UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL J. FROMMERT, et al.,

Plaintiffs,

-against-

SALLY L. CONKRIGHT, et al.,

Defendants.

Civil Action No. 00-cv-6311

**DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR ENTRY OF JUDGMENT ON NOTICE ISSUE**

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## PRELIMINARY STATEMENT

This Memorandum of Law is submitted by Defendants in opposition to Plaintiffs' latest motion for entry of judgment or for summary or partial summary judgment in their favor on the issue of notice and equitable remedies.[1] Plaintiffs' motion should be denied outright on a number of grounds.

First, although liability on the issue of notice was resolved by the United States Court of Appeals for the Second Circuit ("Second Circuit") in its latest Decision and Order, Plaintiffs have neither pled nor proven any factual or legal basis for the equitable remedies of surcharge, reformation or estoppel. Indeed, the operative Complaint, the First Consolidated and Amended Complaint (Docket 85) (the "Complaint"), is completely devoid of allegations that would support the type of equitable relief Plaintiffs now seek, and Plaintiffs themselves have never sought surcharge, reformation or estoppel during the past nearly fifteen years of litigation.

Second, Plaintiffs have not met their burden of coming forward with sufficient evidence to prove requisite elements of surcharge, reformation or estoppel; accordingly, their request for judgment in their favor, pursuant to Rule 56 of the Fed. R. of Civ. Proc., fails as a matter of law with respect to the imposition of those remedies. (*See* discussion at POINTS II-IV below).

Third, Plaintiffs have failed to comply with this Court's Local Rule 56 for the filing a motion for summary judgment in that they have not filed the required statement of material facts not in genuine dispute. Many of the material facts upon which they presumably would rely for their motion are in genuine dispute, as is demonstrated by the testimony and other evidentiary proof submitted at the 2006 hearing on remedies, which was conducted on July 17, 2006 and July 18, 2006. Defendants cite to and incorporate such testimony in the opposition to this motion, including the testimony of their actuarial expert Lawrence Sher and the admissions made

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[1] The basis for Plaintiffs' Rule 56 motion is, at best, unclear.

under oath by Plaintiffs' expert, Phillip Cofield. (Docket 127 at pp. 85-105; Docket 128 at 109-180; Clemens Decl., Ex. S).

Fourth, the allegations contained in the nine declarations submitted by Plaintiffs are inconsistent with allegations contained in the Complaint, as well as previous statements submitted to the Court by or on behalf of Plaintiffs contained in the administrative record, in the Complaint and over the course of the litigation. Plaintiffs, for example, have long ago set out the detailed factual basis of their non-disclosure claims, and their facts never included many of the new allegations of misrepresentation contained in the Declarations being submitted now. Similarly, Plaintiffs for many years have claimed that the equitable remedy they seek based on the failure to give proper notice of the phantom account offset provision prior to 1998 is for the Court: (1) to "enjoin" the application of the phantom account offset from being applied to the calculation of their accrued benefits for their rehired periods of employment; and (2) to issue an order compelling the reversal of the denial of the administrative claims made by the named plaintiffs so that they could receive retirement benefits at least equal to the benefits of new hires as of their respective Reemployment Commencement Dates. (Compl. ¶ 111 and Wherefore Clause for SECOND COUNT).[2]

To the extent that some Plaintiffs now belatedly claiming that they were told or promised something else and supposedly relied on those previously undisclosed representations to their detriment, such declarations must be disregarded by the Court. It is far too late in the day, at the post-liability stage following discovery, a hearing on remedies, and numerous motions and appeals, to make new allegations upon which to predicate a remedy. See discussions at POINT V below.

[2] References to the Complaint (Docket 85) are cited as "Compl. ¶ [number]".

For all of these reasons, and for the reasons discussed in further detail below, Plaintiffs' motion must be denied.

## PROCEDURAL BACKGROUND

### A. The Administrative Claims Process and the Commencement of This Action

Plaintiff Paul Frommert ("Plaintiff Frommert") and a group of 12 other rehired Xerox employees commenced this lawsuit in 1999, seeking to be paid additional pension benefits under the Employee Retirement Income Security Act ("ERISA"), 88 Stat. 829, as amended, 29 U.S.C. § 1001 *et seq*. The crux of their claim is that, when they previously left Xerox's employment in the 1980's, they received a lump sum distribution from the Plan, and that upon being rehired by Xerox, the written materials they received did not adequately disclose, until 1995, that their RIGP benefit would "be reduced if you've had a prior distribution." (Initial Compl., ¶ 56).[3] Plaintiffs further claimed that, until 1996, such materials did not notify them that the potential offset for their prior distributions would include the hypothetical investment returns based on those lump sum distributions. (Initial Compl., ¶¶ 52, 57). Plaintiffs also claim that these omissions violated various statutory obligations under ERISA, entitling them to the payment of additional benefits and/or equitable relief under ERISA, 29 U.S.C. §§ 1132(a)(1)(B) and/or 1132(a)(3).

As further alleged in the Initial Complaint, prior to commencing suit, Plaintiffs exhausted their administrative remedies. Plaintiff Frommert, for example, sent a letter to Defendant Patricia Nazemetz ("Defendant Nazemetz") on September 17, 1996 complaining about his "discriminatory" treatment as a Xerox rehire. He specifically asked to be "treated the same as a new hire," and, according to the Complaint, his request was denied. (Initial Compl., ¶¶ 65-66;

[3] References to Plaintiffs' initial complaint, filed in the United States District Court for the District of Connecticut on November 24, 1999, are referred to as "Initial Compl.".

*see* Clemens Decl., Ex. A). *Notably, Plaintiff Frommert then sent a memo, dated October 28, 1996 "requesting that he be viewed as a new employee for retirement benefit purposes retroactive to November 16, 1989, the day he was rehired."* (Initial Compl., ¶ 68) (emphasis added).

The Initial Complaint further alleges that *Frommert and the other 12 Plaintiffs had retained counsel and sent a "letter petition," dated April 28, 1999, to Defendant Nazemetz, which asked that these 13 individuals "be treated the same as a new hire with respect to retirement benefits under the RIGP Plan[sic] based on their respective Recommencement Dates."* (Initial Compl., ¶ 145) (emphasis added). On or about August 31, 1999, a request for reconsideration was submitted by Plaintiffs' counsel on behalf of this group of individuals (who were referred to as the Barnes Group), as well as another group of seven Xerox rehires, referred to as the Johnson Group.

Subsequently, Plaintiffs filed an Amended Complaint, dated March 10, 2000, also in the United States District Court for Connecticut, joining in other groups of Plaintiffs. The case was transferred to the Western District of New York on or about June 30, 2000, after which Plaintiffs filed yet a Second Amended Complaint (Docket 71) and an action entitled *Levy v. Conkright et al* (01-CV-6447). Plaintiffs then filed the First Consolidated and Amended Complaint joining the *Frommert* and *Levy* cases and in adding in other groups of Plaintiffs (for a total of 104 individuals). (Compl., Docket 85). ***This is the final pleading from which an analysis of the claims asserted must be made.***

The First Consolidated and Amended Complaint consists of four separate COUNTS, each challenging the method used to calculate the amount of the offset attributable to their prior distribution. In support of all four COUNTS, Plaintiffs claim *that when rehired, each of the* *named plaintiffs relied upon representations contained in the Summary Plan Descriptions ("SPDs") and in annual benefit statements that they would receive retirement benefits based on their length of service at least equal to the retirement benefits new hires who had never previously been employed by Xerox would receive*. (Compl. ¶ 42) (emphasis added).

