable relief" under Section 502(a)(3) of ERISA might be available to remedy a notice violation. Here, by contrast, the Second Circuit has already ordered a remedy for the Section 204(h) notice violation, *i.e.*, suppression of the Plan's phantom accounting provisions and a calculation of benefits consistent with the remaining Plan terms. *See Frommert I*, 433 F.3d at 270. Thus, the sole task remaining before this Court is to give effect to the terms of the "pre-amendment" Plan under Section 502(a)(1)(B) of ERISA, applying a deferential standard of review to the interpretation offered by the Plan Administrator.[13]

Even if *Amara* were applicable, the Supreme Court's decision makes clear that, in order to recover, each Plaintiff in this case would, at a minimum, need to have proved by a preponderance of the evidence that he or she personally suffered "actual harm" as a result of the purported notice violation, *see* 131 S. Ct. at 1881-82, and in fact, the Supreme Court remanded the matter back to the lower court for a determination as to whether the *Amara* plaintiffs could meet their burden of proof in this regard. *Id.* at 1882. Here, Plaintiffs have made no such evidentiary showing, and they have not even requested an opportunity to do so.

In any event, any recovery under Section 502(a)(3) of ERISA is limited to "appropriate equitable relief." *Id*. at 1878 (*quoting* 29 U.S.C. § 1132(a)(3)). Any offset for prior distributions that failed to account for the time value of money would be "heresy" and represent a "windfall." *Conkright*, 130 S. Ct. at 1650. Thus, even if the Court were to doubt that the sufficiency of the notice of the precise method of implementing the Plan's non-duplication of benefits provision had been provided, and even assuming that Plaintiffs could meet their burden of proving on a plaintiff-by-plaintiff basis that each had suffered actual harm, *Amara* lends no support to Plaintiffs' position that this Court should reject the Plan

[13] This case is also distinguishable from *Amara* because, unlike *Amara*, "the instant case does not involve a challenge under 29 U.S.C. § 1022 [*i.e.*, Section 102 of ERISA]." *Frommert I*, 433 F.3d at 265.

Administrator's interpretation and instead should award benefits based on one of their proposals. *See Miller*, 2010 U.S. Dist. LEXIS 144520 ("Even were we to agree that Plaintiffs did not receive adequate notice of the phantom account mechanism until the 1998 SPD was disseminated, this would have no effect on the outcome of this case" because the Plan Administrator's approach "makes a number of reasonable and fair assumptions that broadly seek to achieve equity in this re-calculation of the appropriate offset.").

POINT III

THE DISTRICT COURT'S DENIAL OF ADDITIONAL DISCOVERY WAS CORRECT AND SHOULD BE AFFIRMED

Finally, Plaintiffs complain that they were not allowed to reopen discovery after remand from the Supreme Court. The District Court's exercise of discretion in this regard should not be disturbed.

A. Plaintiffs' Efforts to Reopen Discovery Would Violate the Mandate Rule

Under the mandate rule, a court is bound by the decree of a superior court and must carry it into execution. *See In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895) (whatever was before the Supreme Court and disposed of by its decree is considered as finally settled; the inferior court is bound by the decree as the law of the case; must carry it into execution according to that mandate; and cannot vary it, examine it for any other purpose other than execution, give any other or further relief, review it, even for apparent error, or intermeddle with it, further than to settle so much as has been remanded); *Sibbald v. United States*, 37 U.S. 488, 489 (1838)(same).

In other words, "the mandate rule compels compliance on remand with the dictates of the superior court and forecloses relitigation of issues expressly or *impliedly* decided" by that court. *United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001) (*quoting United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993)(emphasis in original). The mandate rule has been consistently and strictly followed. *See, e.g., Escalera v. Coombe*, 852 F.2d 45, 47 (2d Cir. 1988) ("Any reconsideration at this juncture of our earlier opinion must be limited to the scope of the Supreme Court's remand."); *Kotler v. Am. Tobacco Co*., 981 F.2d 7, 13 (1st Cir. 1992).

Here, a proper application of the mandate rule forecloses consideration by this Court as to whether discovery should have been permitted on the issue of whether the Plan Administrator had a conflict of interest. That is because the issues on which the Supreme Court granted certiorari in *Conkright* were limited to: (i) whether the District Court owed deference to the Plan Administrator's interpretation of the Plan on remand; and (ii) whether the Court of Appeals properly granted deference to the District Court on the merits. The Supreme Court found it necessary only to decide the first issue. *Conkright*, 130 S. Ct. at 1646.

In resolving that issue, the Supreme Court confirmed, in no uncertain terms, that there was no exception to the deference owed to the Plan Administrator's decision under *Firestone* despite the fact that the Plan Administrator had previously made an honest mistake in previously interpreting the Plan's terms. *Id*. at 1646 (expressly rejecting the "one-strike-and-you're-out" approach). As explained by the Supreme Court, the District Court should not have acted as a substitute trustee in stripping the plan administrator of the deference to which he which he was entitled under *Firestone* and the terms of the Plan, because there had been no finding that the Plan Administrator had acted in bad faith or would not fairly exercise his discretion to interpret the terms of the Plan. *Id*. at 1647-48.

