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 AND SPECIAL APPENDIX
FOR PLAINTIFFS-APPELLANTS

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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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JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. § 1331. This Court has jurisdiction to review the district court's final judgment under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

1. Were plaintiffs entitled under ERISA to notice of the hypothetical interest rate Xerox now uses to reduce their collective pensions by fourteen million dollars, and if so, what is the appropriate remedy for Xerox's failure to provide such notice?

2. Does the governing ERISA plan permit Xerox to tack an annually compounding 8.5% interest rate onto money plaintiffs received years ago and deduct that hugely-appreciated phantom sum from plaintiffs' pension entitlement today?

INTRODUCTION

Plaintiffs are all Xerox employees who were rehired after leaving the company. Decades ago, plaintiffs received modest sums—typically, several thousand dollars—when they left Xerox and cashed out their pensions. These cashed-out pensions were from an old plan called the Profit-Sharing Plan ("PSP") that no longer exists.

When these employees later rejoined Xerox, they were covered by a new retirement Plan. Nothing in that Plan said that an employee's pension earned during her second period of employment would be reduced by the appreciated value of amounts cashed out as compensation for her first period of employment (and under a defunct plan). Moreover, as required by ERISA, Xerox sent out periodic Summary Plan Descriptions ("SPDs") and benefits statements that showed how much of a pension each employee was entitled to upon retirement. None of these documents said anything about reducing plaintiffs' second pension by hypothetical appreciation of the amounts cashed out of the earlier plan. To the contrary, they reflected a benefit level without such an appreciated offset.

This Court has already held—three times—that the use of hypothetical appreciation by Xerox to reduce the pensions of its rehired employees violates ERISA. This Court first did so in *Layaou v. Xerox*, 238 F.3d 205 (2d Cir. 2001) ("*Layaou*") (Sotomayor, J., joined by Meskill and Calabresi, JJ.). This Court so held again in *Frommert v. Conkright*, 433 F.3d 254 (2d Cir. 2006) ("*Frommert I"*) (Garaufis, D.J., joined by Pooler and Sack, J.J.). This Court finally so held in *Frommert v. Conkright*, 535 F.3d 111 (2d Cir. 2008) ("*Frommert II*") (Straub, J., joined by Raggi, J., and Sessions, D.J.).

In the present case—*Frommert III*—Xerox continues to apply a hypothetical appreciated offset to reduce the pensions of its rehired employees. The district court judge below, who was the same district court judge in each of the three earlier cases appealed to this Court (Judge Larimer), permitted Xerox to apply a hypothetical (annually compounded) 8.5% interest rate to the pensions cashed out when an employee first left Xerox in order to reduce the employee's pension for his second term of service.

This appreciated offset is referred to by Xerox as the "Plan Administrator Approach" ("PAA" or "PAA offset"). It results in the reduction of plaintiffs' pensions by over fourteen million dollars.

A515 (Xerox's comparative calculation of different offset methods).[1] Indeed, under the PAA, plaintiffs are to receive vastly reduced and financially inadequate retirement benefits for their lengthy rehire service. This is so despite the fact that they worked for many years and were consistently told by Xerox, in written SPDs and benefits statements, that they were entitled to a specific and much higher benefit amount upon retirement.

STATEMENT OF THE CASE

ERISA imposes two crucial requirements on all pension arrangements. First, the terms of the pension deal must be written in the plan. 29 U.S.C. § 1102(a)(1). Second, those terms must be communicated to the beneficiaries in a way that the "average plan participant" can understand. 29 U.S.C. § 1022(b). The first is a matter of plan interpretation. The latter is a question of notice.

[1] In preparation for the 2006 hearing before Judge Larimer, Xerox presented a comparative calculation of plaintiffs' benefits under the different offset methods the parties proposed. A513-515. While those numbers, which were calculated in early 2006, have changed, they provide a useful approximation of the difference in plaintiffs' pensions under the different offset calculations that have been contemplated in this lawsuit. *Id.* The second line from the bottom on A515 reflects the total pension calculations for all plaintiffs under the respective methods.

These inquires ask different questions and are governed by different standards. The Supreme Court has said so explicitly in this very case. *Conkright v. Frommert*, 130 S. Ct. 1640, 1652 n.2 (2010) (distinguishing between questions of plan interpretation and notice).

Plaintiffs had no notice of the terms of the offset Xerox attempts to impose on their pensions. This was a violation of the notice requirements of ERISA. Nor, in any event, is the offset applied by Xerox actually included in the plan. This was a violation of the terms of the plan. The district court erred in concluding otherwise.

No Notice. No Deference on Notice.

The objective of notice is to permit employees to calculate their entitlement and budget accordingly. *Firestone & Rubber Co. v. Bruch*, 489 U.S. 101, 118 (1989) (explaining that the purpose of ERISA's notice requirements is to "ensure that the individual participant knows exactly where he stands with respect to the plan."). This is the central purpose of the Employee *Retirement Income Security* Act.

No such notice occurred here. The district court held that Xerox adequately informed plaintiffs that it would offset past money received using a compounded 8.5% interest rate. SPA14-20. But based upon the documents plaintiffs received from Xerox, no "average plan participant" could have *possibly* discerned the offset interest rate Xerox now claims should be applied to plaintiffs' past distributions (or even that there would be an offset interest rate).

There is no line of text, no example, no pointer to another document—nothing—in the relevant SPDs or personal benefit statements that would allow a plaintiff rehired in the 1990s to have determined that (1) an interest rate would be used to appreciate his/her past distributions for offset purposes, or (2) what that interest rate would be. A516-563; A692-707. Without the interest rate (whether 0% or 10%), one cannot calculate the size of Xerox's proposed offset. Indeed, the interest rate is the *most* important factor in determining the size of the offset. Of course, the reason Xerox did not notify plaintiffs of the relevant interest rate, or provide an illustrative example, was that Xerox did not determine the offset rate until many years after it sent the alleged notice to plaintiffs.

Moreover, the district court wrongly used a deferential standard of review when adjudging notice. As the district court judge explained: "Before 1998, the disclosure of an offset may have been provided in an 'ambiguous manner,' but it is precisely in such situations that deference is owed to a plan administrator who has been granted discretion to interpret the terms of a plan." SPA17. That is reversible error. The sufficiency of ERISA notice is to be non-deferentially determined by a court, standing in the shoes of the average plan participant.

As the Supreme Court explicitly stated in this case, notice is entirely separate from plan interpretation and is sufficient reason to find for plaintiffs. The appropriate remedies for defective notice in ERISA cases like this one include the equitable remedies of reformation, estoppel, and surcharge. *CIGNA Corp. v. Amara,* 131 S. Ct. 1866, 1871 (2011) (discussing available equitable relief in defective notice cases). Equitable relief here is that plaintiffs receive, at a minimum, pensions equal in amount to what plaintiffs would have received had they been "new hires," *i.e.,* had they never worked at Xerox before their second stint of service.

The PAA: An Unreasonable Interpretation of the Plan

Putting aside the issue of notice, the Plan Administrator Approach is patently unreasonable, given the history and language of the relevant Xerox plans. Prior to 1989, those plans provided for a detailed offset procedure that specifically attached (1) high interest rates to (2) past PSP distributions (3) for offset purposes. In 1989, Xerox removed those provisions, and did not replace them until 1998. *See generally Frommert v. Conkright*, 433 F.3d 254 (2d Cir. 2006). Accordingly, Xerox can only win on plan interpretation grounds if its 1989 Plan—in essence fortuitously—attaches an interest rate to plaintiffs' PSP distributions. It does not.

The district court did not pretend otherwise. Instead, it held that it was "reasonable" for Xerox to pick one of the many interest rates referred to in the 1989 Plan and slap that rate onto plaintiffs' past distributions for offset purposes. SPA12. That was error. When a plan wishes to use an interest rate to annuitize a lump sum—exactly what Xerox wants to do here—that interest rate must be "specified in the plan in a way which precludes employer discretion." 26 U.S.C. § 401(a)(25). Plans that fail to do so lose their tax qualification.

Here the 1989 Xerox Plan failed—literally—to tie any interest rate to past PSP distributions. A106-186 (Xerox Corporation Retirement Income Guarantee Plan, 1989 Restatement) (hereafter "1989 Plan" or "Plan"). There is no dispute about that. Xerox hopes to win the case by *using its discretion* to pick another interest rate from the many that federal statutes and the Plan use for a multitude of purposes and apply that rate to plaintiffs' distributions. But the exercise of such discretion in connection with picking interest rates would tax-disqualify the plan, and any interpretation of a plan that tax-disqualifies the plan is automatically arbitrary and capricious.

There are precisely two permissible readings of the Plan that do not require Xerox to selectively pick an interest rate from a hat to calculate plaintiffs' offset. Both of those readings were urged by plaintiffs throughout this case.

One is the *Layaou* offset, inspired by Judge (now Justice) Sotomayor's opinion in *Layaou v. Xerox Corp.*, 238 F.3d 205, 209-212 (2d Cir. 2001) (concluding that Xerox failed to inform employees like plaintiffs "that their future benefits would be offset by an appreciated value of their prior lump-sum benefits distributions."). The *Layaou* offset sets the offset equal to the nominal sum originally received, and, admittedly, includes no "time value of money."

The other possible offset is the actual-annuity-offset, proposed by plaintiffs' expert below, which deducts from plaintiffs' current pension the annuity they were entitled to *actually* receive when they first left Xerox. A77-80. The actual-annuity-offset *does* include an implicit time value of money, SPA19, but gives Xerox no discretion to adjust that rate, and is thus not arbitrary and capricious. To the extent this case is not resolved on notice grounds, plaintiffs urge that the actual-annuity-offset method be applied to their pensions.

Misunderstanding *Conkright* and *Glenn*

There is a simple explanation for why the trial court made the errors it did. As the transcript of the lower court proceeding makes clear, the trial court was convinced that the Supreme Court's holding in this case amounted to a command that Xerox's PAA approach was reasonable and must be applied to plaintiffs. A776-781. The Supreme Court said nothing of the sort; to the contrary, it stressed that (1) the case could be independently decided on notice grounds and that (2) deferential review did not mean the administrator's interpretation would necessarily prevail on remand. *Conkright*, 130 S.Ct. at 1651-52, n.2.

Nor, of course, did the Supreme Court suggest that the lower court should ignore the commands of *Metropolitan Life Ins. Co., v. Glenn,* 554 U.S. 105 (2008). *Glenn* held that a conflict is present when an employer both pays and determines benefits and that a court must, in case-specific fashion, "weigh" that conflict when deferentially reviewing an administrator's action. Below, the trial court simply refused to conduct—or even allow plaintiffs to seek discovery regarding—the required conflict of interest analysis. SPA20-22. That was error.

One reason for allowing discovery when there is a *per se* conflict is to ensure that the conflict is not so severe as to amount to bad faith. The latter would strip the administrator of any entitlement to deference. Moreover, conflict discovery permits the court to accurately assess the likelihood that an administrator might have acted unreasonably in the absence of bad faith; the more acute the conflict, the more likely a finding of arbitrariness. It was an abuse of discretion for the court to refuse discovery on, as well as to not weigh, the severity of the *Glenn* conflict here.

STATEMENT OF FACTS

Before 1989, Xerox Corporation provided its employees with two ERISA plans: (1) a defined benefit pension plan called the Retirement Income Guarantee Plan ("Retirement Plan" or "Plan") and (2) a defined contribution plan called the Profit Sharing Plan ("PSP"). *Miller v. Xerox Corp. Ret. Income Guarantee Plan*, 464 F.3d 871, 872

(9th Cir. 2006), *cert. denied*, 549 U.S. 1280 (2007).[2] The Retirement Plan provided a fixed "formula" benefit based on compensation and total years of service; this formula is often referred to as the RIGP or highest-average-pay ("HAP") benefit.[3] In English: the RIGP/HAP benefit is like a traditional pension, where the recipient gets a fixed monthly amount based on tenure and pay. A106 (Section 1.1, 1989 Plan); A533 (description of RIGP/HAP annuity in SPD). The PSP provided each participant with an individual account that consisted of annual contributions plus investment performance appreciation. *Miller*, 464 F.3d at 872. In English: the PSP was a retirement savings account driven by Xerox's yearly profits and investment performance.

In 1989, Xerox combined the two plans, eliminating the PSP and transferring existing individual accounts into the Retirement Plan. A106-186. The 1989 Retirement Plan created two new accounts—a Cash Balance Retirement Account ("CBRA") and a Transitional Retirement Account ("TRA"). A179-186. Like all cash-balance

[2] The history of the plans was extensively described in briefing before the Supreme Court, and is not in serious dispute here. *See* Respondents Br. in *Conkright et al. v. Frommert et al.*, 130 S. Ct. 1640 (2010), 2009 WL 5240210 at *9-20 (discussing history of Xerox plans).

[3] Various players—courts, experts, parties—have used different terms for the RIGP/HAP annuity throughout this litigation. *See, e.g.,* SPA8 (referring to the "HAP or RIGP formula"). To dispel confusion, plaintiffs refer to that annuity as the RIGP/HAP annuity, and by that plaintiffs simply mean "the entitlement under the Xerox plans that provided for a traditional monthly pension."

arrangements, the CBRA was not an actual account; it merely provided a benefit based on the balance of an employee's PSP account, plus annual contributions by Xerox equal to five percent of the employee's salary, plus interest at a specified rate. *Frommert v. Conkright*, 433 F.3d 254, 258 (2d Cir. 2006) ("*Frommert I*").

The TRA, however, was an actual, transitional account used to port employees' current PSP funds out of the abolished PSP plan and into the restructured Retirement Plan. A179 (Section 17.1, 1989 Plan); A693 (SPD describing TRA). No employee could contribute to or create a TRA after 1989, although any existing TRA account would accumulate real interest. A179. Thus, the TRA could not apply to employees who had cashed out their PSP accounts prior to 1989, because they had no money in the PSP to transfer into the TRA. For employees who had never cashed out their PSP, the money they had in the old PSP was transferred to into the TRA, where it accrued actual interest. A179; A693.

When the two plans merged in 1989, the new plan distinguished between the offset applicable to retired employees and employees like plaintiffs. A126-131; *Frommert I*, 433 F.3d at 258. For those who had already retired from Xerox and were thus receiving monthly retirement checks, the 1989 Plan provided that their monthly checks would remain the same: any offset that had previously applied to amounts received in the past by these retirees—specifically the original "phantom account" offset—would persist. A126-128 (Section 4.2, 1989 Plan).[4] The phantom account offset used an interest rate equal to equity growth rates that the monies "would have experienced if the mon[ies] had remained in Xerox's investment funds, and reduced respondents' present benefits accordingly." *Conkright*, 130 S.Ct. at 1645. For those not yet retired, like plaintiffs, the "phantom account offset" was eliminated. A128-131 (Section 4.3, 1989 Plan).