With respect to their breach of fiduciary duty claim at issue here, *Plaintiffs seek in their Complaint an order clarifying or declaring their right to be paid pension benefits without the application of the offset provisions contained in the RIGP, and enjoining Defendants from applying the RIGP offset formula, and recalculating their retirement benefit as though they were new hires under the terms of the RIGP.* (See Compl.¶ 111 and Wherefore Clause for SECOND COUNT) (emphasis added).

**B. The District Court's 2004 Decision and Order**

Following the completion of discovery, which was limited given the nature of the allegations contained in the Complaint, Plaintiff Frommert and Plaintiff Alan H. Clair ("Plaintiff Clair") filed motions seeking summary judgment against Defendants, and Defendants filed cross-motions for summary judgment against Plaintiffs.

The Plan Administrator had initially interpreted the Plan as calling for an offset approach referred to as the "phantom account" method. That method calculated the hypothetical growth that Plaintiffs' past distributions would have experienced if those distributions had remained in the Plan and continued to earn investment returns, and then reduced Plaintiffs' present benefits accordingly. Plaintiffs argued that the Plan Administrator's calculation was improper because the Plan documents did not provide for the phantom account method. This Court rejected Plaintiffs' argument and granted summary judgment to the Plan, reasoning that the Plan Administrator's "consistent application" of the phantom account methodology was neither arbitrary nor capricious "[g]iven the history of the Plan." *See Frommert v. Conkright*, 328 F. Supp. 2d 420, 433 (W.D.N.Y. 2004). Plaintiffs appealed. (Docket 110).

**C. The First Appeal**

A central issue on the appeal was whether Defendants had provided adequate notice of the Plan offset with respect to Plaintiffs' prior lump sum distributions from their retirement benefits. The Second Circuit reversed the grant of summary judgment in favor of Defendants and held that the RIGP did not always contain a provision allowing for the offset of prior distributions in the manner utilized by Defendants and that the amendment of the RIGP to include the offset provision in 1998 was without proper notice to Plan participants and could not be applied to those plaintiffs who had been rehired before the issuance of the 1998 SPD. Thus, the Court vacated the Decision and Order of the District Court and remanded the matter back to the District Court to craft a remedy for the alleged ERISA violations. *Frommert v. Conkright*, 433 F.3d 254, 268-269 (2d Cir. 2006) ("*Frommert I*").

**D. Motions Following Remand**

Following *Frommert I*, the case was remanded back to this Court for a determination as to the appropriate remedy to be applied. (Docket 115). This Court held a two-day hearing on remedies at which both Plaintiffs and Defendants presented evidence, including actuarial expert evidence. Plaintiff Clair also testified at the hearing, and he admitted that he had previously submitted an affidavit to the Court in 2003 in support of his motion for summary judgment stating that a strict application of the terms of the 1989 RIGP, particularly sections 9.6 and 1.44, would place him in a similar place as that of a new hire employed on the same date as his reemployment commencement date, and that was the position he urged the Plan Administrator to take during the claims process. (Docket 127 at 35).

At that time, the Plan Administrator had interpreted the terms of the Plan in light of the Second Circuit's decision and determined the appropriate methodology to be used was to apply an "Actuarial Equivalence" approach. (*See* Docket 121, Affidavit of Lawrence Becker in Support of Defendants' Pre-hearing Brief Addressing Remedies). Under the "Actuarial Equivalence" or Plan Administrator's approach, the prior distribution received by a rehired employee is converted into an age-65 annuity that is the actuarial equivalent of the prior lump sum distribution. The resulting age-65 annuity was subtracted from the age-65 annuity provided by the Plan's HAP ("Highest Average Pay") formula. (Docket 121, 123, 124). Because the Second Circuit had found that the 1998 SPD provided adequate notice of the offset provision contained in the RIGP, Defendants urged this Court to apply the Plan Administrator's interpretation for benefit calculations until the issuance of the 1998 SPD, but to use the Plan's offset provisions for the post-1998 portion of Plaintiffs' benefit calculations. (*Id*.).

In contrast, Plaintiffs insisted that the methodology to be used was the Nominal Offset approach, and they cited this Court's opinion in *Layaou v. Xerox Corp*., as support for that proposition. (Docket 232, 233). This Court held a hearing allowing both parties to present witnesses in support of their positions, including actuarial experts. (Docket 127 and 128). Defendants' expert, Lawrence Sher, testified as to why the Plan Administrator's interpretation, which used an Actuarial Equivalence approach taking into account the time value of money, was both fair and consistent with the terms of the Plan and the Second Circuit's decision. (*Id;* Clemens Decl. Exhs. R, S). Despite the fact that Plaintiffs' own expert, Philip Cofield, also testified that the appropriate method for offsetting the prior distribution was to take into account the time value of money, but in a manner that was somewhat different than the Plan

Administrator's approach, Plaintiffs continued to insist that the Court adopt their Nominal Offset or "Layaou" approach. (See Docket 127).

**E. This Court's January 24, 2007 Decision and Order**

On January 24, 2007, this Court issued a decision, reported at *Frommert v. Conkright*, 472 F. Supp. 2d 452 (W.D.N.Y. 2007) (Docket 137). In addition to directing Defendants to recalculate Plaintiffs' retirement benefits in accordance with its Decision and Order and ordering the Plan to pay each Plaintiff a lump sum in the amount of the difference between the amount of the recalculated benefits after deducting the nominal amount of the prior distribution, this Court specifically rejected the suggestion that the Plan's offset provision could be applied to all employees after 1998 regardless of when they were rehired. (*Frommert,* 472 F. Supp. 2d at 459).

**F. Defendants' Appeal and the Second Circuit's Decision and Order**

By Notice of Appeal dated February 5, 2007, Defendants appealed from the portion of the January 24, 2007 Order which adopted the Nominal Offset approach as an appropriate remedy. (Dkt. 138). On appeal, Defendants contended that the Decision and Order should be reversed because the Court should have adopted the Plan Administrator's approach. Plaintiffs claimed that the Decision and Order should be affirmed.

On July 24, 2008, the Second Circuit issued a decision rejecting Defendants' "first challenge and agree[ing] with the second." *Frommert v. Conkright*, 535 F.3d 111, 115 (2d Cir. 2008) ("*Frommert II*"). More specifically, the Second Circuit reasoned that the District Court did not need to defer to the Plan Administrator's interpretation of the Plan, and it affirmed this Court's ruling that the appropriate method for offsetting Plaintiffs' prior distributions was to use the Nominal Offset approach proposed by Plaintiffs. The Second Circuit then remanded the case to the District Court for further proceedings not inconsistent with its decision. *Id*. The parties filed cross-petitions for certiorari to the Supreme Court. (Clemens Decl., Ex. D).

**G. The Supreme Court's Decision and the Second Circuit's Remand**

The United States Supreme Court granted certiorari to decide whether the Plan Administrator's interpretation of the Plan was entitled to judicial deference. *Conkright v. Frommert*, 129 S. Ct. 2860 (2009). In April 2010, the Supreme Court reversed the Second Circuit, holding that the Plan Administrator's interpretation should have been reviewed under a deferential standard. *Conkright v. Frommert*, 130 S. Ct. 1640, 1651 (2010). The Supreme Court held that a *"single honest mistake in plan interpretation" did not strip a court of its obligation to defer to a plan administrator's interpretation of plan terms. Id.* at 1644 (emphasis added).