The Supreme Court remanded the case for consideration as to whether the Plan Administrator's interpretation of the plan is a reasonable one. Although the Supreme Court also noted that this Court could consider the issue of notice, the Supreme Court did not leave open the issue as to whether the Plan Administrator had a conflict of interest or had acted in bad faith in reaching his determination. Thus, the Court's mandate cannot reasonably be construed to authorize or warrant a reconsideration of that issue or to permit additional discovery at this late stage. *See Conkright*, 130 S. Ct. 1640; *Ben Zvi*, 242 F.3d at 95 (holding that "[t]o determine whether an issue remains open for reconsideration on remand, the . . . court should look to both the specific dictates of the remand order as well as the broader 'spirit of the mandate'") (internal citations omitted). *See also Fed. Trade Comm'n. v. Standard Educ. Soc'y*, 148 F.2d 931 (2d Cir. 1945).

B. The District Court Did Not Abuse Its Discretion by Refusing to Reopen Discovery

Even if further discovery had not been foreclosed by the mandate rule, the District Court properly exercised its discretion in refusing to reopen discovery on the conflicts issue. Plaintiffs cannot show as they must that such denial of discovery was improvident and affected any substantial rights. *See Alto*, 2012 U.S. App. LEXIS at 11938, *3. Plaintiffs and the DOL now point to three circumstances that they assert establish a conflict of interest here: (i) that the Plan Administrator has at all relevant times been an employee of Xerox, which is ultimately responsible for funding the Plan; (ii) that the Plan Administrator's interpretation was adopted during the course of litigation; and (iii) that the Plan Administrator had previously proposed to reintroduce the phantom account methodology for periods after the issuance of the 1998 SPD. This information has been well-known to Plaintiffs for many years, and they could have made such arguments regarding the Plan Administrator's purported conflict without any additional discovery whatsoever.

In any event, Plaintiffs had ample time and opportunity to take discovery regarding such a conflict. *Trebor Sportswear Co., Inc. v. The Limited Stores, Inc.*, 865 F.2d 506, 511 (2d Cir. 1989) ("[C]ourt may properly deny further discovery if the [requesting] party has had a fully adequate opportunity for discovery.").

Furthermore, the District Court was well aware of these circumstances and nevertheless found the Plan Administrator's interpretation to be entitled to deference "[e]ven taking this conflict into account." (SPA-22). It is well-established in this Circuit that no weight is given to a conflict in the absence of any evidence that the conflict actually affected the administrator's decision. *Hobson v. Metro. Life Ins. Co.*, 574 F.3d 75, 83 (2d Cir. 2009). Here, there is no record evidence that any of the circumstances cited by Plaintiffs "actually affected" the Plan Administrator's interpretation of the Plan in any way. For this reason, Plaintiffs' conflict of interest argument fails as a matter of law.

Nor is it relevant that the Supreme Court decided *Glenn*, 554 U.S. 105, after the 2006 remedies trial. Before the 2006 remand, it was established in this Circuit that: (i) a conflict of interest is relevant to the amount of deference owed a plan administrator; and (ii) discovery regarding such a conflict may be available in appropriate cases. *See e.g.*, *Wagner v. First Unum Life Ins. Co.*, 100 F. App'x 862, 864 n.1 (2d Cir. 2004) (summary order); *Harris v. Donnelly*, 99 civ. 12361, 2000 U.S. Dist. LEXIS 17911 *25 (S.D.N.Y. 2000). Thus, *Glenn* does not create a new justification for discovery in this case and does not warrant the reopening of discovery.

The DOL (but not Plaintiffs) also asserts that changes in the "standard of proof" applicable to Plaintiffs' claims effected by *Conkright* and *Amara* justify granting their request for additional discovery after remand from the Supreme

Court. (DOL Br. at 24). This assertion lacks merit. The only topic on which Plaintiffs *ever* sought additional discovery after these decisions was the conflict of interest question. Accordingly, Plaintiffs have waived any possible entitlement to discovery on *other* topics, such as the showing required to recover equitable relief for notice violations under Section 502(a)(3) of ERISA. Moreover, the *Amara* decision plainly did not change the law in any way that is relevant to Plaintiffs' conflict of interest discovery. Thus, *Amara* provides no basis upon which to hold that the District Court abused its discretion in denying the belated discovery now requested by Plaintiffs.

Accordingly, the District Court's denial of additional discovery should be affirmed.

CONCLUSION

The judgment of the District Court should be affirmed in its entirety.

Dated: July 19, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,799 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman.

Dated: Rochester, New York
July 19, 2012

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