Frommert I: 1999-2006

Xerox, nonetheless, attempted to apply the phantom account offset to plaintiffs. In 1999, plaintiffs sued under sections 502(a)(1)(B) and 502(a)(3) of ERISA (set forth at 29 U.S.C. §§ 1132(a)(1) & (3)). *Frommert I,* 433 F.3d at 262. Plaintiffs claimed that the Plan did not by its terms provide for the use of the phantom account methodology to inflate and offset plaintiffs' prior PSP distributions. *Frommert v.*

[4] This "phantom account offset for then-retirees" does not apply to plaintiffs because they had not retired and were not receiving checks when the Plans merged. The parties do not dispute that.

Conkright, 328 F.Supp.2d 420, 432, 433 (W.D.N.Y 2004). Plaintiffs additionally contended that "the SPD did not disclose that the phantom account would be used" and that "defendants breached their fiduciary duties . . . by not adequately disclosing the offset to plaintiffs." *Id.* at 429, 432.

The district court granted summary judgment to Xerox, and a panel of this Court vacated the district court's decision in relevant part. *Frommert I*, 433 F.3d 254. The panel held "that the Plan administrator's conclusion that the Plan always included the phantom account is unreasonable," even under "an arbitrary or capricious standard" of review. *Id.* at 265-66. The panel further observed that it had already held, in *Layaou v. Xerox Corp.*, 238 F.3d 205, 209-212 (2d Cir. 2001) (Sotomayor, J.), that the Plan had violated ERISA's SPD requirement by failing to "provide notice" that rehired employees' "future benefits would be offset by an appreciated value of their prior lump-sum benefits distributions." *Frommert I,* 433 F.3d at 265. The case was remanded for the district court to fashion an equitable remedy that would "utilize an appropriate pre-amendment calculation to determine [plaintiffs'] benefits." *Id.* at 268.

Frommert II: 2006-2010

On remand, the parties proposed a total of four different "methodologies" to calculate plaintiffs' benefits. Xerox proposed two methods, and plaintiffs proposed two methods. They are described below.

Xerox's Two Methods

The Plan Administrator Approach (PAA). The PAA is a slightly less aggressive appreciated offset than the phantom account. Whereas the phantom account offset inflated the past distributions using equity growth rates, the PAA inflates the past distributions using a compounding 8.5% rate. A91. As the United States explained:

> [The PAA] would, like the phantom account, have offset an employee's benefits by an appreciated value of his prior distribution . . . . Unlike the phantom-account method, however, the administrators' appreciated-offset method would have used a fixed interest rate, rather than hypothetical investment earnings, to calculate the appreciation. Using that rate, the administrator would have converted the employee's prior distribution into an annuity and then subtracted that annuity from the employee's RIGP benefit, expressed as an annuity and calculated using total years of service.

Brief for United States as *Amicus Curiae* Supporting Respondents, *Conkright v. Frommert*, 2009 WL 4030393 at *6-7.

New Hire. The other methodology proposed by Xerox was the "new hire" method, where plaintiffs would be treated as if they were "new hires," *i.e.*, their pension entitlement would be based exclusively on their second stint of service. As the United States explained:

> The second approach proposed by [Xerox] would have treated rehired employees the same as newly-hired employees, calculating their CBRA and TRA benefits based on only the actual amount in their accounts and their RIGP benefits based only on their years of service and compensation after they were rehired (the new-hire approach).

Id. at *7.

Plaintiffs' Two Methods

Layaou. Under the *Layaou* method—named after the approach contemplated by now-Justice Sotomayor—current benefits would be offset by only the nominal amounts of their prior distributions.

Actual-Annuity-Offset. Under plaintiffs' second proposed method—explained by plaintiffs' expert Phillip Cofield—the offset would have been equal to the *actual* RIGP/HAP annuity which plaintiffs were contractually entitled at their original date of departure. A77-80. If, for example, at the original date of departure, Plaintiff A was entitled to an annuity worth $1,200 a month, then that annuity would be subtracted from Plaintiff A's annuity entitlement today.

From these four proposed methods, the district court chose the *Layaou* method. The trial court articulated two bases for its decision.

The first was "plan interpretation," *i.e.,* the court believed that the 1989 Plan did not include any language authorizing any type of appreciated offset. The second was "notice," *i.e.,* the court believed that Xerox was prohibited from using an appreciated offset, because no interest rate was ever disclosed:

> I must interpret the Plan as written *and* consider what a reasonable employee would have understood to be the case concerning the effect of prior distributions. If the employee had no notice of the 'phantom account,' he also had no notice of some of the other mechanism suggested by witnesses at the remand hearing before me.

Frommert v. Conkright, 472 F.Supp.2d 452, 457 (W.D.N.Y. 2007) (emphasis added).

Xerox appealed to this Court and lost. *Frommert v. Conkright*, 535 F.3d 111 (2008) ("*Frommert II*"). A panel of this Court rejected the argument that Xerox's PAA "interpretation" of the 1989 Plan was entitled to deference. *Id.* at 119. The panel then affirmed the district court's *Layaou* method of pension recalculation which, in its view, was one reasonable interpretation of the 1989 Plan. *Id.* at 119, 123. Because the court resolved the case in plaintiffs' favor on plan interpretation grounds, this Court did not find it necessary to address the notice issue.

Xerox sought review with the United States Supreme Court solely on the plan interpretation question. Before the Supreme Court, Xerox argued that this Court's judgment as to the meaning of the plan must be reversed because the district court did not "extend deference to the Plan Administrator's interpretation of the Plan." *Conkright*, 130 S.Ct. at 1646. On that question, five justices agreed with Xerox. *Id.* at 1651 (concluding that the *Frommert II* panel "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 related interpretation by the Administrator to be invalid."). Because this Court had not yet passed on the merits of the notice question, the Supreme Court expressly left that issue "to be decided, if necessary, on remand." *Conkright*, 130 S.Ct. at 1652 n.2.[5] Thus, the case was remanded "for further proceedings consistent with [its] opinion." *Id.* at 1652.

[5] The United States, as *amicus curiae*, filed a brief and participated in oral argument before the Supreme Court. In addition to defending plaintiffs' "interpretation" argument, the government also endorsed plaintiffs' position regarding "notice." The Government argued that the district court's order could not only be affirmed as a matter of "interpretation" *but alternatively* on "notice" grounds. *Id.* at 1652 n.2 (citing Brief for United States as *Amicus Curiae* Supporting Respondents, *Conkright v. Frommert*, 2009 WL 4030393 at *25-26). Plaintiffs also advanced this argument before the Supreme Court. *See* Brief for Respondents, *Conkright v. Frommert,* 2009 WL 5240210 at *65-66 (discussing defective notice).

Frommert III: 2010-today

On remand, plaintiffs ultimately filed a motion with the trial court requesting that it reenter its January 2007 judgment—in which the court held that the appropriate offset in this case was the *Layaou* offset—on notice grounds. SPA3. Xerox cross-moved and sought an order that the PAA be applied. *Id.*

On June 2, 2011, the trial court heard argument regarding the appropriate offset in this case. A759-858. During that argument, the trial judge made clear that he fundamentally misunderstood the scope and import of both the Supreme Court's decisions in *Conkright* and *Amara*:

> THE COURT: When you say "reenter the judgment," how can I do that without finding that the administrator's then interpretation and now interpretation is unreasonable?
>
> MR. STRIS: . . . . If you do not disclose a material term, then it does not matter how you interpret the plan; it would be invalid – it would be invalid and illegal under ERISA to enforce that provision. So there's actually a simple path to *Layaou*. Now, if you're uncomfortable with that, Your Honor, we would be perfectly happy if this Court went the [*Amara*] route and essentially used its equitable discretion to pick an interest rate of 1%, of 2%, of – whatever the Court thinks is fair, that does not treat our clients worse than new hire.
>
> THE COURT: That's precisely what I tried to do the first time is create an equitable approach here, which the

Second Circuit thought was proper, but the Supreme Court, which tends to trump every court below that, said no.

MR. STRIS:. . . . The Supreme Court, when the petition for the writ of *certiorari* was filed, was viewing this as the Second Circuit affirming your judgment on plan interpretation grounds; the notice question, which is an alternative basis, was never reached by the Second Circuit. So it was never, in their view, before the Supreme Court. If there's any doubt on this question, you only need to look at two things: The footnote in the Supreme Court opinion in *Frommert* saying that the issue of notice is available to be decided, if necessary, on remand; and, number two, the [*Amara*] opinion, which has facts that are strikingly similar to those in this case. . . .

THE COURT: Well, I still have difficulty getting away from the basic holding of the Supreme Court that said, Judge Larimer, you have to give deference to what the plan – for what the plan administrator did. . . .I mean, I'm not insensitive to the concern you have for your clients, but I also, I think, have to be perfectly clear as to what the United States Supreme Court said I must do, and that is to give . . . .deference to what the plan administrator thinks here. I think this sort of bleeds into our discussion about notice. But the phantom account has been struck down so that no matter what we do here, it's going to be hard to find, I think, that your clients had precise notice about the exact way their benefits might be affected. . . .I thought that was significant, and I ruled the way I did. The Supreme Court said, no, you have to give deference now to the administrator's present interpretation of a plan that has been affected by a determination of the phantom account isn't appropriate. So no matter what plan is now adopted here, it's different from the phantom account. So that's the problem you have when sort of dealing with this grounds on notice level. . . .And I'm repeating myself, but I don't know how – and maybe you both can speak to this, how we deal

> with the fact that there could not be any notice because the original plan that Xerox was pushing was struck down.

A776-781. On November 17, 2011, the trial court granted Xerox's motion and ordered that the PAA be applied and plaintiffs be paid benefits accordingly. SPA1-26. The court held that Xerox's PAA approach was a "reasonable" interpretation of the plan, SPA9, and that plaintiffs' were sufficiently noticed under ERISA because they were aware that "some" offset would operate on their pensions. SPA17 ("[P]articipants were on notice at all relevant times that *some* offset would be applied to account for prior distributions.").

The trial court accepted that no interest rate had ever been disclosed, explained, or illustrated in the SPDs. Nonetheless, it held that sufficient notice occurred here because while "[b]efore 1998, the disclosure of an offset may have been provided in an 'ambiguous manner,' . . . it is precisely in such situations that deference is owed to a plan administrator who has been granted discretion to interpret the terms of a plan." SPA17.

The court also denied plaintiffs' request for discovery pertaining to the per se *Glenn* conflict in this case. SPA20-22. While correctly noting that *Glenn* requires a court to assess, on a case-specific basis, the acuteness of a conflict, and "weigh" said conflict as a "factor" when reviewing an administrator's determination, the trial court offered no explanation as to why the conflict present in this case was not accorded "tie-breaking" weight as a part of the court's reasonableness review. *Id.*

Plaintiffs timely filed a notice of appeal.

SUMMARY OF ARGUMENT

Plaintiffs are rehired employees of Xerox. They received modest compensation from the company long ago. This litigation is about the degree to which that compensation should reduce plaintiffs' current pension entitlement. Below, the trial court held that Xerox was entitled to inflate the value of those old payments to such a degree that plaintiffs' pensions are to be collectively reduced by fourteen million dollars.

The trial court's holding was impelled by clear error.

As the Supreme Court acknowledged in this very case, plan interpretation and notice are two different things under ERISA. The trial court erroneously (1) conflated those two inquiries and ignored ERISA's statutory requirement that notice must be comprehensible to the "average plan participant" to be legally effective, (2) deferred to an interpretation of the Xerox plan that violates the federal tax rules for qualified plans and is otherwise unreasonable, and (3) refused to conduct (or even permit discovery pertaining to) a "conflict" analysis required by the Supreme Court if the same party, as here, determines and pays out benefits. Plaintiffs are entitled to receive, at a minimum, pensions worth an amount equal to those that would have been received by "new hires."

ARGUMENT

I. The Lower Court's Judgment Should Be Reversed on Notice Grounds.

As explained below, plaintiffs were not noticed of the appreciated offset Xerox seeks to impose. The trial court's holding otherwise was error.

A. Plan Terms Are Not Enforceable Absent Adequate Notice.

ERISA requires that participants be provided with a SPD that must be "written in a manner calculated to be understood by the average plan participant" and "sufficiently accurate and comprehensive to apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a)(1). "ERISA contemplates that the SPD is an employee's primary source of information regarding employment benefits, and employees are entitled to rely on the descriptions contained in the summary." *Mario v. P & C Food Mkts., Inc.*, 313 F.3d 758, 764 (2d Cir. 2002).

An SPD will only be deemed "sufficiently accurate and comprehensive" if it provides notice of certain items. For example, every SPD must describe the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." 29 U.S.C. § 1022(b).

Federal regulations specifically reiterate the statutory requirement that notice of any potential reduction in benefits must be given in an SPD:

> [T]he summary plan description [shall include] a statement clearly identifying circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture, suspension, offset, reduction, or recovery . . . of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide. . .

29 C.F.R. § 2520.102-3(l). The regulations further clarify the manner and form in which such notice must be given. For example:

- "[T]he plan administrator shall . . . tak[e] into account such factors as the . . . the complexity of the terms of the plan [which] will usually require . . . the use of clarifying examples and illustrations. . ."

- "The format of the summary plan description must not have the effect [of] misleading, misinforming or failing to inform. . ."

- "Any description of exception, limitations, reductions, or restrictions of plan benefits shall not be minimized, rendered obscure or otherwise made to appear unimportant."

- "Such exceptions, limitations, reductions, or restrictions of plan benefits shall be described or summarized in a manner not less prominent than the style, captions, printing type, and prominence used to describe or summarize plan benefits."

- "The advantages and disadvantages of the plan shall be presented without either exaggerating the benefits or minimizing the limitations."

29 C.F.R. § 2520.102-2(a); 29 C.F.R. § 2520.102-2(b). In sum, an SPD will only comply with the statutory requirements of ERISA if it is written to explain the "full import" of material plan terms in plain English. *See e.g., Chambless v. Masters, Mates & Pilots Pension Plan*, 772 F.2d 1032, 1040 (2d Cir. 1985) (requiring SPD to explain "full import" of provisions affecting employees); *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574, 587 (7th Cir. 2000) (holding that an SPD failing to provide "critical information" was defective).

B. The Trial Court Improperly Used a Deferential Standard to Assess Notice.

ERISA notice is to be non-deferentially determined by a court, standing in the shoes of the average plan participant. 28 U.S.C. § 1022. Notice failures are statutory violations, not plan interpretation questions, and, as a general rule, no court defers to a private party as to the meaning of a statute. *See, e.g., Long v. Flying Tiger Line, Inc. Fixed Pension Plan for Pilots*, 994 F.2d 692, 694 (9th Cir. 1993) ("The interpretation of ERISA, a federal statute, is a question of law subject to de novo review.").