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

On remand from the Supreme Court, Plaintiffs urged the Second Circuit to enter judgment in their favor, regardless of whether deference was applied to the Plan Administrator's interpretation. By Order filed August 2, 2010, the Second Circuit remanded the matter back to this Court for further proceedings consistent with the Supreme Court's decision, and the Second Circuit denied Plaintiffs' motion for a decision as moot. (Docket 203).

**H. The November 17, 2011 Decision and Order**

Following remand, Plaintiffs filed a motion to re-enter judgment in their favor. (Docket 204, 226). Defendants cross-moved for the adoption of the Plan Administrator's interpretation.

(Docket 211, 227). On November 17, 2011, the Court issued a Decision and Order in this case, denying Plaintiffs' motion and granting the cross-motion. (Docket 237).

Once again, this Court reviewed the Plan Administrator's interpretation and, as directed by the Supreme Court, conducted such review under the *Firestone* standard of deference. Under this deferential standard of review, the Court found that the Plan Administrator's interpretation, which provided for an offset of the rehired Plaintiffs' benefits by calculating an "actuarial equivalent" of the prior distributions, was reasonable. *Frommert v. Conkright*, 825 F. Supp. 2d 433, 438-43 (W.D.N.Y. 2011). Plaintiffs appealed to the Second Circuit.

### I. The Second Circuit's 2013 Decision and Order

The Second Circuit vacated the judgment and remanded this case, again, back to this Court. The basis for its Decision and Order was limited. *Frommert v. Conkright*, 738 F.3d 522 (2d Cir. 2013) ("*Frommert 2013*"). The Court found the Plan Administrator's interpretation to be unreasonable solely based on its determination that the proposed offset would result in rehired employees being "worse off" than newly hired Xerox employees "in terms of actual benefits received." *Id.* at 530.

In its remand order to this Court, the Second Circuit stated that, given its finding that any offset of the RIGP benefit violated ERISA's notice provisions, the lower court was directed to first consider the imposition of equitable remedies in this case. To that end, the Second Circuit directed this Court to consider: "(1) what remedy is appropriate; [and] (2) whether Plaintiffs have established the requisite level of harm as a result of the notice violations." *Id*. at 534. In this respect, this Court is required to follow the Supreme Court's *Amara* decision and determine whether Plaintiffs have made a sufficient showing of harm specifically in connection with the equitable remedies they seek. *CIGNA Corp. v. Amara, et al.*, 131 S. Ct. 1866 (2011).

The Second Circuit then directed this Court, in the event that it determined that no equitable remedy is available, to enforce a reasonable interpretation of the Plan, once again giving the deference required by *Firestone* to the Plan Administrator's interpretation. *Frommert 2013*, 738 F.3d at 534. Such a determination is to be made without considering the issue of notice. *Id*.

Instead of waiting until a judgment was entered by this Court, (which would require this Court to consider whether Plaintiffs met their applicable burden of proof under 29 U.S.C. § 1132(a)(1)(B) or § 1132(a)(3), in accordance with the directive of the Second Circuit in *Frommert 2013*), Plaintiffs moved for an order compelling immediate payment of their benefits, recalculated under the *Layaou* remedy. This is the same remedy as Plaintiffs sought at the 2006 hearing on remedies and is also referred to as the Nominal Offset Approach. Defendants opposed that motion.

In connection with that motion, this Court requested, in a letter Order, that the Plaintiffs advise the Court of the equitable remedies they were seeking and that Defendants advise the Court of the Plan Administrator's interpretation of the Plan. The Plan Administrator submitted his interpretation of the Plan. Plaintiffs responded by filing the instant motion for re-entry of Judgment in their favor or for summary judgment or partial summary judgment on the issue of notice and remedies. Plaintiffs claimed that they are now seeking the three equitable remedies of surcharge, reformation, and estoppel.

In support of their motion, Plaintiffs submit the declarations of nine Plaintiffs, each of whom now purports – for the first time ever – to have relied to their alleged detriment upon unspecified statements or alleged promises made at unknown times from often unidentified individuals at Xerox about their pensions. Incredibly, none of these allegations have ever been made during the extensive administrative claims process, (*see* Clemens Decl., Exhs. A-O), or in the Complaint (including any of its previous versions), despite the fact that Plaintiffs were represented by counsel (and oftentimes more than one firm).

In any event, had any of the Plaintiffs, or these nine individuals, or all of the 104 individuals claimed that they suffered individualized harm beyond what is alleged in the Complaint, such allegations would have warranted extensive *individualized* discovery years ago when records existed, memories were fresh and events not long faded into the past. It is far too late in the day to allow this type of new evidence to be considered by the Court. It is for these reasons and those discussed below, that Plaintiffs' Declarations should be disregarded and their motion denied.

## ARGUMENT

## POINT I

## PLAINTIFFS' INTRODUCTION OF ENTIRELY NEW REMEDIAL THEORIES AFTER FIFTEEN YEARS OF LITIGATION IS NOT SUPPORTED BY THEIR COMPLAINT OR THE "EVIDENCE SUBMITTED ON THEIR MOTION

### A. Plaintiffs' Failure to Allege in the Complaint or Otherwise Place Defendants on Notice of Any Claim of the Equitable Remedies of Surcharge, Reformation or Estoppel Warrants Rejection of Their Present Motion Seeking Judgment Granting Such Relief

Despite the fact that Plaintiffs themselves have never specifically pled that the SPDs in this case violated Section 1022 of ERISA and that such violation was a breach of fiduciary duty in their Complaint as a specific claim, the Second Circuit's Decision and Order has assisted them by addressing and resolving that issue in its latest Decision and Order. The Second Circuit, however, remanded the case back to this Court for a determination as to remedies to be imposed for this specific notice violation.

At this point, given Plaintiffs' introduction of entirely new factual allegations and remedial theories, a careful consideration of the allegations contained in the Complaint is warranted. In their SECOND COUNT of the First Consolidated and Amended Complaint, Plaintiffs purport to assert a breach of fiduciary duty claim under Section 503 (a)(3), seeking the exact same relief as they seek under the FIRST COUNT of the Complaint, which claim arises under Section 502(a)(1)(B). Notably, Plaintiffs do NOT state that they are seeking the equitable remedies of surcharge, reformation or estoppel as a remedy for the alleged breach of fiduciary duty violation asserted in the Complaint. Even more significantly, for purposes of this motion and the remedy to be awarded by the Court, the specific remedy they seek, as set forth in paragraph 111 Complaint, is the following:

> Under common law principles applicable to trusts and fiduciaries, *an order reversing the denial of the claims made by the named plaintiffs to receive retirement benefits at least equal to new hires based upon their respective Reemployment Commencement Dates and employment dates is mandated.*

In addition, Plaintiffs seek the Defendants be "enjoined" from applying the appreciated hypothetical value investment of the lump sum payments or distributions previously paid to the Plaintiffs to offset the accrued pension benefits earned by Xerox rehires under one or more of the alternative sources or components of the RIGP since their Reemployment Commencement Dates; and for an order compelling the Defendant Plan Administrator to recalculate their benefits without the application of the phantom account offset. (Compl., Wherefore Clause for SECOND COUNT). While they also seek "restitutionary damages" such as prejudgment interest and reimbursement of litigations expenses, they do not seek or even mention surcharge, reformation or estoppel, nor do they seek to be paid duplicate benefits for their first period of employment. Accordingly, to the extent that Plaintiffs now request that they be granted a remedy that awards that "no offset," under any equitable theory, such request must be denied. While the crux of this litigation all along has been focused on Plaintiffs' request that phantom accounting not be applied, now they are asking to be paid duplicative pension benefits for their first period of employment, something they never claimed they were promised or expected and certainly nothing that has been contained in the Plan.