In addition, *Firestone* limits deference to an administrator's interpretation of the plan, and, as the Supreme Court's recent opinion in *Amara* makes clear, SPDs are not *part* of the plan; they are communications *about* the plan. *Amara,* 131 S.Ct. at 1879.[6] *See Firestone,* 489 U.S. at 108 (limiting deference to claims brought in the section 1132(a)(1)(B) context); *see also Luby v. Teamsters Health, Welfare, and Pension Trust Funds*, 944 F.2d 1176, 1183 (3d Cir. 1991) (holding that *Firestone* deference is limited to "remedial actions challenging claim denials brought under 29 U.S.C. § 1132(a)(1)(B)" and "not remedial actions based on or brought under other ERISA provisions."). This case is about what the SPDs did or did not disclose; no deference is due.

[6] In *Amara*, the Court held that notice failures give rise to section 1132(a)(3) claims, not section 1132(a)(1)(B) "terms of the plan" claims. *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1871 (2011) (explaining that notice failures permit the seeking of equitable relief under section 1132(a)(3)). *Firestone* deference only applies to section 1132(a)(1)(B) "terms of the plan" claims.

Although this Court has declined to explicitly adopt a blanket rule regarding deference with respect to SPDs, where, as here, "no provision of the SPD even arguably gives notice" of the material term being applied to a participant, no deference is due. *Wilkins v. Mason Tenders*, 445 F.3d 572, 582 (2d Cir. 2006). *Cf. Rhorer v. Raytheon Eng'rs & Contractors Inc.*, 181 F.3d 634, 639 (5th Cir. 1999) (holding that notice sufficiency is a legal question entitled to *de novo* review). The trial court's deference on notice is reversible error.

C. The Trial Court Erred In Concluding That Xerox Gave Any Notice, Let Alone Sufficient Notice, of the PAA.

The court compounded its error by holding, under any standard, that notice of the PAA occurred in this case. It did not.

Conceptually, the PAA is simple: Xerox wishes to tack an imaginary interest rate onto plaintiffs' old monies, inflate that sum, and deduct that phantom amount from plaintiffs' current entitlement. The problem for Xerox is equally simple: it never mentioned it would be using *any* interest rate to reduce plaintiffs' pensions, let alone a confiscatory rate.

In the SPDs provided to plaintiffs, no interest rate was mentioned, and no example was given. There is no discussion of any offset for past distributions at all, except for one line saying that "the amount you receive may also be reduced if you previously left the Company and received a distribution at that time." A534; A694. That is not notice of an appreciated offset, let alone a large appreciated offset, primarily because it leaves out the part about appreciation. *Cf. Layaou*, 238 F.3d at 210 (construing the same language and concluding that the "SPD failed to provide notice" to employees like plaintiffs that "their future benefits would be offset by an appreciated value of their prior lump-sum benefits distributions").[7]

It would not have been difficult to provide proper notice. Here is an example of sufficient notice: "Your prior distributions will be offset based on the amount received plus an interest rate of X. Consider this example…" That is it. It is that simple. Xerox failed to do this. When Justice Sotomayor was sitting on this Court, reviewing the same documents here, she made precisely this point. She wrote: "[t]he SPD could have [easily] given sufficient notice, for example, by . . . providing an example calculating the benefits of an employee who had received a prior distribution." *Layaou,* 238 F.3d at 211.

[7] Judge Sotomayor was construing the SPD language set forth at A694. *Layaou,* 238 F.3d at 206, 210 ("The only relevant language in Xerox's SPD states that "[t]he amount you receive may also be reduced if you had previously left the Company and received a distribution at that time.'"). An earlier SPD, from December 1989, employs the same language. A534.

It gets worse. Not only was there no interest rate or appreciated offset mentioned, plaintiffs were affirmatively misled. Each plaintiff received personalized benefit statements ("Personal Statements") that calculated the dollar amount of each recipient's "100% vested" "accrued benefit" under the new Plan. The statement received in 1990 by Paul Frommert is a representative example. It stated:

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

See Joint Appendix, *Conkright v. Frommert*, 130 S. Ct. 1640, WL 2955642, at *60a. The monthly benefit calculations in each Personal Statement did not include any calculated offset for prior distributions received from the PSP. No reasonable person would expect that a specified pension would undergo a sinister transformation into nearly nothing.

The grossly misleading SPDs and personal benefits statements provided by Xerox are a paradigmatic example of precisely what ERISA was designed to prohibit. Xerox failed to identify—let alone describe or illustrate—the interest rate it would use to effect a never-mentioned appreciated offset. The interest rate is the most important term in calculating the size of the offset. There is no question this amounts to "minimiz[ing], render[ing] obscure[e and] otherwise ma[king] to appear unimportant" critical provisions that Xerox now alleges are part of the Plan. 29 C.F.R. § 2520.102-2(a); 29 C.F.R. § 2520.102-2(b). *Cf. Devlin v. Empire Blue Cross and Blue Shield*, 274 F.3d 76, 88 (2d Cir. 2001) ("[W]hen a plan administrator…fails to provide information when it knows that its failure to do so might cause harm, the plan administrator has breached its fiduciary duty to individual plan participants and beneficiaries."); *In re Long Island Lighting Co.*, 129 F.3d 268, 271 (2d Cir. 1997) ("An ERISA fiduciary has an obligation to provide full and accurate information to the plan beneficiaries regarding the administration of the plan.").

A recent decision of this Court is instructive. In *Wilkins v. Mason Tenders Dist. Council Pension Fund,* 445 F.3d 572 (2d Cir. 2006), Wilkins was entitled to benefits from a union fund involving many employers. Wilkins claimed his pension was smaller than it should be because several employers had underreported his earnings. *Id.* at 583. The defendant plan claimed its "policy" was to require "records of covered employment" to substantiate an employee's claims of underreported earnings. *Id.* at 584. Wilkins claimed he had never received notice that he needed to preserve and present employment records, because the relevant SPDs never mentioned such a "preservation" requirement. *Id.*

Judge Calabresi, writing for a unanimous panel, agreed. The Court's discussion of notice is perfectly analogous to this case:

> SPDs are expected to "explain[ ] the full import" of the provisions affecting participants. *Chambless v. Masters, Mates & Pilots Pension Plan*, 772 F.2d 1032, 1040 (2d Cir. 1985). Here, the Fund's SPD does not even mention the Policy, let alone explain its full import (i.e., that participants should save their employment records). Obviously, it falls short of the high standards of clarity and completeness to which SPDs are held. *Cf. Layaou*, 238 F.3d at 212 (finding that the SPD did not apprise participants of a risk of benefit reduction with adequate clarity and completeness). Accordingly, we conclude that the Fund's SPD does not comply with the requirements of ERISA.

Id. at 584.

Replace "the Policy" with "an offset interest rate," and "should save their employment records" with "should save their past distributions in vehicles earning 8.5%" and one gets a perfect explanation of why plaintiffs should win on notice grounds:

> SPDs are expected to "explain[ ] the full import" of the provisions affecting participants. *Chambless v. Masters, Mates & Pilots Pension Plan*, 772 F.2d 1032, 1040 (2d Cir. 1985). Here, the Fund's SPD does not even mention **[an offset interest rate]** let alone explain its full import (i.e., that participants **[should save their past**

> **distributions in vehicles earning 8.5%]**). Obviously, it falls short of the high standards of clarity and completeness to which SPDs are held. *Cf. Layaou*, 238 F.3d at 212 (finding that the SPD did not apprise participants of a risk of benefit reduction with adequate clarity and completeness). Accordingly, we conclude that the Fund's SPD does not comply with the requirements of ERISA.[8]

Indeed, years later, after over a decade of litigation, plaintiffs still cannot figure out how, given the SPDs and the personal benefits statements they had in hand, they could have possibly determined their past distributions would be appreciated (let alone at 8.5%) and then deducted from their current entitlement.

D. This Court Could and Should End This Decade-Long Case By Reversing the District Court and Equitably Awarding Plaintiffs, At Least, "New Hire" Pensions.

There can be no serious dispute in this case that plaintiffs were not given notice of the interest rate Xerox wants to tack on to their old distributions. As this Court correctly recognized in 2006, the issue is

[8] In another case, *McCarthy v. Dun & Bradstreet Corp*., 482 F.3d 184 (2d. Cir. 2007), there was a dispute over the notice afforded to plaintiffs who had retired before age 55. Plaintiffs asserted that material information pertaining to retirees under the age of 55 was absent from the SPD; a panel of this Court disagreed. In a holding that could not be more on point, the *McCarthy* court explicitly distinguished the sufficiency of the notice in McCarthy from the insufficiency of notice regarding the very Xerox plan and very notice at issue here. *See McCarthy* at 195-196 (notice in *McCarthy* was sufficient because the notice "expressly informs" plaintiffs that an "actuarial reduction" above 3% would occur in connection with early retirement, whereas notice in *Layaou* was insufficient because it provided no notice of any appreciated offset or actuarial reduction).

the appropriate remedy. In May of last year, the United States Supreme Court decided *CIGNA Corp. v. Amara,* 131 S.Ct. 1866 (2011), and provided much-needed clarity regarding the appropriate remedies in defective SPD cases like this one.

Amara involved a dispute over a benefit plan undergoing a "cash-balance" conversion, i.e., the conversion of a defined benefit plan into a cash-balance plan. Plaintiffs alleged that CIGNA had failed to properly notice them of the terms and consequences of that conversion. The Court held that CIGNA's notice to employees failed, *inter alia*, to appropriately apprise employees of the risk of how "a fall in interest rates" would leave employees "with less money at retirement." *Id.* at 1873-74. Defective notice, the Court explained, is remediated through equity. Various species of equitable relief are available to beneficiaries, including reformation, estoppel, and surcharge. *Id.*

Reformation is a type of equitable relief appropriate in defective notice cases so as "to remedy the false or misleading information [the employer] provided." *Id.* at 1879. Equitable reformation reforms the contract so as to be consistent with misled party's justifiable expectations regarding what the contract supposedly provided. *Id*; *see* *also* RESTATEMENT (SECOND) CONTRACTS § 166 (1981) (reformation is an appropriate remedy where a misled party was "justified in relying on the misrepresentation").

ERISA commands that notice be given in a way that is comprehensible to the average plan participant. 28 U.S.C. § 1022. Plaintiffs were accordingly justified in relying on the SPD and personal benefit statements from Xerox and construing them in a way consistent with how an "average plan participant" would have construed them. As explained above, Xerox neither mentioned nor illustrated any type of appreciated offset, and no average plan participant could have possibly discerned the imposition of the PAA offset.

There is no dispute in this case that plaintiffs—given the notice they received—expected to be treated at least as well as "new hires." Indeed, *Xerox* has always insisted that the plaintiffs understood the relevant notice in this case to mean that they, plaintiffs, would be treated like new hires. Xerox vigorously confirmed on cross-examination plaintiffs' expectation of being treated no worse than "new hires." A307. As *Xerox* wrote in *Frommert II,* in a section of *its* brief entitled "A New Hire Approach Meets Appellees' Prior Expectations":

> Although the District Court expressed concern that a new hire method was not set out in detail in the summary plan description, such concern was misplaced. In his sworn affidavit, Clair, who acted as a spokesperson for appellees, affirmed that it was his understanding from the time he was rehired that if someone was originally hired on the same date as he was rehired, and they retired on the same date as he did, they would both receive the same retirement benefits. Clair, like other appellees, admittedly took this same position during his administrative claims review process.[9]

Again, the language quoted above is *Xerox's* description of plaintiffs' construal of the defective SPDs. Accordingly, this Court could reform the plan to provide the plaintiffs with "new hire" pensions.[10] Such a remedy—which, in absolute dollar terms, splits the baby between the PAA and *Layaou*—is also consistent with common sense. A515. Veteran employees do not rejoin companies if they are going to be treated worse than rookies. *Cf. Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) ("[E]quitable remedies are a special blend of what is necessary, what is fair, and what is workable.").

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[9] Xerox Brief in *Frommert II,* 2007 WL 6216089 at *14-17 ("F. A New Hire Approach Meets Appellees' Prior Expectations").

[10] It is now settled that reformation may result in the payment of monies under ERISA. As the *Amara* Court explained, reformation that results in the payment of money damages arising from a misrepresentation tracks the equitable remedy of surcharge. *Amara*, 131 S. Ct. at 1881.

Xerox's admission that it would be equitable to treat plaintiffs as new hires also permits awarding plaintiffs' such relief under an equitable estoppel theory. "Equitable estoppel operates to place the person entitled to its benefit in the same position he would have been in had the representations been true." *Amara,* 131 S. Ct. at 1880 (internal citations omitted). Equitable estoppel involves "(1) a promise, (2) reliance on the promise, (3) injury caused by the reliance, and (4) an injustice if the promise is not enforced." *Schonholz v. Long Island Jewish Med. Ctr.*, 87 F.3d 72, 78-79 (2d Cir. 1996). A plaintiff must also show "extraordinary circumstance." *Devlin v. Empire Blue Cross and Blue Shield*, 274 F.3d 76, 86 (2d Cir. 2001).

The Restatement of Contracts is illustrative:

> A promises B to pay him an annuity during B's life. B thereupon resigns a profitable employment, as A expected that he might. B receives the annuity for some years, in the meantime becoming disqualified from again obtaining good employment. A's promise is binding.

RESTATEMENT OF CONTRACTS § 90, ill. 2 (1932). The situation here is exactly the same except the equities are even worse: the resignation induced was from a competing company, rather than Xerox, which simultaneously advantaged Xerox, hurt the employee, and deprived a competitor of veteran talent.

The defendants induced plaintiffs to return to Xerox by misleading plaintiffs about the size of their pension annuities; no "average plan participant" would have understood the SPDs and Personal Statements at issue here to impose an appreciated offset that would treat them *worse* than new hires. Plaintiffs relied on that belief by agreeing to take (and stay at) jobs at Xerox and not otherwise save for retirement. And plaintiffs suffered injury because of Xerox's failure to live up to that promise. Permitting an employer to profit from such conduct is unjust, and satisfies the extraordinary circumstance requirement of estoppel. *Cf. Schonholz,* 87 F.3d at 78-79 (holding that taking a job in reliance on written descriptions of a pension promise of a particular quality satisfies the requirements of estoppel); *Devlin,* 274 F.3d at 86 (employees accepting employment and "dedicating much of their working lives to" a company in reliance on an attractive benefits package amounts to "extraordinary circumstances").

Xerox has provided no plausible explanation—none whatsoever—as to why plaintiffs would leave their existing jobs and return to Xerox, only to be treated worse than rookie employees. Nor has Xerox ever challenged plaintiffs' assertions on that point. To the contrary, Xerox has repeatedly asserted and confirmed to its satisfaction that plaintiffs expected to be treated at least as well as new hires and relied on that belief when agreeing to work for and stay with Xerox. A307. Apart from reformation, an estoppel theory justifies the award of a "new hire" pension to plaintiffs.

More than "new hire." Plaintiffs still assert, as they have maintained throughout this litigation, that "new hire" is an accurate *outer bound* on how they expected to be treated, i.e., "whatever the offset is, we won't be worse off than new hires." A307. Real-world expectations, however, frequently consist of two parts: an outer bound, and an operative expectation. For example, one speculating about a Super Bowl outcome might believe that Team A will most likely win by 10 (the operative expectation), but under no circumstances will Team A lose (the outer bound). Plaintiffs' operative understanding as to the offset was that it was a simple reduction equivalent to the money plaintiffs actually got a check for, i.e., the nominal value of the old PSP distribution. A299. It is therefore permissible, under an equitable theory of reformation, to award plaintiffs the *Layaou* offset, to the extent this court believes an "average plan participant," based on the notice in this case, would have affirmatively expected a nominal offset.

E. Alternatively, This Court Could Reverse and Remand For Proper Consideration of Notice By The Lower Court.

It is clear that the lower court believed the plan interpretation question subsumed the question of notice. *See, supra,* pages 20-24. Were this Court to correct that mistaken impression of the trial court, it need not here decide the proper remedy; it may instead instruct the lower court to do so, with appropriate guidance from this Court as to what elements of the notice inquiry would benefit from additional development. Plaintiffs would welcome remand along those lines. Plaintiffs remain astonished that, in any conceivable world, they can have been expected to discern an 8.5% rate of interest from disclosures that never mentioned the words "interest" or "appreciation."

II. The PAA Is Not a Reasonable Interpretation of the Plan.

In the words of the Supreme Court: "Applying a deferential standard of review does not mean that the plan administrator will prevail on the merits. It means only that the plan administrator's interpretation of the plan will not be disturbed if reasonable." *Conkright,* 130 S. Ct. at 1651. The PAA is an unreasonable interpretation of the 1989 Plan, and therefore cannot be applied to plaintiffs' pensions.

A. There Are Only Two Reasonable Interpretations of the Plan: a *Layaou* Offset or an Actual-Annuity-Offset.

Prior to 1989, the Xerox plan had provisions that artificially appreciated the value of past distributions to plan participants and deducted that phantom sum from participants' current entitlements. In 1989, those appreciative provisions were removed. *Frommert I*, 433 F.3d at 258.[11] All that was left in the plan regarding any "offset" was section 9.6, which provides, in pertinent part:

> Section 9.6. Nonduplication of Benefits. In the event any part of or all of a Member's accrued benefit is distributed to him prior to his Normal Retirement Date, if…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.

A152.

Section 9.6 is simple. It says that one's current accrued benefit today need be reduced by the accrued benefit attributable to one's prior distribution. It is a verbal form of the below equation:

Net accrued benefit= gross accrued benefit - prior accrued benefit

[11] *See also id.* at 264-265 ("Despite its absence from the 1989 Restatement... defendants argue that the Plan contained the phantom account.... Specifically, the defendants... argue that this oversight was quickly rectified by changes to the Plan.... Implicit in this approach is an assumption that material terms of a plan may be omitted from a plan for significant periods only to surface later and be given binding effect for the period prior to their absence.").

Every input in this equation is tied to a current or past "accrued benefit." That limits the possibilities, because something cannot be an "accrued benefit" if you were never entitled to receive it. Accrued benefits cannot be imaginary or uncollectable, because otherwise they are neither accrued nor benefits.[12]

Written as it is, section 9.6 permits the offset to equal one of only two things for plaintiffs: (1) the distributed balance from their PSP accounts or (2) the RIGP annuity they had earned to date. The reason is because those are the only two things that plaintiffs, when they first left the company, were entitled to have actually received.

The first offset possibility is to set the offset equal to the nominal value of the PSP distribution. Recall that the PSP distribution was a cash-out from a defined contribution plan, and by definition, the accrued benefit in a defined contribution plan is the balance of the account. 29 U.S.C. §1002(23)(B). Using the PSP cashed-out balance as the offset is, of course, the *Layaou* offset.

The second offset possibility is to set the offset equal to the actual RIGP annuity plaintiffs could have received as an accrued benefit

[12] An offset, of course, can consist of something other than an accrued benefit—an offset could theoretically be an imaginary sum—but the offset must be so defined. An offset cannot consist on an imaginary sum if the plan *defines* the offset in terms of "accrued benefit," because something is not an accrued benefit if one could never have gotten it.

from Xerox when they first left the company. Upon their original departure, plaintiffs were entitled to either the PSP cash-out or a RIGP/HAP annuity. *Miller*, 464 F.3d 871, 872 (9th Cir. 2006), *cert. denied*, 549 U.S. 1280 (2007). The RIGP/HAP annuity was a traditional pension annuity equal to a specified percentage of the plaintiff's average pay. A77-80. Using the RIGP/HAP annuity as the offset—the Actual-Annuity-Offset—was proposed by plaintiff's expert Philip Cofield. *Id.*

While *Layaou* is unquestionably a permissible reading of the plan, it does not take into account any time value of money. The Actual-Annuity-Offset—as the trial judge acknowledged—*does* take into account the time value of money, because it is a funded promise to pay a fixed annuity in the future. SPA19. Importantly, however, while the Actual-Annuity-Offset relies on an implicit interest projection, it provides Xerox no room for discretion and plaintiffs no room for confusion, because the output of the annuity (and thus the size of the offset) is fixed.

The Actual-Annuity-Offset is almost certainly what the *Conkright* Court was hinting at when it expressed a solicitude for the time value of money. It *is* certain the Court was not signaling that lower courts should adopt the PAA, because, as we explain below, the PAA would cause the Xerox plan to lose its tax-qualified status.

B. The PAA Is Unreasonable

The PAA is unreasonable for three reasons. First, it depends on a use of discretion which the tax code prohibits for tax-qualified plans; any interpretation of a plan which tax-disqualifies the plan is unreasonable in comparison to interpretations that do not tax-disqualify the plan. Second, the PAA is unreasonable because it was not remotely discernible from the face of the plan by anyone seeking to understand his entitlement; while an administrator may have the freedom to pick among two or three predictable readings of a given plan, a reading that is impossible to have predicted *ex ante* is the very definition of "arbitrary and capricious." Third, any reading of the plan that does not consider labor market realities is unreasonable; plans reflect negotiated arrangements between employer and employees, and come into being only to the extent the plan at least resembles the standard market expectations of those involved.

1. The PAA Discretionarily Picks an Interest Rate To Annuitize Lump Sums, Which Violates the Tax Code and, As Such, Is a Per Se Abuse of Discretion.

The 1989 Plan specifies no interest rate with which to appreciate past distributions to plaintiffs for work performed before they were rehired. A106-186. To avoid the plain text of the Plan, Xerox attempts to inject an interest rate into an offset by "annuitizing" plaintiffs' past distributions using a high interest rate. A86-93.[13]

Annuitizing a lump sum requires multiple assumptions, including use of an interest rate. The higher the interest rate used, the larger the annuity a lump sum can buy. Thus, if an offset depends on the annuitized value of a lump sum, spelling out the interest rate assumptions used for such an annuity conversion is critical. Those assumptions determine the size of the offset.

The importance of identifying the assumptions governing annuitization is more than academic. It is written into law. Because pension plans are tax-favored, they must comply with the statutory requirement that the benefits provided therefrom be "definitely

[13] Xerox describes the PAA as an "apples to apples" conversion, as if that justified the use of a confiscatory interest rate. A88. The whole point of converting a lump sum to an annuity and vice versa is to use an *appropriate* interest rate; if you do not, you are not performing a true conversion. This can be shown rather easily by annuitizing any lump sum using a 1% interest rate and a 50% interest rate. Both conversions will allow you to make an apples to apples conversion to some other annuity. That has nothing to do with whether the resulting annuity is economically sensible or fair.

determinable." 26 U.S.C. § 401(a)(25). In this regard, Congress has expressly declared:

> [a] defined benefit plan shall not be treated as providing definitely determinable benefits unless, whenever the amount of any benefit is to be determined on the basis of actuarial assumptions, such assumptions are specified in the plan in a way which precludes employer discretion.

Id. In other words, any "actuarial assumptions" used to calculate benefit amounts must be specified and beyond employer discretion. A pretend interest rate, of course, is an actuarial assumption.

The *raison d'etre* of section 401(a)(25), obviously, is to prevent employees from watching helplessly as their pensions are reduced into nothingness by undisclosed or discretionary "assumptions." *See McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 206 (2d Cir. 2007) (explaining that the point of 26 U.S.C. § 401(a)(25) is that "employers should not be able to manipulate actuarial assumptions to their benefit and to the detriment of employees."). Precisely that happened here, and even worse. Not only does the Plan nowhere specify the "assumptions" it will use to appreciate and annuitize plaintiffs' past distributions from the PSP; it does not even specify that plaintiffs' past distributions will be appreciated and annuitized.

Xerox admits it is borrowing interest rates from elsewhere in the plan; specifically, Xerox claims it is borrowing the interest rates the plan used to "convert the TRA and CBRA accounts to annuities." A90. That is not even strictly accurate; the TRA and CBRA accounts came into being years after plaintiffs received their distributions, when interest rates were much lower. Xerox is essentially picking a random interest rate alluded to elsewhere in the plan—an interest rate of 8.5%, compounded annually—and using it to create an imaginary sum to then subtract from plaintiffs' real pensions.

That is precisely what Section 401(a) prohibits: it does not allow a plan to exercise discretion to "borrow" assumptions.[14] If the actuarial assumptions, such as interest rates, are not clear and tied to plaintiff's benefit in a way that precludes employer discretion, such actuarial assumptions may not be used.

It is unreasonable for an administrator to "interpret the plan in a manner inconsistent with its plain words." *Miles v. New York State Teamsters Conference Pension and Retirement Fund Employee*

[14] The Plan makes a plethora of actuarial assumptions, which differ radically depending on context. "Borrowing" from elsewhere in the Plan the interest rate most convenient to Xerox and applying it to plaintiffs' past distributions is both discretionary and arbitrary. It essentially means that any benefit is subject to any actuarial assumption that appears anywhere in a Plan, even if that assumption is not squarely linked to plaintiff's specific benefit entitlement.

Pension Ben. Plan, 698 F.2d 593, 599 (2d Cir. 1983) The 1989 Plan requires the administrator to act with the "care, skill, prudence, and diligence" of a prudent person. A251 (1989 Plan, § 10.5(a)). No prudent person would interpret a plan in such a way as to tax-disqualify the plan, when alternate interpretations were available. The PAA is accordingly unreasonable.

2. The PAA is an Arbitrary and Capricious Interpretation of the Plan Because It Is Utterly Unpredictable.

The 1989 Plan does not specify, anywhere, any procedure for applying an interest rate to plaintiffs' past distributions. This is not a case where the ambiguity at issue is binary: like, for example, ambiguities that often arise in welfare plans, as to whether medical treatment A is covered or not covered under the plan. Indeed, the question in this case isn't even about a discrete range of possibilities—e.g., the interest rate was to be somewhere between 6.5 and 8.5 percent, and the administrator picked 8.5 percent. There are essentially an *infinite* number of options regarding possible interest rates one "could" use to determine the offset value of past sums.

Imagine being an outside observer—who we will call Sherlock—attempting to determine the pension entitlement of a rehired employee who we will call "Plaintiff A." Plaintiff A's entitlement—which neither party disputes—is governed by Sections 4.3 (A128-131) and 9.6 (A152) of the Plan:

- Sherlock would read nothing in either provision providing that the plaintiff's RIGP/HAP entitlement will be reduced by the appreciated value of an old PSP distribution, any more than the plan provides that a plaintiff's current RIGP/HAP entitlement will be reduced by the appreciated value of old performance bonuses, company cars, or medical procedures.
- Sherlock would read nothing that specifies any particular appreciation rate to be applied to a plaintiff's old PSP distribution.
- Sherlock might notice that Section 4.3(a)(v) creates an offset only equal to 50% of the value of retirement monies received from certain other sources. A129. Sherlock would have no reason to even guess that Plaintiff A's distribution was to be inflated at some high level of interest when many other employees were getting offsets that only valued the *principal* at 50%.

Ultimately, no interest rate—or even a range of interest rates—is textually linked to Plaintiff A's past distribution. It is unreasonable to subject plaintiffs to an offset using an appreciative mechanism the specifics of which plaintiffs carefully reading the Plan could not even *guess*.

3. The PAA Is Unreasonable Because It Totally Ignores Labor Market Realities Regarding the Treatment of Experienced Employees.

The PAA indisputably treats rehired employees worse than new employees. The former have their pensions offset by prior distributions inflated by interest rates. The latter do not. The mere fact that an employee formerly worked at Xerox results in radically different pension amounts.

No reasonable rehire would understand the employment bargain to include something like the PAA, and the reason has nothing to do with "equity" or "fairness." It has to do with a bedrock norm regarding how labor markets work, namely: loyal employees are not punished for past service. This assumption animates the negotiation of virtually every labor deal involving an experienced employee; negotiations regarding veteran employees involve *how much better* that employee will be treated than a rookie, not whether the veteran will be treated as well as the rookie. The former is assumed.

Yet the PAA grossly violates this assumption by punishing experienced employees who previously worked at Xerox. Consider: new employees hired by Xerox typically received distributions from their old (different) employer, but Xerox does not inflate those old payments with interest even though those distributions—like the ones paid by Xerox—were paid long ago and thus "worth more" today.

A simple example will suffice. Imagine two Xerox employees live next to each other in Rochester. Both ("Pal" and "Plaintiff") were hired by Xerox in 1980. One previously worked at Xerox and was rehired, while another previously worked for Kodak. Both received a retirement distribution of $50,000 in 1970 upon leaving his former employer, and both invested this $50,000 in an identical manner. Both then worked for Xerox for 25 years, with identical salaries and identical job titles.

How does Xerox's formula treat these financially identical employees? Here are the results.[15] Xerox's approach pays the new employee a pension of $2000/month for his 25 years of service, but the former employee receives nothing for his identical work. The sole difference between the two employees is the name of their former employer. This is the archetype of an arbitrary and capricious result; Xerox is impoverishing plaintiffs in their retirement merely because the $50,000 check they received in 1970—identical to the one

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	Old Empl.	Worked	Past Payout	New Empl.	Hired at Xrx	Employ ed	Yrs	PAA
Pal	Kodak	1960-70	$50k	Xrx	1980	1980-2005	25	$2k/ Mth
Pltf	Xerox	1960-70	$50k	Xrx	1980	1980-2005	25	$0

received by their colleague in the next cubicle—was issued by an entity whose name begins with an "X".

But Xerox's approach is even worse than that. Not only does it make former employees (and no one else) owe it interest, but it also reduces the pension of rehired employees—but not new employees—the longer they work. This is because Xerox continues to charge hypothetical interest even when the employee has maxed out his retirement benefits after 30 years of service.