Given that Plaintiffs have never pled sufficient facts to show that they are entitled to the equitable remedies they now seek, and that they have never placed Defendants on any kind of notice that they would be seeking that type of equitable relief as a part of this litigation, Plaintiffs' motion should be denied on this basis alone. In any event, Plaintiffs' motion should be denied for numerous other reasons, including that they did not meet their evidentiary burden of proof required by the Supreme Court under *Amara*, 131 S. Ct. at 1866, for its imposition.

### B. Even if Plaintiffs Were Permitted to Seek the Equitable Remedies Which Are the Subject of this Motion, They Have Not Met Their Burden to Establish A Basis Upon Which Such Relief Should Be Granted

There is yet another basis for the denial of Plaintiffs' motion: unlike the plaintiffs in Amara, who arguably had a case in which the Court could consider whether equitable relief was warranted, Plaintiffs have not established that the type of equitable relief that they are proposing should even be considered by this Court in the first instance. *Amara* involved a traditional defined benefit pension plan that was frozen and later changed to a cash balance plan. *See* 131 S. Ct. at 1871-72. The district court found that the defendant "intentionally misled its employees" in communications announcing the adoption of the new cash balance plan, and thereby violated Section 204(h) of ERISA, requiring advance written notice of plan amendments that provide for significant reductions in future benefit accruals. *Id.* at 1874. As the *Amara* court observed, the usual remedy in this Circuit for a Section 204(h) notice violation is "the invalidation of [the] plan amendment[]" that was not properly noticed. *Id.* at 1875 (*citing Frommert I*, 433 F.3d at 263). *Id*. at 1875. However, because the plan in place immediately before the improperly noticed amendment was a frozen plan, the court concluded that invalidation of the amendment would harm plan participants, and so was not an available remedy. In light of these unique facts, the Supreme Court in *Amara* considered whether Section 502(a)(3) of ERISA might provide some other type of remedy for any harm resulting from the defendant's intentionally misleading communications. *Id*. at 1880.

By contrast, as the Second Circuit already reasoned, the "relief that the [P]laintiffs seek" here "falls comfortably within the scope of § 502(a)(1)(B)" of ERISA. *Frommert I*, 433 F.3d at 270. In *Frommert I*, the Court held that: (i) Plan language specifying use of the so-called phantom account offset was omitted from the Plan for a time; (ii) notice under Section 204(h) of ERISA was required before phantom accounting could permissibly be reintroduced to the Plan; (iii) Defendants failed to provide proper notice under Section 204(h) of ERISA until 1998; and so (iv) Plan language requiring use of phantom accounting could not be applied to participants rehired before 1998. *See Id.* at 266-68. Accordingly, the Court remanded the case to the District Court to interpret and apply "the pre-amendment terms of the Plan" – *i.e.*, the terms of the Plan without reference to the phantom accounting provisions – "describ[ing] how prior distributions were to be treated." *Id.* at 268.

The facts and procedural posture of this case thus differ sharply from *Amara*. The Supreme Court in *Amara* considered whether "other . . . equitable relief" under Section 502(a)(3) of ERISA might be available to remedy a notice violation because there was no other way to remedy the harm done to the plaintiffs and provide them benefits under a plan. Here, by contrast, the Second Circuit has already ordered a remedy for the Section 204(h) notice violation, *i.e.*, suppression of the Plan's phantom accounting provisions and a calculation of benefits consistent with the remaining Plan terms. *See Frommert I*, 433 F.3d at 270. Thus, the sole task remaining before this Court was to give effect to the terms of the "pre-amendment" Plan under Section 502(a)(1)(B) of ERISA, applying a deferential standard of review to the interpretation offered by the Plan Administrator.

That task does not automatically change with the finding of a disclosure violation. Even if *Amara* were applicable, the Supreme Court's decision makes clear that, in order to recover, *each Plaintiff* in this case would, at a minimum, need to have proved by a preponderance of the evidence that he or she personally suffered "actual harm" as a result of the purported notice violation. *See Amara*, 131 S. Ct. at 1881-82, and in fact, the Supreme Court remanded the matter back to the lower court for a determination as to whether the *Amara* plaintiffs could meet their burden of proof in this regard. *Id.* at 1882.

Plaintiffs have made no such evidentiary showing. To begin with, there is no evidence of bad faith or fraud on the part of Defendants, and unlike the *Amara* plaintiffs, the *Frommert* Plaintiffs have offered none whatsoever. There is also no evidence that any of the Plaintiffs suffered actual harm that cannot be remedied by the payment of their recalculated benefits from the existing RIGP. The relatively few declarations submitted by Plaintiffs at this late stage should be disregarded by the Court for the reasons discussed in detail in POINT V. In any event, even assuming that the allegations contained in those nine declarations are true, they are not sufficient, as a matter of law, to establish the type of individualized harm needed to warrant the imposition of the remedies of surcharge, reformation and estoppel for those nine, let alone the remaining seventy-five individual Plaintiffs who have submitted nothing to demonstrate that they suffered any harm beyond what is alleged in the Complaint. None of the Declarants point to misrepresentations made by *a plan fiduciary,* and none allege that there was any type of fraudulent concealment on the part of a *plan fiduciary* whatsoever of the type that exist in the

*Amara* case and which the Court viewed as a prerequisite for granting surcharge, reformation or estoppel. As a result, the type of evidence submitted by Plaintiffs is not sufficient to meet their evidentiary burden of proof as to any of equitable of relief they now seek. See also discussion at POINTS II-IV below.

### C. The Equitable Relief Sought is Not Appropriate For this Case

In any event, even assuming that Plaintiffs could somehow cure this deficiency, recovery under Section 502(a)(3) of ERISA is limited to ". . . *appropriate equitable relief*." *Id*. at 1878 (*quoting* 29 U.S.C. § 1132(a)(3)). The ultimate form of relief that Plaintiffs seek is simply not appropriate, under whatever theory.

#### 1. The No-Offset Approach Provides Duplicative Benefits for the First Period of Employment and is Not Justified

As stated above, the No-Offset approach is the least equitable form of relief. While Plaintiffs have not specified what they mean precisely by "No-offset" relief, it is clear that they mean much more than the non-application of the phantom account offset provision to the calculation of the current pension benefit—which is the remedy repeatedly requested throughout the Complaint. Rather, they appear to be seeking far more than that remedy. They appear to be requesting that the Court order that they be paid benefits that include their years of service from their first period of employment even though they have already been fully paid their pension benefits for that period of service. In fact, Plaintiffs have attached as an Exhibit to their Complaint a list of their names with the amounts of pension benefits each received for that prior service. Not only have Plaintiffs never sought to be paid duplicative benefits for their first period of employment, there is no justification for doing so under any theory. Equity does not countenance such a windfall. *See Conkright*, 130 S. Ct. at 1650.

### 2. The Layaou Approach Was Rejected By the Supreme Court

In their motion papers, Plaintiffs also seek, for all three forms of equitable relief, to be paid benefits "at least equal to Layaou." However, the Supreme Court has already rejected such an approach, albeit in dicta. As the Supreme Court clearly explained, any offset for prior distributions that failed to account for the time value of money would be "heresy" and represent a "windfall." *Conkright*, 130 S. Ct. at 1650. Thus, even assuming that Plaintiffs could meet their burden of proving on a plaintiff-by-plaintiff basis that each had suffered actual harm, this Court is precluded from ordering a remedy that very clearly fails to take into account the time value of money and represents a windfall to these Plaintiffs.

### 3. The Actual Annuity Approach is Unsound

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

The fundamental problem with Plaintiffs' Actual-Annuity-Offset approach is that it does not reflect the prior distributions actually received, but rather a small fraction of the amount that they actually received instead. (Clemens Decl., Ex. S). The approach does so substitutes the employee's benefit under the Highest Average Pay (HAP) formula on the original date of termination. (*Id*.). As justification for ignoring the amount of the actual distribution received, and substituting a lower amount, Plaintiffs' expert relied on a narrow reading of Section 9.6 of the Plan document while disregarding the other relevant – and inseparable – sections of the Plan document, Sections 4.2 and 4.3. (*Id.;* Docket 127 at pp. 85-105; Docket 128 at pp. 109-129).

Because the value of the defined contribution benefits that Plaintiffs actually received necessarily exceeded the value of their HAP benefits under the Plan at the time of their prior distributions, this approach systematically *understates* the true economic value of the benefits Plaintiffs received when they initially departed employment by Xerox by a significant amount. (In Mr. Clair's case, by 80%). Thus, the Actual-Annuity-Offset approach is inconsistent with the Plan's definition of the term "accrued benefits" and results in a windfall to Plaintiffs. (*Id.;* Docket 127 at pp. 85-105; Docket 128 at pp. 109-129).

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

Regardless, the Actual-Annuity-Offset approach suffers from the same purported notice deficiency upon which Plaintiffs rely to attack the Plan Administrator's approach. In short, all of the remedies urged by Plaintiffs are fundamentally flawed and should not be utilized by this Court under any theory.

**D. The New Hire Remedy Can and Should be Awarded**

In contrast, there is a remedy that can and should be awarded, and one that has been suggested by both the Plaintiffs and the Second Circuit in its latest Decision and Order, that is, to recalculate the Plaintiffs' benefits in a manner assuring that they are treated no worse than a newly-hired employee. *See* Becker Declaration. Plaintiffs' concern that the Court would be disregarding years of service for these individuals is misplaced. That is because Plaintiffs have already been paid their full accrued pension benefits for their prior years of service. Plaintiffs never expected to receive duplicate benefits for this first period of service a second time. Indeed, Plaintiff Frommert himself explained as much to the Court, in paragraph 25 of his Affidavit submitted in support of his summary judgment motion in 2003, that, in his October 26, 1996 memorandum, he "was not looking to be paid duplicate benefits, but only 'what benefits would be if I had been treated as a new employee upon my rehire. . ..' He also states again, in paragraph 30, that he is not requesting funds that have already been distributed, but rather is seeking "the normal retirement benefits that all others, including new employees, receive."

All of the above reasons warrant a denial of Plaintiffs' motion.

**POINT II**

**PLAINTIFFS' REQUEST FOR REFORMATION OF THE PLAN MUST BE DENIED BECAUSE THERE IS NO FRAUD OR CONDUCT WARRANTING THAT RELIEF**

In their latest motion for re-entry of judgment in their favor, or alternatively, for summary judgment or partial summary judgment, Plaintiffs' assert that they are entitled to reformation of the RIGP in an amount that entitles Plaintiffs to "at least *Layaou*." There is no legal or factual basis for Plaintiffs' request for reformation of the Plan. Nor have Plaintiffs proven all of the elements necessary for reformation by clear and convincing evidence, which is their evidentiary burden of proof for plan reformation to occur. *See e.g., HSB Group Inc. v. SVG Underwriting LTD*, 664 F. Supp. 2d 158, 176 (D. Conn. 2009).

As recognized by the Supreme Court in its *Amara* decision, "[t]he power to reform contracts (as contrasted with the power to enforce contracts as written) is a traditional power of an equity court, not a court of law, which was used to prevent fraud." *Amara*, 131 S. Ct. at 1879 (citations omitted). "Equity courts, for example, would reform contracts to reflect the mutual understanding of the contracting parties where 'fraudulent suppression[s], omission[s], or insertion[s] . . . materially . . . affect[ed]' the 'substance' of the contract, even if the 'complaining part[y]' was negligent in not realizing its mistake, as long as its negligence did not fall below a standard of 'reasonable prudence' and violate a legal duty." *Id.* at 1881 (citations omitted). *See Skinner v. Northrup Grumman Retirement Plan,* 673 F.3d 1162, 1166 (9th Cir. 2012) ("reformation is proper only in cases of fraud and mistake"). As explained by Justice Scalia in his concurrence in *Amara*, "Contract reformation is a standard remedy for altering the terms of a writing that fails to express the agreement of the parties owing to the fraud of one of the parties and the mistake of the other." (Scalia, J) (concurrence) (citation omitted). *Amara*, 131 S. Ct. at 1884. It is not an available remedy to use for altering the terms of an ERISA plan based on an SPD, which is not written by the plan sponsor but by the Plan Administrator, particularly since reformation is intended to effectuate a mutual mistake at the time of contracting, and not that intent is retroactively revised by subsequent misstatements as contained in an SPD. *Id*. at 1885. *See Preston v. U.S, Trust Co. of N.Y.*, 394 F.2d 456, 460 and n.4 (2d Cir. 1968) (when reforming a trust, the court must consider whether the language used is what the grantor intended).

Here, Plaintiffs failed to present any evidence of fraudulent conduct on the part of the plan sponsor, Xerox. The Supreme Court specifically held that the Plan Administrator made a "single honest mistake in plan interpretation," which mistake did not justify stripping away the deference owed to the plan administrator's interpretation of the plan for subsequent related interpretations. *Conkright*, 130 S. Ct. at 1644. The Court expressly noted that its decision not to strip away the deference otherwise due to a trustee decision because of one good-faith mistake was based on the fact that the lower courts "made no finding that the Plan Administrator had acted in bad faith or would not fairly exercise his discretion to interpret the terms of the Plan."

*Id*. at 1648. This decision is law of the case and cannot and has not been challenged by allegations of any type of fraud now.

In short, there is no basis for reforming the Plan to pay additional benefits beyond what Plaintiffs actually earned for their rehired periods of employment. To do so based on disclosure violations would undermine the actuarial soundness of the Plan and its ability to pay benefits that are actually owed under the Plans terms both to the Plaintiffs and to other plan participants. *See Perreca v. Gluck*, 295 F.3d 215, 225 (2d Cir. 2002) (explaining that ERISA's requirement that a plan have a written amendment procedure "protects the plan's actuarial soundness by preventing plan administrators from contracting to pay benefits to persons not entitled to such under the express terms of the plan.").