Take yet another example. Friend is a new employee with 40 years of service at age 65. Plaintiff is also 65 and also has 40 years of service: 10 years of initial service (for which he received a distribution of $100,000) and 30 years of additional service after being rehired. Both have identical salaries and job responsibilities. Both continue working for Xerox after their 30th anniversary and reaching normal retirement age. Under Xerox's approach, after thirty years of service, Friend does not receive additional retirement benefits for working beyond his normal retirement age, but neither is he punished for doing so. That is precisely what the text of the Plan provides. His retirement benefits remain the same: if Friend was entitled to a lump sum of $200,000 at age 65, he will remain entitled to a lump sum of $200,000 upon retiring at age 75.

But for rehired employees like Plaintiff, under Xerox's approach, the longer they work, the less retirement benefits they receive. Not only will Plaintiff be entitled to only $100,000 (rather than the $200,000 received by Friend) for the same 40 years of service, but Plaintiff's benefits will also be reduced by an additional $10,000 for every year he continues to work. That is because, under Xerox's approach, his "debt" to Xerox keeps appreciating at inflated interest rates while his retirement benefits are capped. In short, while the Plan allows Friend to work without penalty, Xerox's approach affirmatively penalizes an otherwise identically-situated rehired employee like Plaintiff!

What rehired employee would ever expect that his "benefits" plan would treat him so badly? How can any "interpretation" that leads to that result be a reasonable one? It cannot, because treating proven employees worse than new hires is commercially absurd, and a "definition of a contract term that leads to impractical or commercially absurd results is unreasonable." *L & A Contracting Co. v. Southern Concrete Services, Inc.*, 17 F.3d 106, 110-111 (5th Cir.

1994). As Judge Learned Hand put it over eighty years ago, with characteristic elegance: "I cannot see why judges should not hold men to understandings which are the tacit presupposition on which they deal." *Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, Inc.*, 299 F. 991, 994 (S.D.N.Y. 1924). It is wildly unreasonable to assume that the plaintiffs bargained to return and stay at Xerox on the assumption that they would be treated so poorly by their employer that they would have to work for *years* to "catch up" with new employees, and then *again* lose ground if they work longer than thirty years. No construction of the plan that provides for such a "deal" is reasonable, given the reality of labor markets. *Cf. Porto Rico Sugar Co. v. Lorenzo*, 222 U.S. 481, 482 (1912) (Holmes, J.) (holding that reasonable reading of contract requires knowledge of the business context).

III. The Lower Court Failed To Conduct The Required *Glenn* Review

While this case was pending before the Second Circuit in 2008, the United States Supreme Court decided *Metropolitan Life Ins. Co., v. Glenn,* 554 U.S. 105 (2008). The holding of *Glenn* is simple: lower courts *must* consider potential conflicts of interest that might affect benefit payouts.

The *Glenn* Court was expressly motivated by conflicts like the instant one, where employer-administrators might wrongfully deny benefits in order to save the employer millions in future Plan contributions. When "the employer both funds the plan and evaluates the claims. . . . every dollar provided in benefits is a dollar spent by the employer; and every dollar saved is a dollar in the employer's pocket." *Glenn,* 554 U.S. 105 at 112 (internal citations and quotations omitted). Cases like this involve "the type of conduct judges *must* take into account when they review the discretionary acts" of the administrator. *Id.* (emphasis added). Such conflicts may well be dispositive. *Id.* at 117. The Supreme Court could not have clearer: conflicts like this need be scrutinized closely.

To ensure all possible conflicts are appropriately reviewed, *Glenn* requires lower courts to conduct a "case-specific" conflict analysis, so that any potential conflicts may be properly weighed during review. *Id.* As this Court has explained, "[t]he weight properly accorded a *Glenn* conflict varies in direct proportion to the likelihood that [the conflict] affected the benefits decision." *Durakovic v. Building Service*, 609 F.3d 133, 135 (2d Cir. 2010).

The likelihood of conflict is tied to both of the structural nature of a Plan and case-specific factors. Structural circumstances which suggest weighty conflict include circumstances like this, in which those construing the plan are not "wall[ed] off" from "those interested in firm finances." *Glenn*, 554 U.S. 105 at 117. Case-specific factors are just that, and ascertainable only through discovery. For example, here, plaintiffs strongly believe that discovery will reflect, *inter alia*, (1) that the Plan Administrator has pervasive structural and case-specific conflicts, adopted the PAA solely in order to reduce Xerox's expenses, and not on any principled basis or pursuant to the terms of the Plan; (2) that the Plan Administrator continues to believe that the PAA is an *erroneous* interpretation of the Plan; and (3) that the Plan Administrator calculated the interest rate under the PAA based purely upon a post-hoc assessment of its chances for success in litigation.

Accordingly, the plaintiffs sought discovery below, relating to the content and genesis of the PAA, its hypothetical assumptions and application to plaintiffs, potential bad faith, and other material relevant to a determination of whether Xerox's new-found PAA was a reasonable interpretation of the Plan. Dkt. #217, pp. 21-23. Not only did the district court deny plaintiffs such discovery opportunity, which was an abuse of discretion, it accorded *no weight at all* to the conflict the Xerox Plan Administrator labored under when it was reviewing the PAA for unreasonableness. SPA 20-22. Such is plain error. *Cf. McCauley v. First Unum Life Ins. Co.*, 551 F.3d 126, 128 (2d Cir. 2008) (noting the appropriateness of considering matter "outside the administrative record" to assess conflict); *Fortune v. Group Long Term Disability Plan for Employees of Keyspan Corp.*, 391 Fed.Appx. 74, 78 (2d Cir. 2010) (same).

Should this court not enter judgment for plaintiffs, the matter at a minimum should be remanded with instructions that conflict discovery occur and that the lower court appropriately weigh the conflict when assessing whether the PAA was arbitrary and capricious.

CONCLUSION

The lower court, confused about the import of the Supreme Court's ruling in this case, conflated the questions of plan interpretation and notice, and got both wrong. Nor did the court recognize, or appropriately weigh, the severe conflict in this case. Had it done so, it would have realized that Xerox's appreciated PAA offset is neither in the plan nor in the notice plaintiffs received.

Ultimately, this case, for all its detail, is not that complicated. Xerox formerly had a plan that hugely appreciated past pension payments to demolish the pensions of rehired employees. That offset mechanism was removed from the Xerox plan in 1989.

In its place, Xerox left nothing, beyond a simple offset based on what a rehire actually did or could have received when he first left the company. The relevant notice that Xerox issued does not suggest otherwise; indeed, the SPDs do not mention any appreciated offset, let alone an appreciated offset using an 8.5% compounding rate. No plaintiff in this case believed his pension was subject to an appreciated offset, and no plaintiff expected, whatever the details, to have been treated worse than a new hire. Equity demands reversal of the judgment below.

Dated: April 20, 2012

Respectfully submitted,

/s/ Peter K. Stris

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the foregoing brief is in 14-Point Times Roman proportional font and contains 12,416 words and thus is in compliance with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure.

Dated: Gardena, California
April 20, 2012

/s/ Peter K. Stris
Peter K. Stris
Counsel for Plaintiffs-Appellants

SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL J. FROMMERT, et al.,

Plaintiffs,

DECISION AND ORDER

00-CV-6311L

v.

SALLY L. CONKRIGHT,
Xerox Corporation Pension Plan Administrator,
et al.,

Defendants.

INTRODUCTION

This case presents claims under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1101 *et seq.*, by current and former employees of Xerox Corporation ("Xerox"), relating to their pension benefits. The plaintiffs in this action have all been employed by Xerox at various times, and they have all participated in the Xerox Retirement Income Guarantee Plan ("RIGP" or "Plan"). All the plaintiffs left Xerox's employ at some point, at which time they each received a lump-sum distribution of accrued pension benefits, and they later returned to work for Xerox. The basic issue in this case involves how to take those past distributions into account when calculating plaintiffs' current or future benefits, so that plaintiffs are neither shortchanged nor given a windfall.

Besides the instant case, five other related lawsuits are currently pending before the Court, involving similar claims and issues.[1] Various issues and motions are awaiting decision by

[1]Those cases are: *Anderson v. Xerox*, 06-6202; *Kunsman v. Conkright*, 08-CV-6080;
(continued...)

the Court in all of these actions. This Decision and Order directly deals only with the *Frommert* action, although my rulings here may effectively dispose of, or at least have some bearing on, some of the issues in those other cases.

This action, *Frommert*, is now before the Court on remand from the Court of Appeals for the Second Circuit. That remand followed the United States Supreme Court's remand of this action to the Court of Appeals. Some background is necessary to understand the terms of those remands.

In 2007 this Court, on remand from the Court of Appeals from an earlier decision in this case, crafted a remedy to address ERISA violations that had been identified by the Second Circuit in a prior appeal. In doing so, I applied a *de novo* standard in interpreting the Plan, and I did not accept the Plan Administrator's proposed interpretation of the Plan, the substance of which will be discussed in more detail below. *See* 472 F.Supp.2d 452, 456-59. I also ruled that the written releases signed by some of the plaintiffs were unenforceable as to the ERISA claims at issue in this case. *Id.* at 461-62.

On appeal, the Second Circuit upheld my decision not to apply a deferential standard to the Administrator's interpretation, and affirmed as to the remedy portion of my decision. The court also vacated and remanded as to the issue concerning the releases, however, finding that the releases were enforceable. 535 F.3d 111, 120-22 (2d Cir. 2008).

Defendants then successfully sought a writ of certiorari from the Supreme Court, a majority of which held that "[t]he 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 related interpretation by the Administrator to be invalid." *Conkright v. Frommert*, 559 U.S. ___, 130 S.Ct. 1640, 1651 (2010). The Supreme

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[1](...continued)
Holland v. Becker, 08-CV-6171; *Testa v. Becker*, 10-CV-6229; and *Clouthier v. Becker*, 08-CV-6441.

Court remanded the case to the Second Circuit, which in turn remanded to this Court for further proceedings. *See* Dkt. #203. The Supreme Court did not address the Court of Appeals' holding concerning the enforceability of the release forms signed by some of the plaintiffs.

Following the Supreme Court's and Court of Appeals' remands, the *Frommert* plaintiffs filed a motion to reenter judgment (Dkt. #204, #205), and defendants filed a cross-motion (Dkt. #211) for an order affirming the Plan Administrator's interpretation of the Plan, authorizing the Plan Administrator to calculate and pay benefits in accordance with that interpretation, and dismissing the complaint. On June 2, 2011, the Court met with counsel for all the parties in *Frommert* and the five other related cases, to discuss the various pending motions and how best to proceed. The following constitutes the Court's decision on the pending motions in *Frommert*. Written decisions on the pending motions in the other cases will be issued separately.

DISCUSSION

I. Procedural History

The *Frommert* action was the first of these cases to be filed, in June 2000. The factual background and history of the *Frommert* litigation (which were aptly described by the Supreme Court as "exceedingly complicated," *see Conkright*, 559 U.S. at ___, 130 S.Ct. at 1644), have been fully set forth in a number of decisions by this Court, by the Court of Appeals for the Second Circuit, and by the Supreme Court, familiarity with all of which is assumed.[2]

In general, the *Frommert* plaintiffs are all current or former employees of Xerox, each of whom worked for Xerox during two separate periods. During the original period of employment, each plaintiff was a participant in the RIGP. Upon the initial termination of employment, each

[2] *See, e.g.*, 535 F.3d at 115-16; 433 F.3d 254, 257-62 (2d Cir. 2006); 328 F.Supp.2d 420, 423-29 (W.D.N.Y. 2004).

plaintiff received a lump-sum distribution of his pension benefit. Each plaintiff was later rehired by Xerox and again became a participant in the RIGP.

"In order to avoid paying duplicative benefits to rehired employees who had previously received a lump sum distribution, the Plan has always contained provisions concerning the offset of prior distributions." *Frommert v. Conkright* ("*Frommert I*"), 433 F.3d 254, 257 (2d Cir. 2006).[3] What is at issue here is the manner in which that offset has been calculated and applied, and whether plaintiffs were adequately notified in advance of that offset.

Again, the details of the offset, as it has been applied and made known to participants over the years, have been set forth elsewhere, *see, e.g., id.* at 257-61, but in short, the methodology by which the Administrator originally calculated plaintiffs' benefits involved the use of a so-called "phantom account." Under the phantom-account formula, the Plan Administrator would calculate the hypothetical growth that the employees' past distributions would have experienced if the previously-distributed money had remained in Xerox's investment funds, and the Administrator would then reduce the employee's present benefits accordingly.

In 2004, this Court granted summary judgment for the Plan, applying a deferential standard of review to the Plan Administrator's interpretation. *See* 328 F.Supp.2d 420, 430-431. On appeal, the Second Circuit in *Frommert I* found, "as a matter of law, that the phantom account was not part of the Plan until 1998 when it was added by amendment of the Plan's text through its explanation in the 1998 SPD [summary plan description]." 433 F.3d at 263. Therefore, the court stated, "the phantom account may not be applied to employees rehired prior to the issuance of the 1998 SPD," although it could be applied to employees rehired after that date, because the phantom account was adequately disclosed by the 1998 SPD to such employees when they joined the plan. *Id.* That holding was not affected by the Supreme Court's decision in this case, and the Administrator does not now contend that the phantom account should be

[3]For the reader's convenience, the names "*Frommert I*" and "*Frommert II*" will be used here to distinguish between the Court of Appeals' 2006 and 2008 decisions in this case.

utilized in calculating the benefits owed to any of the plaintiffs, other than those who have signed written release forms.

On remand to this Court from the Court of Appeals, the Administrator proposed a new interpretation of the Plan. That interpretation did not use the phantom-account formula, but it did take prior distributions into account, by expressing the participant's prior distribution as an annuity commencing at normal retirement age. *See* Dkt. #121-2 ¶ 7. The Administrator explained that this approach would offset the participant's accrued benefit by the "actuarial equivalent" of the prior lump-sum distribution. *Id.* ¶ 11.

This Court, however, did not give any deference to that proposed interpretation. Instead, applying a *de novo* standard, the Court adopted an approach under which plaintiffs' present benefits were reduced only by the nominal, non-appreciated amount of their past distributions. *See* 472 F.Supp.2d at 457-458.

On appeal from that decision, the Second Circuit affirmed in relevant part, holding in *Frommert II* that this Court was correct not to apply a deferential standard on remand, and that my decision on the merits, concerning the proper remedy, was not an abuse of discretion. *See Frommert II*, 535 F.3d at 119. The court stated that there was no authority that a court must "afford deference to the mere *opinion* of the plan administrator in a case, such as this, where the administrator had previously construed the same terms and we found such a construction to have violated ERISA." *Id.*

The Supreme Court, however, disagreed. It held that both this Court and the Court of Appeals erred with respect to the standard of review to be applied to the Administrator's new proposed interpretation of the Plan. By a 5-4 majority, the Supreme Court held that this Court should give deference to the Plan Administrator's interpretation of the Plan with respect to the treatment of prior distributions to employees who were rehired prior to the issuance of the 1998 SPD. The Court did not hold that the Administrator should necessarily prevail on the merits, but only that this Court should apply the standard of review established in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), and *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008).