In the absence of any evidence of fraudulent conduct, this Court must deny Plaintiffs request to reform the Plan to provide them with at least the Layaou remedy.

**POINT III**

**PLAINTIFFS' SURCHARGE REMEDY IS WITHOUT ANY FACTUAL OR LEGAL SUPPORT**

Plaintiffs argue that their request for a recalculation of benefits based, alternatively, on No Offset, the Layaou Offset or an Actuarial Offset, is permissible as an equitable remedy under the theory of "surcharge". While, in *Amara*, the Supreme Court did recognize that, under very limited circumstances, the payment of monetary damages could fall within the equitable remedy of surcharge, 131 S. Ct. at 1881-82, Plaintiffs' attempt to squeeze their requested remedy into this box represents a complete misapplication of the surcharge remedy.

Specifically, surcharge is an equitable remedy that is designed to charge a fiduciary for actual losses to a trust that are caused by a breach of fiduciary duty. *See, e.g., Roth v. Sawyer-Cleator Lumber Co.*, 61 F.3d 599, 604-05 (8th Cir. 1995) (trustee is chargeable with amount of loss to trust caused by breach of duty). Accordingly, a "[t]he trustee is not subject to surcharge for breach of trust that results in no loss to the trust estate." 4 Scott and Ascher on Trusts §24.9 at 1693 (5th ed. 2007). *See also Amara*, 131 S. Ct. at 1881 ("a court of equity would not surcharge a trustee for a non-existent harm").

Thus, beneficiaries who challenge a trustee's improper transaction may seek a recovery "as is necessary 'to restore the values of the trust estate and trust distributions to what they would have been if the trust had been properly administered' by electing to surcharge the trustee for any losses incurred [by the trust], as well as for any gains forgone, as a result of the breach." 4 Scott and Ascher on Trusts §24.9 at 1686 (quoting Restatement (Third) of Trusts §205 cmt. A (1992)). Put another way, the focus of a surcharge remedy is on the loss occasioned to the trust estate itself. Where a trustee or fiduciary is found to have breached his/her fiduciary duty to the detriment of the trust estate, a surcharge against the trustee and in favor of the trust estate may be awarded. *Id*.

By contrast, Plaintiffs' argument for surcharge in their present motion, turns this equitable notion on its head. The surcharge that Plaintiffs argue for is not one that benefits the "trust estate" but, instead, would benefit the Plaintiffs personally, as beneficiaries. Specifically, Plaintiffs argue that a revised benefits calculation, based on No Offset, the Layaou Offset or an Actuarial Offset, should be awarded to the individual Plaintiffs as a surcharge equitable remedy. However, nowhere in this case have Plaintiffs argued that the plan fiduciary has acted to the detriment of the plan, and the surcharge remedy Plaintiffs propose does nothing to restore plan assets. Thus, Plaintiffs' argument for a surcharge remedy fails as a matter of law.

Furthermore, since it is the Plan Administrator who is statutorily responsible for any notice violations, and not the Plan itself, a surcharge against the Plan would be improper.

*Amara*, 131 S. Ct. 1877 (noting that plan administrator has statutory obligation to publish required notices; and further noting the distinctions between ERISA plans, plan sponsors and plan administrators).[4] The remedy of surcharge proposed by Plaintiffs – No Offset, the Layaou Offset or an Actuarial Offset – does not "punish" the Plan Administrator; instead, the so-called surcharge would diminish the Plan's assets, rather than remedy any loss to the Plan, and does not punish the Plan Administrator as the plan fiduciary.

Similarly, as established by *Amara*, surcharge is only a viable remedy when there is an *actual* loss to the *trust* (i.e., Plan) caused by a breach of fiduciary duty. *Amara*, 131 S. Ct. at 1881 ("... a fiduciary can be surcharged under §502(a)(3) only upon a showing of *actual harm* – proved ... by a preponderance of the evidence." (emphasis added)).[5] *See also Miles v. Corning Inc. Long Term Disability Plan*, 948 F. Supp. 2d 295, 298 (W.D.N.Y. 2013) (Larimer, J.) (granting motion to dismiss breach of fiduciary duty claims based on failure to allege "actual harm" to support surcharge remedy); *Perelman v. Perelman*, 2012 U.S. Dist. LEXIS 122054 (E.D. Pa. Aug. 28, 2012) (granting motion to dismiss that portion of §502(a)(3) claim seeking equitable remedy of restoration of plan losses and disgorgement of profits, based on failure to allege actual injury); *Parsons v. Board of Trustees of the Nevada Resort Ass'n*, 2012 U.S. Dist. LEXIS 113560 (D. Nev. Aug 13, 2012) (rejecting all equitable remedies recognized by *Amara*,

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[4] Similarly, Plaintiffs argue throughout their brief that "Xerox" has been unjustly enriched by the failure to pay the pension benefits at issue. (*See, e.g.*, Pl. Memo 23 (arguing that Xerox unjustly benefitted by paying "rookie" prices for "veteran labor.")). This argument is entirely misplaced since Xerox Corporation, the named Plaintiffs' current or former employer, is no longer a party to this case and is not the fiduciary. Moreover, any remedy issued (whether legal or equitable) would be as against the Plan and its assets, not the Corporation.

[5] While not reaching the issue of whether a plaintiff established "actual harm" so as to obtain a remedy under a surcharge theory, the Second Circuit recently reiterated *Amara's* requirement that a plaintiff seeking surcharge make a showing of "actual harm". *Osberg v. Foot Locker, Inc.*, 555 Fed. Appx. 77, 80 (2d Cir. 2014).

specifically holding that remedy of surcharge did not apply to monetary damages in the form of past due sums).

In their motion, Plaintiffs argue that their "actual harm" is that they lost "the right to be told by their employer precisely how their pension will be calculated and to be able to plan for their retirement accordingly." (Pl. Memo 11)[6]. This harm, they argue, "justifies the equitable remedy of surcharge." *Id.* Plaintiffs, however, identify no "actual harm" to the trust; they do not identify any losses suffered by the plan based on a breach of fiduciary duty by the Plan; nor do they identify any unjust enrichment obtained by the plan fiduciary.[7] As stated, the type of harm Plaintiffs claim is the type of harm that is subject to compensatory damages, or legal relief – not equitable relief.

Notably, Plaintiffs fail to cite to any cases where the equitable remedy of surcharge was awarded in the form of monetary relief to beneficiaries. Moreover, while Plaintiffs have cited no cases applying a surcharge remedy to the type of relief Plaintiffs seek here, there are several decisions, post-*Amara*, which have rejected the notion that such monetary relief constitutes the equitable remedy of surcharge.

In *Stocks v. Life Insurance Company of North America*, for example, the plaintiff asserted a breach of fiduciary duty claim under ERISA seeking proceeds from a life insurance policy. In opposing the plan administrator's motion to dismiss, Plaintiff argued that the Supreme Court's decision in *Amara* allowed for the monetary damages she sought as a form of equitable relief. In

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[6] References to Plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Entry of Judgment on Notice Issue (Docket 267-1), are cited to as "Pl. Memo [number]".

[7] Despite referring to Xerox, repeatedly, as the fiduciary (see, e.g. Pl. Memo 12), in fact Xerox Corporation, has long been dismissed from this case, precisely because it is not a fiduciary. *Frommert v. Conkright*, 266 F. Supp. 2d 435, 438-39 (W.D.N.Y. 2002).

rejecting the application of *Amara* to the breach of fiduciary duty claim being asserted, the District Court for the Eastern District of Wisconsin stated:

> . . . [plaintiff] correctly interprets *CIGNA* as standing for the limited proposition that equitable relief under §502(a)(3) may, on rare occasions, take the form of monetary compensation so long as it may be accurately characterized as an equitable remedy, not a legal one.
>
> However, despite her best efforts to characterize her requested relief as equitable, it is clear that the remedy [plaintiff] seeks is purely legal and thus *CIGNA's* holding is inapplicable to this case.

861 F. Supp. 2d 948, 952 (E.D. Wis. 2012). *See also Skinner v. Northrop Grumman Retirement Pla*n, 673 F.3d 1162, 1167 (9th Cir. 2012) (rejecting argument that compensatory damages should be awarded as surcharge remedy for statutory violation, where no evidence of unjust enrichment and no evidence of actual harm caused by statutory violation).

Finally, Plaintiffs argue that the No Offset equitable remedy is appropriate here because it failed to make clear that there would be an offset, and the Layaou Offset is appropriate because there was no indication that the offset would be appreciated. As discussed above, neither of these remedies have been justified as a "surcharge", as neither address losses to the trust, or plan, based on a breach of fiduciary duty. These remedies are designed to benefit the beneficiaries, not the Plan. However, if the Court were to consider these remedies under a surcharge theory, these remedies are not appropriate under the facts of this case. Moreover, either No Offset or the Layaou Offset would run directly counter to the Supreme Court's assertion that no windfall is appropriate. Regardless of whether one considers this statement to be dicta, it was made in the context of this very case and, thus, this directive from the Supreme Court must be heeded.

For all of these reasons, Plaintiffs request for an "equitable" remedy in the form of a surcharge is without legal or factual basis. The remedies proposed by Plaintiffs do not constitute a surcharge remedy but are, instead, legal in nature. Further, the surcharge remedies proposed would provide a windfall for the Plaintiffs, in direct contravention of the Supreme Court's decision in this case.

**POINT IV**

**PLAINTIFFS HAVE FAILED TO PLEAD AND PROVE THE NECESSARY ELEMENTS OF AN ESTOPPEL CLAIM UNDER ERISA FOR EACH AND EVERY PLAINTIFF PLAN PARTICIPANT**

Estoppel requires a miscommunication about benefits which causes a plaintiff to change his position to his detriment. *Amara*, 131 S. Ct. at 1869 ("[W]hen a court exercises authority under § 502(a)(3) to impose a remedy equivalent to estoppel, a showing of detrimental reliance must be made."). This showing is necessarily individualized. As Justice Scalia noted in his concurrence, "questions of reliance [are] individualized and potentially inappropriate for class-action treatment." *Amara*, 131 S. Ct. at 1885. (Scalia, J.) (concurrence). Plaintiffs overlook the fact that they would need to prove individualized detrimental reliance on a misrepresentation by each of the 84 Plaintiffs in this case to establish that estoppel is an appropriate remedy for each Plaintiffs' breach of fiduciary duty claim under Section 502(a)(3). Here, Plaintiffs have neither pled nor proven the elements of an estoppel claim on an individualized basis for each of the 84 Plaintiffs in this case. With regard to the proposed No-offset remedy, there was no specific representation made to any Plaintiff in the SPD, or any written communication that there would be no offset for their prior distribution of pension benefits. The SDP may not have told Plaintiffs how the phantom account offset provision worked, but no one claims that they expected that they would be paid twice for their first period of service. Indeed, the record is very clear that not a single Plaintiff ever sought to be paid duplicative pension benefits for their first period of employment nor did they ever claim that they were told that they would be paid a pension again for that same time period. (See Compl. And Exhibits). To the contrary, from the outset, Plaintiffs have been asking that the phantom account offset provision not be applied to reduce their accrued pension benefits and that their pension benefits be recalculated in a manner equal to newly-hired employees at Xerox. That remedy is an equitable one as they are paid a full pension for each period of service without any offsets for prior service periods.

Plaintiff would have the Court believe that, upon finding a breach of fiduciary duty, it is *required* to furnish one of the three remedies they now identify under section 1132(a)(3) by distorting trust principles. It is not. Although section 1132(a)(3) is ERISA's "catch all" provision, it does not always provide for a Plaintiff's choice of remedy (or a remedy at all). As the Ninth Circuit has explained, "[e]quity often involves the weighing of wrongdoing as well as of harm." *Peralta v. Hispanic Bus. Inc.*, 419 F. 3d 1064, 1076 (9th Cir. 2005). Where there is clear evidence of egregious behavior, such as fraud or deliberate misrepresentation, courts may award appropriate equitable relief under section 1132(a)(3). *See Id.* However, where the behavior does not rise to that level, ERISA may not provide a remedy, even in cases where there is a fiduciary breach. *See e.g., Peralta*, 419 F.3d 1064 (denying any relief under section (a)(1) and (a)(3) despite breach of fiduciary duty for failure to notify of plan termination because there was no evidence that the employer engaged in egregious behavior, such as deliberately misleading its employees, and because the only remedy sought was money damages for past harm); *Cannon v. Group Health Serv.,* 77 F.3d 1270 (10th Cir. 1996), *cert. denied,* 519 U.S. 816 (1996) (denying any relief under ERISA even if surviving spouse is left without a remedy for fiduciary's breach); *Livick v. Gillette Co.,* 492 F. Supp. 2d 1, 12 (D. Mass. 2007) (no remedy under 1132(a)(3) or any other provision under ERISA because benefits must be "paid consistently and predictably in accordance with a written plan".)

In this case, Defendants are not requesting that Plaintiffs that be denied a remedy, however, for the reasons discussed in detail herein, the equitable remedies they are now seeking for the first time on this motion—surcharge, reformation and estoppel—must be denied. Not only have Plaintiffs never specifically sought such equitable relief in their Complaint, but they have failed to meet their evidentiary burden of proof that they are entitled to any of these three types of relief (all of which have their own legal requirements) on this motion for the reasons discussed above.

**POINT V**

**PLAINTIFFS' DECLARATIONS MUST BE DISREGARDED**

Plaintiffs submitted nine declarations in support of their argument for imposition of an equitable estoppel remedy, based on an alleged detrimental reliance theory. Each of these declarations should be entirely disregarded by this Court. Plaintiffs' equitable estoppel theory is a brand new theory NOT supported by any allegations contained in the Complaint. Their introduction of new evidence to support a completely new theory for a remedy at this late stage of this case is improper and highly prejudicial to Defendants, especially since Defendants conducted zero discovery as to any of the alleged misrepresentations or promises made to any individual Plaintiff beyond what was contained in the SPDs and their annual benefits statements or any discovery as to their alleged reliance or individualized harm. It is far too late in the day to pretend that adequate discovery could be had now. There is ample legal support for this Court to disregard all of the evidence submitted by Plaintiffs to support this new detrimental reliance theory.