The Supreme Court therefore remanded the case to the Court of Appeals for further proceedings. The latter court in turn remanded to this Court, without comment. Dkt. #203.

What must now be decided by this Court, then, is how to apply the Supreme Court's holding: in other words, the Court must decide how to interpret the Plan, giving due deference to the Plan Administrator's proposed interpretation. In addition, the Court must implement the Second Circuit's holding concerning the releases signed by some of the plaintiffs, which was not affected by the Supreme Court's decision.

II. Plan Interpretation: General Principles

Under the "highly deferential" *Firestone* standard, *see Celardo v. GNY Automobile Dealers Health & Welfare Trust*, 318 F.3d 142, 146 (2d Cir. 2003), "[t]he Court may not upset a reasonable interpretation by the administrator." *Jordan v. Retirement Comm. of Rensselaer Polytechnic Inst.*, 46 F.3d 1264, 1271 (2d Cir. 1995). *See also Conkright*, 559 U.S. at ___, 130 S.Ct. at 1646 (stating that *Firestone* established a "broad standard of deference without any suggestion that the standard was susceptible to ad hoc exceptions"); *Miles v. New York State Teamsters Conference Pension & Ret. Fund Employee Pension Benefit Plan*, 698 F.2d 593, 601 (2d Cir. 1983) ("Where both the trustees of [an ERISA plan] and a rejected applicant offer rational, though conflicting, interpretations of plan provisions, the trustees' interpretation must be allowed to control").

When applying this standard, then, the "court may overturn a plan administrator's decision to deny benefits only if the decision was 'without reason, unsupported by substantial evidence or erroneous as a matter of law.'" *Celardo*, 318 F.3d at 146 (internal quotation marks omitted). *Accord Novella v. Westchester County*, ___ F.3d ___, 2011 WL 5222788, at *8 (2d Cir. Nov. 3, 2011). *See also Manning v. American Republic Ins. Co.*, 604 F.3d 1030, 1038 (8^{th}

Cir.) (under arbitrary-and-capricious standard, "[a]ny reasonable decision will stand, even if the court would interpret the language differently as an original matter"), *cert. denied,* 131 S.Ct. 648 (2010).

An administrator's discretion is not unbridled, however. "[E]ven as an ERISA plan confers discretion on its administrator to interpret the plan, the administrator is not free to alter the terms of the plan or to construe unambiguous terms other than as written. Interpretive discretion only allows an administrator to resolve ambiguity." *Colucci v. Agfa Corp. Severance Pay Plan*, 431 F.3d 170, 176 (4th Cir. 2005) (citations omitted), *cert. denied*, 547 U.S. 1148 (2006). "Yet when the plan's terms are ambiguous in the sense that its language gives rise to at least two different but reasonable interpretations and when the plan confers discretion on the administrator to interpret the plan and resolve ambiguities, a court defers to the administrator's interpretation by reviewing it only for abuse of discretion." *Id.* (citing *Firestone*, 489 U.S. at 111). "The Court may not substitute its own judgment as to the interpretation of the plan" under this deferential standard. *Shapiro v. Metropolitan Life Ins. Co.*, No. 08-6204, 2010 WL 1779392, at *4 (D.N.J. Apr. 30, 2010) (citing *Moats v. United Mine Workers of America Health and Retirement Funds*, 981 F.2d 685, 687-88 (3d Cir. 1992)), *aff'd*, 430 Fed.Appx. 169 (3d Cir. 2011).

Leaving aside for the moment the issue of notice, which will be addressed below, the basic question before the Court, then, is whether the Plan Administrator's current proposed interpretation of the Plan is reasonable. If so, the Court must accept it, regardless of whether a contrary but equally reasonable interpretation could be postulated. *See Bari v. Continental Cas. Co.*, No. 02 CIV. 5628, 2004 WL 1124685, at *10 (S.D.N.Y. May 20, 2004) ("Where it is necessary for a reviewing court to choose between two competing yet reasonable interpretations of a pension plan, this Court must accept that offered by the administrators") (quoting *Pagan v. NYNEX Pension Plan*, 52 F.3d 438, 443 (2d Cir. 1995)).

III. Plan Interpretation in this Case

The Plan Administrator, Lawrence Becker, has set forth his proposed interpretation in an affidavit (Dkt. #211-2).[4] Under that approach, each plaintiff's benefit would be expressed as an annuity beginning at the plaintiff's normal retirement age, *i.e.*, age sixty-five. *See* Dkt. #133-6 at 10 § 1.26.

Determining an individual participant's benefit under this approach would require several calculations to be performed, to determine and compare the benefits potentially available under the participant's Transitional Retirement Account ("TRA"), Cash Balance Retirement Account ("CBRA"), and highest-average yearly pay ("HAP" or "RIGP formula"). Those formulas have been set forth in prior decisions in this case, *see, e.g., Frommert I*, 433 F.3d at 275, and as stated, familiarity with those decisions is assumed.

Under the Administrator's current approach, both the TRA and the CBRA would be determined without regard to the prior distribution; in other words, the calculation would exclude any amounts associated with the prior distribution. *See* Becker Aff. (Dkt. #211-2) ¶ 7. The calculation of the HAP or RIGP formula, though, includes an offset of the participant's accrued benefit by the "actuarial equivalent" of the prior distribution. Becker Aff. ¶ 9. In other words, the distribution is expressed as an annual benefit payable at the normal retirement age of sixty-five years. *See Esden v. Bank of Boston*, 229 F.3d 154, 164 (2d Cir. 2000). *See also Berger v. Xerox Corp. Retirement Income Guarantee Plan*, 338 F.3d 755, 759 (7th Cir. 2003) (discussing actuarial-equivalence methodology generally); *Drutis v. Rand McNally & Co.*, 499 F.3d 608, 613 (6th Cir. 2007) ("To derive the 'actuarial equivalent' of a pension at age 65, a plan must (a) add

[4]The Administrator's current approach is identical to the one that he advanced following the Court of Appeals' 2008 decision striking down the use of the phantom account for employees rehired prior to 1998. *See* Dkt. #121-2. Although the Supreme Court did not address the merits of that interpretation, then, it was that interpretation that the Supreme Court was referring to when it stated that this Court should have applied *Firestone* deference to the Plan Administrator's interpretation of the Plan.

all interest that would accrue through age 65, then (b) discount the resulting sum to its present value") (citing *Berger*, 338 F.3d at 762–63), *cert. denied*, 555 U.S. 816 (2008).

Having reviewed the voluminous submissions in this case, I conclude that the Administrator's proposed interpretation of the Plan is reasonable, and, guided by the Supreme Court's admonitions, I accept that interpretation. The Administrator's approach takes into account the time value of money, which the Supreme Court has indicated is proper to do, *see Conkright*, 559 U.S. at ___, 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.

As the Ninth Circuit has recognized, "the courts have plainly sanctioned" the "use of benefit offsets in general ... ." *Miller v. Xerox Corp. Retirement Income Guarantee Plan* ("*Miller I*"), 464 F.3d 871, 876 n.5 (9th Cir. 2006), *cert. denied*, 549 U.S. 1280 (2007). For that matter, plaintiffs here do not dispute that some account should be taken of their prior distributions. And as the Second Circuit has also pointed out, "the Plan has always contained provisions concerning the offset of prior distributions. Without such provisions, rehired employees would receive a windfall upon their second departure from Xerox because they would receive benefits based on their initial tenure at the company on two separate occasions." *Frommert I*, 433 F.3d at 257.

In accounting for such prior distributions, it is reasonable and equitable to take into account the time value of money, *i.e.*, the fact that a sum of money received today, if invested, can appreciate over time. In its decision in this case, the Supreme Court expressly endorsed such an approach, stating that the use of "actuarial principles in accounting for rehired employees' past distributions ... would presumably include taking some cognizance of the time value of money." *Conkright*, 559 U.S. at ___, 130 S.Ct. at 1651. The actuarial-equivalence methodology advocated by the Plan Administrator effectively achieves that result. *See Cooper v. IBM Personal Pension Plan*, 457 F.3d 636, 640 (7th Cir. 2006) (under ERISA, "when any beneficiary ... elects to take a cash distribution ... before reaching age 65, the plan must distribute a lump sum calculated to be the 'actuarial equivalent' of the annuity that would be available at normal retirement age," which requires the plan to "add all interest that would accrue through age 65, then (b) discount the resulting sum to its present value") (citing 29 U.S.C. § 1054(c)(3)), *cert. denied*, 549 U.S. 1175 (2007). *See also Brown v. Secretary of Dept. of Health and Human Services*, No. 00–0182, 2005 WL 2659073, at *2 (Fed. Cl. Sept. 21, 2005) ("The present value of a future stream of payments may be thought of as the lump-sum amount that, if invested today, together with interest earnings would be just enough to meet each of the payments as they fell due") (quoting 2005 Annual Report of the Board of Trustees of the Federal Old–Age and Survivors Insurance and Disability Insurance Trust Funds, H.R. Doc. No. 109–18, at 200–01 (2005), *available at* http://www.socialsecurity.gov/OACT/TR/TR05/VI_glossary.html).

Likewise, in the *Miller* case decided by the Court of Appeals for the Ninth Circuit, which involved the same Plan as the one at issue here, that court held that "Xerox's method of calculating the offset" using the phantom account "violate[d] ERISA by overestimating the value of distributions made upon a previous separation from employment," but the court nonetheless indicated that there should have been *some* appreciated offset, stating that "[t]he benefit properly attributable to the Profit Sharing Plan distributions is simply the Income Guarantee Plan annuity amount that those distributions would have provided" had each recipient used the distribution to purchase an annuity payable at normal retirement age. *Miller I*, 464 F.3d at 875 (emphasis omitted).

On remand in *Miller*, the district court noted that "[a]t no point during the *Frommert* litigation has there been any question as to whether *some* offset may be applied, even where the 'phantom account' offset method may not be," because Plan documents dating back to the 1980s reflected the disclosure of some offset. *Miller v. Xerox Corp. Retirement Income Plan* ("*Miller II*"), No. 98-10389, Dkt. #134 at 8 (C.D.Cal. Sept. 22, 2010). The court went on to conclude that "[s]ome offset based on the prior lump sum distribution must be applied, as it was adequately disclosed prior to Plaintiffs' rejoining Xerox," and the court "order[ed] the application of an offset equal to the actuarial equivalent of the prior ... lump sum distributions ... ." *Id.* at 9. In so doing, the court found that "the RIGP Plan Administrator's proposal [which was the same as the Administrator's proposed approach in the case at bar] is reasonable and reaches as nearly as possible the actuarial equivalent of the prior lump sum distribution." *Id.* at 13.

In support of their motion to reenter judgment in this case, and in opposition to defendants' cross-motion for adoption of the Plan Administrator's approach, plaintiffs have proposed their own alternatives, such as not using *any* appreciated offset, or utilizing a so-called "new hire" methodology. *See* Dkt. #205 at 20. In short, plaintiffs are asking this Court to do exactly what I did in my 2007 decision, which was found by a majority of the Supreme Court to have been in error. This Court's 2007 decision was in direct response to the Second Circuit's remand which recognized the difficult task involved in calculating benefits and suggested that this Court "employ equitable principles . . ." in fashioning the remedy for Xerox's improper use of the phantom account. *Frommert I*, 433 F.3d at 268. That is exactly what this Court attempted to do but the Supreme Court's majority wagged its collective finger and said "No."

In spite of that well-known history, plaintiffs still contend here that I could decline to adopt the Plan Administrator's approach, and render the same decision I did in 2007, albeit on different grounds. Plaintiffs argue at some length about why their proposals are preferable or more reasonable or better than the Administrator's.

The issue before me at this point, however, is not whether the *plaintiffs* have offered a reasonable interpretation of the Plan, but whether the Plan Administrator has. The Supreme Court made it quite clear that this Court should defer to the Administrator's views in this matter, which means that the Court should accept his approach, unless it is patently unreasonable.

In that regard, plaintiffs have also leveled various criticisms at the Administrator's proposal. *See, e.g.*, Dkt. #217, #233. For example, plaintiffs take issue with the Administrator's use of discount rates set by the federal Pension Benefit Guaranty Corporation ("PBGC") in determining the actuarial equivalence between prior distributions and future annuities. I find the use of those rates to be reasonable, however, inasmuch as they are derived from data on market interest rates, *see Berger*, 338 F.3d at 760, and since the 1989 Restatement of the Plan specified the use of those rates for converting certain benefits to annuities. *See* 1989 Restatement (Dkt. #133-6) §§ 4.3(e), (f), 8.2(c). *See also Miller II*, Dkt. #134 at 11-12 (concluding that Administrator's use of PBGC rate in determining what annuity would have been available at time of plaintiffs' lump-sum payments in 1983 was reasonable).

Plaintiffs have raised a host of other arguments why the Administrator's approach conflicts with both ERISA and the terms of the Plan, and why in their view it is arbitrary and capricious. I will not separately address each of those arguments, but in general I disagree with those arguments and find that the Administrator's present position is a reasonable attempt to apply the Plan in a way that takes into account plaintiffs' prior distributions, consistent with what was disclosed to plaintiffs in the Plan summaries, restatements and other communications. As Becker states in his affidavit, the Administrator's approach, by offsetting the accrued benefit by the actuarial equivalent of the prior distribution, "permit[s] a comparison of benefits *expressed in the same form* – that is, [it] permit[s] an 'apples to apples' comparison." Becker Aff. ¶ 11. Again, I find that approach to be not unreasonable, and entitled to deference. *See Miller II*, Dkt #134 at 13-14 (adopting the Administrator's proposed approach as a "reasonable implementation of the Ninth Circuit's mandate to calculate the actuarial equivalent of the prior lump sum distribution"). *See also Conkright*, 559 U.S. at ___, 130 S.Ct. at 1651 (noting with apparent approval that "[i]n similar litigation over the Plan, the Ninth Circuit also rejected the use of the phantom account method, but held that the Plan Administrator should utilize actuarial principles in accounting for rehired employees' past distributions–which would presumably include taking some cognizance of the time value of money") (citing *Miller I*, 464 F.3d at 875-876).[5]

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[5]Robert Testa, the lead plaintiff in the *Testa* action, has filed a motion for leave to file an *amicus curiae* brief in *Frommert*. In his proposed *amicus* brief, Testa addresses what he terms "a secondary issue" concerning Plan interpretation. Dkt. #216-2.

(continued...)

Several other points bear mentioning. First, plaintiffs contend that the Supreme Court's recent decision in *CIGNA Corp. v. Amara,* ___ U.S. ___, 131 S.Ct. 1866 (2011), "makes clear that Plaintiffs' Motion to Re-Enter Judgment must be granted and Xerox's Cross-Motion summarily denied based precisely on the notice grounds raised by plaintiffs in their papers." Dkt. #226 at 1. The Court in *Amara* addressed a number of issues concerning the effect to be given to plan summaries, whether a showing of "detrimental reliance" is a prerequisite for equitable relief in ERISA actions, and the statutory basis for such relief. *Id.* at 1877–82. *Amara* did not, however, effect a change in the law relative to this case, nor did it represent a departure from the principles on which the Supreme Court's *Conkright* decision rested.

Plaintiffs contend that the Court in *Amara* held that plan amendments not preceded by proper notice are invalid. Actually, the Court, in outlining the history of the *Amara* litigation, simply stated that the district court in that case had "noted that § 204(h) [29 U.S.C. § 1054(h)] had been interpreted by the Second Circuit to permit the invalidation of plan amendments not preceded by a proper notice, prior to the 2001 amendment that made this power explicit." 131 S.Ct. at 1874 (citing *Amara v. CIGNA Corp.*, 559 F.Supp.2d 192, 207 (D.Conn. 2008), and

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[5](...continued)
Whether to accept or reject an *amicus* filing lies entirely within a district court's discretion. *See Picard v. Greiff,* ___ F.Supp.2d ___, 2011 WL 2791279, at *1 (S.D.N.Y. 2011); *Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F.Supp.2d 295, 311 (W.D.N.Y. 2007). Here, I see no need for further briefing. To say that the issues here have been amply briefed by the parties is an understatement. Testa's motion is therefore denied.

In any event, even were to Court to grant Testa's motion for leave to file an *amicus* brief, that would not change the result here. The plaintiffs in the *Miller* case from the Ninth Circuit–who are represented by the same counsel as Testa–raised similar arguments in that case, which were rejected by the district court. *See Miller II*, Dkt. #134 at 9. Despite Testa's argument that *Miller* is both distinguishable from the case at bar and wrongly decided, I agree with that court's reasoning and conclusion that § 9.6 of the Plan adequately disclosed the offsets utilized by the Administrator's current proposal. *See id.* at 9 and n.5 (stating that the court "d[id] not perceive any material difference" between that case and *Frommert* with respect to this issue and that the court could "conceive of no way" in which the Plan Administrator could have come up with a different proposal, particularly since the Supreme Court had "viewed favorably" the Plan Administrator's proposal in *Frommert*, and held that the proposal should have been given deference).

Frommert I, 433 F.3d at 263).

Aside from the fact that this statement in *Amara* is dictum, *see Amara*, ___ U.S. at ___, 131 S.Ct. at 1884 (characterizing as "blatant dictum" the Court's statements concerning the availability of compensation for plan members who have been misled by an SPD") (Scalia, J., concurring in the judgment), it does not require a different result here. There has never been any dispute in this case that a misleading SPD, or a lack of notice prior to a purported plan amendment, can give rise to a cause of action under ERISA, or that a court has the power to fashion a remedy for such violations. The issue before me, rather, is simply whether the Administrator's current proposed interpretation of the Plan is reasonable in light of the notice that *was* given here. I find that it is.[6]

IV. Notice

I also find unpersuasive plaintiffs' suggestion that the Court should reject the Administrator's approach on notice grounds. As plaintiffs correctly point out, the Supreme Court expressly declined to address the notice issue in this case, stating in a footnote:

> The Government raises an additional argument–that the District Court should not have deferred to the Plan Administrator's second interpretation of the Plan [*i.e.*, the interpretation advanced by the Administrator following the Second Circuit's earlier remand] because that interpretation would have violated ERISA's notice requirements. That is an argument about the merits, not the proper standard of review, and we leave it to be decided, if necessary, on remand.

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[6] I also note that the *Amara* Court expressly limited its holding to a relatively narrow issue concerning "the standard of prejudice," and, in so doing, the Court pointed out that it had "not [been] asked to reassess the evidence" or "about the other prerequisites for relief." 131 S.Ct. at 1882. The Court stated that "[w]hether or not the general principles we have discussed above are properly applicable in this case is for [the district court] or the Court of Appeals to determine in the first instance." *Id.* *See also Engers v. AT&T, Inc.*, No. 10-2752, 2011 WL 2507089, at *4 n.9 (3d Cir. 2011) (stating that "the Court [in *Amara*] expressly declined to address 'other prerequisites' for equitable relief," and finding "no reason to depart from our longstanding rule that an equitable estoppel claim under § 502(a)(3) cannot be based merely on simple ERISA reporting errors or disclosure violations, such as a variation between a plan summary and the plan itself, or an omission in the disclosure documents, without a showing of extraordinary circumstances") (additional internal quotation marks omitted) (unpublished decision).

Id. at 1652 n.2. On remand, plaintiffs have pressed this argument, contending that this Court should reject the Administrator's proposed interpretation on the ground that plaintiffs were never provided adequate notice of any "appreciated" offset to their pension benefits. *See* Plaintiffs' Mem. (Dkt. #205) at 3.

In considering this argument, the Court must bear in mind both the substance of, and the reasons for, ERISA's notice requirements. In that regard, there is no dispute that ERISA does impose stringent notice requirements on plan administrators. The statute requires, for instance, that all plan participants and beneficiaries be provided with a plan summary containing certain specified information about the plan and plan benefits, "written in a manner calculated to be understood by the average plan participant, and ... sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a). Similarly, a "summary of any material modification in the terms of the plan ... shall be written in a manner calculated to be understood by the average plan participant ... ." *Id.*

Section 504(h) of ERISA, 29 U.S.C. § 1054(h), also provides that any plan amendment that "provide[s] for a significant reduction in the rate of future benefit accrual" must be preceded by written notice to plan participants and beneficiaries. When the phantom-account provisions were added to the Plan here, § 504(h) provided that a pension plan "may not be amended so as to provide for a significant reduction in the rate of future benefit accrual, unless, after adoption of the plan amendment and not less than 15 days before the effective date of the plan amendment, the plan administrator provides a written notice, setting forth the plan amendment and its effective date," to plan participants. 29 U.S.C. § 1054(h) (2000).[7]

[7]In its current iteration, § 504(h) provides, *inter alia*, that "within a reasonable time before the effective date of the plan amendment," an amendment that "provide[s] for a significant reduction in the rate of future benefit accrual" must be preceded by written notice that is "written in a manner calculated to be understood by the average plan participant," and which "provide[s] sufficient information ... to allow applicable individuals to understand the effect of the plan
(continued...)

Courts have likewise recognized that "adequate disclosure to employees is one of ERISA's major purposes." *Jobe v. Medical Life Ins. Co.*, 598 F.3d 478, 483 (8th 2010); *see also Wilkins v. Mason Tenders Dist. Council Pension Fund*, 445 F.3d 572, 581 (2d Cir. 2006) (noting "ERISA's purpose of ensuring adequate disclosure with respect to pension and welfare plans"); *Izzo v. ING Life Ins. and Annuity Co.*, 235 F.R.D. 177, 187 (E.D.N.Y. 2005) (stating that ERISA's disclosure requirements were "established by Congress for the purposes of 'ensuring that the individual participant knows exactly where he stands with respect to the plan'") (quoting *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 118 (1989)) (additional internal quotation marks omitted).

Changes that adversely affect a participant's or beneficiary's benefits are of particular concern under ERISA. Prior notice of such changes is required, "to give plan participants 'the opportunity to take advantage of an existing benefit before it is lost.'" *Scott v. Administrative Committee of the Allstate Agents Pension Plan*, 113 F.3d 1193, 1202 (11th Cir. 1997) (citing *Davidson v. Canteen Corp.*, 957 F.2d 1404, 1407 (7th Cir.1992)). *See also Frommert I*, 433 F.3d at 266 ("§ 204(h) ... clearly required the Plan administrators to ... give participants the opportunity to take timely action in response to [an] amendment" that would reduce their rate of future benefit accrual) (internal quotation marks omitted).

Applying those principles in this case, the Second Circuit held in *Frommert I* that the 1998 SPD was effective as to employees rehired after its issuance, but not as to employees hired before then. The court held that Xerox's 1995 Benefits Update "was insufficiently 'accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan,'" 29 U.S.C. § 1022(a), and that "while the amendment adding the phantom account was fully disclosed[in the 1998 SPD], it was not preceded by fifteen days notice to Plan participants. Without such proper notice to Plan participants, the amendment was

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[7](...continued)
amendment." 29 U.S.C. § 1054(h) (2011).

ineffective as to them." 433 F.3d at 267. Again, the Supreme Court did not squarely address those holdings.

Also significant, however, is what the Court of Appeals did *not* decide in this regard. Even as to employees rehired before 1998, the court did not forbid *any* use of an appreciated offset, or state that an approach utilizing such an offset could never be reasonable. And certainly the court did not address–indeed, had no occasion to address the interpretation now offered by the Plan Administrator, which was not put forward by the Administrator until after the Court of Appeals' remand to this Court. The Second Circuit dealt only with the issue of whether, or when, the phantom account formula was adequately disclosed to participants.

In remanding, the Court of Appeals left it up to this Court to determine how plaintiffs' benefits should be calculated, based on "equitable principles." In so holding, the court also "recognize[d] the difficulty that this task poses because of the ambiguous manner in which the pre-amendment terms of the Plan described how prior distributions were to be treated." *Id.* at 268. Plaintiffs now contend that the application of "equitable principles" should lead this Court to direct that *no* appreciated offset should be applied.

That argument is unpersuasive. For one thing, the legal landscape has changed considerably since the Second Circuit issued that decision in 2006. The Supreme Court has now held that this Court should give deference to the Plan Administrator with respect to the interpretation and application of the Plan. I conclude that the Administrator's proposal, by reducing both the participant's benefit and the prior distribution to an annuity payable at retirement age, is equitable, particularly since, as explained above, participants were on notice at all relevant times that *some* offset would be applied to account for prior distributions. Before 1998, the disclosure of an offset may have been provided in an "ambiguous manner," but it is precisely in such situations that deference is owed to a plan administrator who has been granted discretion to interpret the terms of a plan. *See, e.g., Firestone,* 489 U.S. at *Weber v. GE Group Life Assur. Co.*, 541 F.3d 1002, 1011 (10th Cir. 2008); *Williams v. Interpublic Severance Pay*

Plan, 523 F.3d 819, 821 (7th Cir. 2008). To hold otherwise in this case 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. *Conkright*, 559 U.S. at ___, 130 S.Ct. at 1650.

In addition, the Second Circuit's concerns about insufficient notice with respect to the phantom account do not apply as to the Administrator's current interpretation, which does not utilize any phantom account. The SPDs and Plan documents *did* notify participants, at all relevant times, that some offset would be implemented to account for prior distributions. *See Frommert I*, 433 F.3d at 257 ("the Plan has always contained provisions concerning the offset of prior distributions"); *see, e.g.*, 1989 Plan Restatement (Dkt. #133-6) at § 9.6 (providing that "[i]n the event any part of or all of a Member's accrued benefit is distributed to him prior to his Normal Retirement Date, if ... 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"). It is now established for purposes of this lawsuit that prior to 1998, the Plan did not adequately inform participants of the existence or operation of the phantom account, but it is equally well established that plaintiffs were on notice at all relevant times that there would be *some* offset.

The fact that the Plan documents did not spell out exactly how the offset would be applied does not mean that the Administrator's current proposal runs afoul of ERISA's notice requirement. For one thing, it is not necessary that a plan summary describe every facet of the plan in detail. As the Seventh Circuit has observed, "[l]arding the summary with minutiae would defeat that document's function: to provide a capsule guide in simple language for employees." *Herrmann v. Cencom Cable Assoc., Inc.*, 978 F.2d 978, 984 (7th Cir. 1992). Likewise, the Second Circuit has explained that the SPD may "summarize, rather than describe in every detail, the benefits available under an employee pension benefit plan," and that a plan summary need not "invariably ... describe or illustrate the method by which a specific retirement benefit is actuarially reduced in a particular circumstance," so long as it discloses the circumstances under which benefits may be reduced, and does not confuse, mislead, or misinform participants. *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 194-96 (2d Cir. 2007).

Moreover, as the Ninth Circuit explained in *Miller I*, ERISA itself "requires actuarial equivalence between the actual distribution and the accrued benefit it replaces." 464 F.3d at 874. While plaintiffs could not be expected to have been intimately familiar with the nuances of ERISA law, the point is that they were on notice that there would be some offset to account for their prior distributions, and the Administrator's current proposal effectuates that offset in a reasonable manner, by accounting for the time value of money and avoiding a windfall to plaintiffs. *See also Prudential Ins. Co. v. S.S. American Lancer*, 870 F.2d 867, 871 (2d Cir. 1989) (stating that "equity ... abhors a windfall"). From the notice given to them, plaintiffs could not reasonably have expected more than that. Indeed, as the Supreme Court explained in this case, any interpretation of the Plan that does not account for the time value of the prior distribution would, "[i]n the actuarial world," be "heresy, and highly unforeseeable." *Conkright*, 559 U.S. at ___, 130 S.Ct. at 1650. The SPDs here adequately conveyed the existence of the offset that the Administrator has now proposed.[8]

In contrast to the Administrator's proposal, then, plaintiffs' suggestion that this Court should not apply *any* appreciated offset is, in light of the Supreme Court's decision in this case, *un*reasonable. In effect, plaintiffs would have this Court do exactly what it did before, *i.e.*, to adopt an approach under which plaintiffs' "present benefits [would be] reduced only by the nominal amount of their past distributions–thereby treating a dollar distributed to [plaintiffs] in

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[8]Plaintiffs argue that they, too, have proposed an annuity-based offset that incorporates the time value of money *See* Plaintiffs' Opposition to Defendants' Cross-Motion (Dkt. #217) at 19. That proposal is based on their expert's interpretation of the Plan as requiring an offset based on each participant's accrued benefit under Xerox's defined benefit plan at the time of the distribution, rather than the benefit actually received from the defined contribution plan. *See* July 11, 2006 Remand Hearing Transcript (Dkt. #127) at 48-58. Again, that may be an arguably reasonable interpretation of the Plan, but the fact remains that this involves an issue of plan interpretation, with respect to which the Court must defer to the Administrator, and I find the Administrator's contrary interpretation to be at least equally reasonable.

the 1980's as equal in value to a dollar distributed today." *Conkright*, 559 U.S. at ___, 130 S.Ct. at 1645. The Supreme Court expressly rejected that approach, and I decline to adopt it again.

V. Conflict of Interest

Plaintiffs have also argued that the Court should not adopt the Administrator's approach unless and until plaintiffs have been permitted to conduct discovery concerning whether the Administrator is operating under a conflict of interest, and to what extent any such conflict may have affected his decision to adopt his current Plan interpretation.