Throughout the entire administrative claims process, both pre-litigation and post-commencement of this litigation, Plaintiffs claimed that, up to and including the September 1998 Summary Plan Description (SPD), Defendants failed to disclose that they intended to apply the phantom account offset and to utilize a comparative methodology resulting in the Xerox rehires receiving the lowest rather than the highest of the benefits between the three retirement components of the RIGP in effect as of January 1, 1990. (Compl. ¶ 28). Plaintiffs further alleged that the application of the phantom account offset significantly reduced their accrued pension benefits since their Reemployment Commencement Date was not adequately disclosed and explained when they were rehired in SPDS or other documents. (Compl. ¶ 32). Notably, for purposes of this motion, Plaintiffs also alleged that they each were given SPDs and other documents which purported to describe the alternative retirement benefits for which they would become eligible upon reinstatement (Compl. ¶ 40), and that after they were rehired, they were provided with Value added statements on an Annual Basis. (Compl. ¶ 41).

Even more significantly for purposes of this motion, Plaintiffs further allege that "[w]hen rehired, *each of the named plaintiffs relied upon the representations contained in SPDs and in annual Personal Benefits Statements that they would receive retirement benefits based on length of service at least equal to the retirement benefits new hires who had never previously been employed by Xerox Corporation would receive*." (Compl.¶ 42).

In paragraphs 43-89 of the Complaint, Plaintiffs provide detailed allegations as to how and why the lack of notice of the phantom account offset provision worked with regard to each of the particular formulas under the Plan and how the examples that were provided over the years in the various SPDs did not cure the notice deficiencies. Plaintiffs then explain in paragraph 90 that "an appropriate and equitable remedy for calculating the standard formula RIGP guaranteed annuity benefit or the CBRA benefit consistent with the provisions of the RGIP Plan Document made effective January 1, 1990 and the ERISA statutory scheme is either to reduce the aggregate accrued benefit by the accrued benefit attribute to the time of the prior distribution or to deduct the number of full and fractional years of service utilized as the basis for the lump sum payments previously received by the plaintiffs. This methodology would be consistent with the definitions in the redesigned RIGP and "*would place Xerox rehires such as the named plaintiffs in an equitable position with respect to retirement benefits earned under the three alternatives sources or components of the Xerox RIGP Plan at least equal to that of new hires.*" (Compl.¶ 90).

In their SECOND COUNT of the Complaint, which purports to assert a claim for breach of fiduciary duty, Plaintiffs seek an order reversing the denial of the claims made by plaintiffs to receive retirement benefits "at least equal to new hires based upon their respective Reemployment Commencement Dates and employment dates is mandated." (Compl. ¶ 111). They also seek injunction prohibiting the application of the appreciated hypothetical investment value of lump sum payment of distributions previously paid to offset accrued pension or retirement benefits under one or more of the three alternative sources or components of RIGP since their Reemployment Commencement Date. (*Id*).

At no time during the administrative claims process, or in the Complaint, did any of the Plaintiffs allege that they wanted to be paid duplicative pension benefits—that is, pension benefits for the first period of employment for which they were already fully paid when they left Xerox's employment the first time. Nor did any Plaintiff claim that they gave up a job on the promise of being paid duplicative pension payments. Nor did they seek to be paid without any offset at all or without an offset that did not take into account the time value of money.

As the Supreme Court recognized in *Conkright*, it would be "highly unforeseeable" and "heresy" *not* to account for the time value of money. 130 S. Ct. at 1650. The time value of money is a basic and pervasive fact of economic life. Plaintiff Alan Clair, for instance, acknowledged during his testimony at the 2006 Hearing on remedies that he was "familiar with the time value of money concept," and admitted that he did not expect to receive a benefit as large as that provided under the Nominal Offset or Layaou approach. (A-304-307; A-235 ¶ 40).[8] Nevertheless, the declarations are now raising these issues for the first time.

In *Design Strategy, Inc. v. Davis*, the Second Circuit upheld a motion *in limine* granted by the lower court which precluded the introduction of evidence at trial to support a new theory of "lost profits" damages. 469 F.3d 284 (2d Cir. 2006). In upholding the exclusion of this evidence the Court relied upon the fact that "lost profits" had not been listed as a category of damages in the plaintiff's Rule 26 Initial Disclosures, "or at any point during discovery. . . ." *Id.* at 293. Moreover, the Court noted that the prejudice to defendant based on the failure to disclose this theory until the eve of trial was real and severe, noting that "discovery would have had to be reopened" to evaluate plaintiff's new theory of damages after it had been closed for a year and a half. *Id.* at 297.

Similarly, in *Roberts v. Ground Handling, Inc.*, the district court granted defendant's motion *in limine* excluding a plaintiff's evidence as to damages that were not identified in Rule 26 disclosures, were not disclosed during any part of discovery (including at deposition or written discovery responses), were not mentioned during prior motion practice and, based on these failures, defendant had no reason to conduct discovery on the issue. As stated by the court:

> To require defendant to incur additional costs and to change its strategy on the eve of trial because plaintiff has concocted a new theory three years into the litigation is simply not fair and would, in a real sense, unduly prejudice defendant.

2007 U.S. Dist. LEXIS 69992, at *15-16 (S.D.N.Y. Sept. 20, 2007).

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

Here, Plaintiffs have never, in the more than 15 years that this case has been litigated, made any mention of a detrimental reliance theory based on alleged promises regarding what offset, if any, individuals who were rehired would be subject to. This includes countless motions, numerous appeals and an evidentiary hearing. Nowhere in this vast record was a claim asserted that any of the Plaintiffs in this action were expressly told by anyone at Xerox that they would not be subject to any offsets to their pensions if they returned to the Company. Certainly, the individualized nature of this type of damages theory is self-evident and, if this Court were going to entertain such a theory, Defendants would be severely prejudiced by having been unable to pursue discovery on this heretofore unmentioned theory. *See, e.g., 24/7 Records, Inc. v. Sony Music Entertainment, Inc.*, 566 F. Supp. 2d 305, 318-320 (S.D.N.Y. 2008) (precluding plaintiff from pursuing damages theory that was not identified in Rule 26 disclosures, was first presented in a pretrial order well after the close of discovery, and where allowing new damages claim would be prejudicial to defendant); *Austrian Airlines Oesterreichische Lufverkehrs AG*, 2005 U.S. Dist. LEXIS 7283, at *5 (S.D.N.Y. April 28, 2005) ("The Court will not allow plaintiff . . . to assert this new, additional damages theory at the eleventh hour.") (citing cases); *Point Prods. A.G. v. Sony Music Entertainment, Inc.*, 2002 U.S. Dist. LEXIS 24450, at *7-14 (S.D.N.Y. Dec. 19, 2002) (precluding introduction of new damages theory where not mentioned during three years of litigation, was first raised after discovery completed and trial was scheduled, and where prejudice to defendant was "significant").

Having first raised the issue of detrimental reliance to support an equitable estoppel remedy request in their present motion, after 15 years of litigation, Plaintiffs should be precluded from pursuing this theory at this point in the case. Accordingly, this Court should entirely disregard the declarations submitted in connection with this theory and should, as well, reject Plaintiffs assertion of equitable estoppel as an equitable remedy.

**CONCLUSION**

For the reasons discussed above, Plaintiffs' motion for re-entry of judgment in its favor or for summary judgment or partial summary judgment on the issue of notice and remedies must be denied.

Date: November 10, 2014
Rochester, New York

*/s/ Margaret A. Clemens*

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