I reject that assertion. There has been extensive discovery in this case, during which plaintiffs never requested discovery on any purported conflict issue. Although following the July 2006 remand hearing, the Supreme Court held in *Glenn*, 554 U.S. 105, that an administrator's conflict of interest is a factor for a court to consider when evaluating whether the plan administrator abused his discretion, that is of no moment here. For one thing, *Glenn* simply "reaffirmed the general proposition that a plan administrator that both evaluates claims for benefits and pays benefits claims creates an inherent conflict of interest." *Badawy v. First Reliance Standard Life Ins. Co.*, 581 F.Supp.2d 594, 602 (S.D.N.Y. 2008). In that regard, *Glenn* did not create new law in this circuit. *See, e.g.*, *Lee v. Aetna Life and Cas. Ins. Co.*, No. 05 Civ. 2960, 2006 WL 345854, at *3 (S.D.N.Y. Feb. 13, 2006) ("there is no dispute that Aetna is a conflicted administrator as the company both makes the disability determination and also pays out on the policy").

Second, "*Glenn* ... overturn[ed] Second Circuit law providing for *de novo* review when plaintiff can demonstrate that the conflict actually influenced the benefits determination." *Id.* (citing *Pulvers v. First UNUM Life Ins. Co.*, 210 F.3d 89, 92 (2d Cir. 2000)). In other words, *Glenn* actually *relaxed* the standard of review in such situations, holding that "the existence of a conflict is just one 'factor' among many that may serve as a 'tiebreaker' when other considerations are in equipoise, or may have greater or lesser strength independently if there is evidence that the conflict had a greater or lesser impact on the benefits determination." *Id.* (quoting *Glenn*, 554 U.S. at 117). *See also McCauley v. First Unum Life Ins. Co.*, 551 F.3d 126, 133 (2d Cir. 2008) ("Following *Glenn*, a plan under which an administrator both evaluates and pays benefits claims creates the kind of conflict of interest that courts must take into account and weigh as a factor in determining whether there was an abuse of discretion, but does not make *de novo* review appropriate") (citing *Glenn*, 128 S.Ct. at 2348).

Third, even before *Glenn* it was the law in this circuit that "discovery may be appropriate in some cases where a petitioner seeks to show a conflict of interest." *Wagner v. First Unum Life Ins. Co.*, 100 Fed.Appx. 862, 864 n.1 (2d Cir.), *cert. denied*, 543 U.S. 958 (2004); *accord Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 174 (2d Cir. 2001). Thus, there is no reason that plaintiffs could not have raised this issue sooner, had they believed there was any basis to do so. Plaintiffs' belated assertion that they need discovery regarding the conflict issue is not persuasive, particularly since plaintiffs have failed to offer anything more than vague speculation concerning the extent to which the Administrator's interpretation of the Plan has been affected by a conflict of interest.

In addition, under *Glenn*, even where the administrator is acting under a conflict, in the sense that he both decides and pays out claims, the standard of review remains deferential where, as here, the plan grants the administrator discretion to construe its terms. *See Glenn*, 554 U.S. at 116-17 (holding that under trust law principles, courts should apply a deferential standard of review to the discretionary decisionmaking of a conflicted plan administrator, while taking account of the conflict when determining whether the administrator has abused his discretion); *Lopes v. First Unum Life Ins. Co.*, No. 09–CV 2642, 2011 WL 1239899, at *4 (E.D.N.Y. Mar. 30, 2011) ("The presence of a conflict of interest does not change the standard of review from deferential to *de novo*," but "[r]ather ... should act as a 'tiebreaker'" when other factors are equally balanced); *In re FedEx Ground Package System, Inc.*, 722 F.Supp.2d 1033, 1047 (N.D.Ind. 2010) ("When the terms of a plan grant discretionary authority to the plan administrator, a deferential standard of review remains appropriate even in the face of a conflict," although "[t]he court must weigh the conflict as a factor when determining whether there was an abuse of discretion") (citing *Glenn*). Even taking this conflict into account, I find the Administrator's interpretation of the Plan to be reasonable, and entitled to deference.

VI. Plaintiffs' Releases

In its 2008 decision, the Second Circuit held that this Court had erred in holding that the releases signed by eighteen of the *Frommert* plaintiffs were unenforceable.[9] Each of the releases at issue contained the statement, "I release Xerox from any and all claims, even if I don't know about the claim at this time, based on anything that has occurred prior to the date I sign this Release." Dkt. #133-7 Ex. D. The releases then listed several examples of the types of claims that the employee agreed to release, including claims under ERISA. In return for those releases, the employees received as consideration up to fifty-two weeks of salary continuance. *Id.*

Applying the relevant factors to the undisputed facts, the Court of Appeals in *Frommert II* concluded that "[u]nless the release form at issue specifically exempted this litigation ..., the releases signed by certain Plaintiffs-Appellees are enforceable." 535 F.3d at 123. That holding was not addressed by the Supreme Court in its decision in this case.

In a letter to the Court concerning the status of these cases, plaintiffs' counsel state with respect to the releases that "[t]he Second Circuit's decision regarding releases will need to be interpreted," that "discovery may be necessary," and that "[a]dditional briefing may then be called for to address how the standards enunciated by the Second Circuit apply when all relevant

[9]As the Court of Appeals explained, 22 of the named plaintiffs in *Frommert* signed release forms, but four of them amended their forms to carve out explicitly their claims as members of the "Frommert lawsuit" from the universe of claims to be covered by the release. *See Frommert II*, 535 F.3d at 120 n.3 (citing *Frommert*, 472 F.Supp.2d at 460). On appeal, defendants did not challenge this Court's conclusion that those four individuals' release forms did not cover their ERISA claims in this action, and the Second Circuit therefore let stand this Court's conclusion that the release forms do not bar the ERISA claims asserted by those four plaintiffs in this litigation. *Id.*

documents and facts pertaining to each Plaintiff are brought to light." Dkt. #35 at 2.

I fail to see what part of the Second Circuit's decision with respect to the releases needs to be "interpreted," or why any discovery is needed as to this issue. The Court of Appeals' decision in this regard could hardly have been clearer:

> Applying the factors ... relevant to the issue of whether a waiver of ERISA rights was knowing and voluntary and reviewing the undisputed facts pertaining to these releases under the totality of the circumstances, we conclude that the District Court erred in holding that the releases at issue were unenforceable. There appears to be no dispute that those Plaintiffs-Appellees who signed these releases had ample time (45 days) to decide whether to sign the release, that Xerox encouraged such individuals to consult an attorney, and that the signatories received salary continuances in consideration of their releasing claims. Some Plaintiffs-Appellees even modified the terms of the release forms with which they had been presented before signing them. ... Unless the release form at issue specifically exempted this litigation as noted above, the releases signed by certain Plaintiffs-Appellees *are enforceable.*

Frommert II, 535 F.3d at 122-23 (emphasis added).

As to the eighteen plaintiffs in *Frommert* who signed the unaltered releases, then, the releases are enforceable, and bar those plaintiffs' claims here. The release forms expressly referenced ERISA claims, and by signing those forms, those eighteen plaintiffs agreed not to bring claims of the type asserted in this action. Although this Court previously found that the releases were ambiguous in one respect, the Second Circuit has unequivocally held otherwise, and that aspect of the Court of Appeals' decision was left intact by the Supreme Court.

VII. Joseph McNeil's Motion to Intervene

Joseph McNeil, a plaintiff in the *Kunsman* action, has filed a motion to intervene in *Frommert*. McNeil has stated in his motion papers that he believes that intervention is needed to ensure that Xerox will treat similarly situated plan participants in a similar fashion.

As the Court stated at oral argument, however (a statement with which his counsel agreed, *see* Tr., Dkt. #236 at 86), whatever rights McNeil has, or whatever defenses to his claims defendants may have, can be litigated in *Kunsman* just as well as in *Frommert*. That includes McNeil's argument that Xerox should not be allowed to assert a statute of limitations defense against him or other plaintifffs in *Kunsman* or the other actions. I see no prejudice, much less unfair prejudice, to McNeil by requiring him to litigate the relevant issues in *Kunsman* rather than in *Frommert*. McNeil's motion for leave in intervene in *Frommert* is therefore denied.

VIII. Other Motions

Plaintiffs have filed several other motions in this case that remain pending, which generally have been mooted by events since their filing. These include a motion for declaratory judgment and interest (Dkt. #181), a motion for sanctions (Dkt. #184), and a motion for interim fees and costs (Dkt. #186).

The declaratory judgment motion, which was filed in 2009, sought an order effectuating this Court's 2007 remedy decision, and entering judgment for the plaintiffs. The Supreme Court's decision has obviously rendered such relief inappropriate.

In their sanctions motion (which could perhaps better be characterized as a motion for an order holding defendants in contempt), plaintiffs alleged that defendants, in bad faith, had been deliberately dragging their feet with respect to paying the named plaintiffs the benefits due them under this Court's 2007 decision, and the Second Circuit's 2008 decision affirming my ruling as to the methodology for calculating plaintiffs' benefits. Plaintiffs sought an order directing the Plan Administrator to pay $1000 per day to plaintiffs' counsel until all plaintiffs' benefits had been paid. Dkt. #184-5.

Again, the Supreme Court's decision has effectively knocked the legs out from under plaintiffs' arguments in that regard. The decisions of this Court and of the Court of Appeals on which plaintiffs relied have now been overturned by the Supreme Court. In any event, having reviewed defendants' response (Dkt. #190) to the sanctions motion, I am not convinced that defendants did act in bad faith, or that the relief requested in the motion was warranted, even prior to the Supreme Court's decision.

The motion for interim fees and costs, which was also filed in 2009, sought over $2 million in attorney's fees, based on the work performed by plaintiffs' counsel up to that point. Although there is authority for granting an award of interim attorney's fees in ERISA cases, under certain circumstances, *see Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1469 (9th Cir. 1995) (holding that "interim attorney's fees are available under ERISA to the extent that they are available under civil rights statutes"); *see also Marriott v. County of Montgomery*, 426 F.Supp.2d 1, 12-13 (N.D.N.Y. 2006) (awarding interim fees in civil rights case), a prerequisite for such an award, just as with an award following the end of a case, is that the moving party "prevailed" as to at least some of his claims. *See, e.g., Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980) ("Congress intended to permit the interim award of counsel fees [under 42 U.S.C. § 1988] only when a party has prevailed on the merits of at least some of his claims") (per curiam); *Singer Mgmt. Consultants, Inc. v. Milgram*, 650 F.3d 223, 229 (3d Cir.) ("to be entitled to prevailing party fees based on interim relief, relief must be derived from some determination on the merits") (internal quotation marks omitted), *cert. denied*, ___ U.S. ___, 2011 WL 3651301 (2011).

Where a party has prevailed on some issue or claim, but the case is still ongoing, subsequent events in the litigation can vitiate the party's "prevailing" status. *See, e.g., Sole v. Wyner*, 551 U.S. 74, 86 (2007) (plaintiff was not a prevailing party for purposes of eligibility for attorney's fee award, where she obtained a preliminary injunction, but district court later denied permanent injunction). While I express no opinion at this point as to the degree to which plaintiffs may be considered to have prevailed in this action, clearly they do not stand on the same footing in that regard as they did prior to the Supreme Court's decision in this case. Accordingly, any motions for attorney's fees must await the entry of a final judgment in this case, following the entry of this Decision and Order.

CONCLUSION

Plaintiffs' motions for declaratory judgment and interest (Dkt. #181), motion for sanctions (Dkt. #184) are denied.

Plaintiffs' motion to reenter judgment (Dkt. #204, #205) is granted in part and denied in part.

Defendants' cross-motion (Dkt. #211) for an order affirming the Plan Administrator's interpretation of the Plan and for other relief is granted.

Defendants are hereby directed to calculate and pay plaintiffs retirement benefits, without utilizing a so-called "phantom account," in accordance with the methodology set forth in the affidavit of Lawrence M. Becker sworn to on June 26, 2006 (Dkt. #211-2), except as to the following plaintiffs, who signed written forms releasing defendants from their claims: Matthew D. Alfieri; William M. Burritt; William F. Coons; Bruce D. Craig; Richard C. Crater; John L. Crisafulli; Deborah J. Davis; Charles R. Drannbauer; Carol E. Gannon; James D. Gagnier; Janice R. Heiler; Charles Hobbs; Gerald A. Leonardo, Jr.; Charles J. Maddalozzo; Walter J. Petroff; Kenneth W. Pietrowski; Irshad Qureshi; and John A. Williams. The claims of those eighteen plaintiffs are dismissed.

Plaintiffs' motion for interim attorney's fees and costs (Dkt. #186) is denied without prejudice to plaintiffs' seeking attorney's fees and costs following the entry of a final judgment in this case.

Joseph McNeil's motion for leave to intervene (Dkt. #167) is denied.

The motion for leave to file a brief as *amicus curiae* by Robert Testa (Dkt. #216) is denied.

IT IS SO ORDERED.

DAVID G. LARIMER
United States District Judge

Dated: Rochester, New York
November 17, 2011.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

PAUL J. FROMMERT et al.,	§	CIVIL ACTION NO. 6:00-cv-6311
Plaintiffs,	§	
vs.	§	
SALLY L. CONKRIGHT et al.,	§	
Defendants.	§	

ORDER

IT IS ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of the defendants with respect to the claims of Matthew D. Alfieri; William M. Burritt; William F. Coons; Bruce D. Craig; Richard C. Crater; John L. Crisafulli; Deborah J. Davis; Charles R. Drannbauer; Carol E. Gannon; James D. Gagnier; Janice R. Heiler; Charles Hobbs; Gerald A. Leonardo, Jr.; Charles J. Maddalozzo; Walter J. Petroff; Kenneth W. Pietrowski; Irshad Qureshi; and John A. Williams (the "Eighteen Releasor Plaintiffs"). The claims of the Eighteen Releasor Plaintiffs are dismissed with prejudice, and without an award of costs to any party.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that judgment is entered in favor of all other plaintiffs (the "Non-Release Plaintiffs") in part. Defendants are ordered to calculate and pay retirement benefits to the Non-Release Plaintiffs without using a so-called "phantom account," in accordance with the methodology set forth in the affidavit of Lawrence M. Becker sworn to on June 26, 2006 (Dkt. #211-2).

Signed: December 14, 2011

David G. Larimer
United States District Judge

STATE OF NEW YORK)
) ss.: **AFFIDAVIT OF**
COUNTY OF NEW YORK) **CM/ECF SERVICE**

I, Glenda Plair, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age.

On

deponent served the within: **Brief and Special Appendix for Defendants-Appellants**

upon:

Margaret A. Clemens
Littler Mendelson, P.C.
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via the CM/ECF Case Filing System. All counsel of record in this case are registered CM/ECF users. Filing and service were performed by direction of counsel.

Sworn to before me on

Maryna Sapyelkina
Notary Public State of New York
No. 01SA6177490
Qualified in Kings County
Commission Expires Nov. 13, 2015

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