UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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| PAUL J. FROMMERT, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>SALLY L. CONKRIGHT, et al.,<br><br>Defendants. | **Civil Action No. 00-CV-6311-DGL-JWL** |

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR ENTRY OF JUDGMENT ON NOTICE ISSUE**

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Plaintiffs hereby move for entry of judgment on the notice issue. Under the facts of this case and the Second Circuit's recent decision, plaintiffs are entitled to an equitable remedy of (1) no offset, (2) the *Layaou* remedy, or (3) the Actual Annuity offset.

## INTRODUCTION

The facts of this dispute are well-known to the Court. Plaintiffs are rehired employees of Xerox seeking the pensions they earned. For fifteen years, Xerox has refused to pay. The details have varied, but the theme has not: Xerox keeps arguing plaintiffs should suffer an "offset" that Xerox failed to put in the plan or otherwise disclose in plain English. ERISA requires both.

Last December, the Second Circuit—upon hearing the matter for the third time—greatly simplified this case. The court of appeals categorically held that Xerox failed to notice plaintiffs of *any* offset to their pensions. *Frommert v. Conkright*, 738 F.3d 522, 532 (2d Cir. 2013). The only live question for this Court is one of remedy. Liability is, as Xerox concedes, undisputed.

For years, the question of equitable remedies under ERISA was complicated. In 2011, however, the Supreme Court clarified matters considerably. As the Court's decision in *CIGNA v. Amara* makes clear, beneficiaries like plaintiffs are entitled to the equitable remedies of "surcharge," "reformation," and "estoppel." *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011). Surcharge prevents a fiduciary from benefiting from a breach of duty. *Id.* at 1880. Reformation is appropriate "to remedy the false or misleading information [the employer] provided." *Id.* at 1879. Finally, estoppel holds a party to its words when others relied on them to their detriment. *Id.* at 1880. All are

applicable here, and entitle plaintiffs to no worse than the *Layaou* remedy this court awarded in 2007 and the Second Circuit approved in 2001.

Once plaintiffs are granted the equitable relief to which they are entitled for the undisputed notice violations, this Court need not attempt to resolve the plan interpretation issue for a fourth time. That issue will be moot.

## FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs are rehired employees of Xerox. Each plaintiff worked at Xerox for at least one stint of service prior to returning. At issue is if and how plaintiffs' earlier period of service should reduce plaintiffs' pension entitlement today.

### Xerox Plan Basics

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"). 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 ("RIGP/HAP benefit"). The RIGP/HAP benefit is like a traditional pension, where the recipient gets a fixed monthly amount based on tenure and pay. By contrast, the PSP provided each participant with an individual account that consisted of annual contributions plus investment performance appreciation. The PSP was thus 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 Plan. Xerox created two new accounts—a Cash Balance

Retirement Account ("CBRA") and a Transitional Retirement Account ("TRA"). The CBRA was not an actual account, but 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' remaining PSP funds out of the abolished PSP plan and into the restructured Plan. No employee could contribute to or create a TRA after 1989, although any existing TRA account would accumulate real interest. Thus, the TRA could not apply to employees (including plaintiffs) who had cashed out their PSP accounts prior to 1989, because they had no money in the PSP to transfer into the TRA.

When the two plans merged in 1989, the new plan distinguished between the offset applicable to retired employees and employees like plaintiffs. *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. (Section 4.2, 1989 Plan). 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 v. Frommert*, 559 U.S. 506, 510 (2010). For those not yet retired, like plaintiffs, the "phantom account offset" was eliminated. (Section 4.3, 1989 Plan).

**Frommert I**

Xerox nonetheless attempted to apply the phantom account offset to plaintiffs. In 1999, plaintiffs sued and 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. Conkright*, 328 F.Supp.2d 420, 432-33 (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.

This court granted summary judgment to Xerox, but the Second Circuit reversed, holding "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. *Frommert I*, 433 F.3d at 265-66. The Second Circuit further observed that it had already held, in *Layaou v. Xerox Corp.*, 238 F.3d 205, 209-12 (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 back to this Court to fashion a remedy to provide plaintiffs with the benefits they were due.

**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.

*The Plan Administrator Approach (PAA).* The PAA was 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 inflated the past distributions using a compounding 8.5% rate.

*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.

*Layaou Offset.* Plaintiffs proposed adoption of the *Layaou* Offset—named after the approach adopted by now-Justice Sotomayor—under which current benefits would be offset by only the nominal amounts of each plaintiff's prior distribution.

*Actual-Annuity-Offset.* Under plaintiffs' second proposed method—explained by expert actuary Phillip Cofield—the offset would have been equal to the actual RIGP/HAP annuity to which plaintiffs were contractually entitled at their original date of departure. 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, this Court chose the *Layaou* Offset, on two grounds. The first was "plan interpretation;" *i.e.*, Your Honor believed that the 1989 Plan did not include any language authorizing any type of appreciated offset. The second was "notice;" *i.e.*, Your Honor believed that Xerox was prohibited from using an appreciated offset, because no interest rate was ever disclosed. As Your Honor wrote in 2007:

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

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

The Second Circuit affirmed, rejecting the argument that Xerox's PAA "interpretation" of the 1989 Plan was entitled to deference *and* then affirming the *Layaou* Offset as a reasonable interpretation of the 1989 Plan. *Frommert v. Conkright*, 535 F.3d 111, 119-23 (2008) ("*Frommert II*"). Because the Second Circuit resolved the case in plaintiffs' favor on plan interpretation grounds, it did not find it necessary to address the "notice" issue.

Xerox sought review by the Supreme Court solely on the plan interpretation question, arguing that Your Honor's judgment as to the meaning of the Plan must be reversed because no deference was extended to the Plan Administrator's interpretation of the Plan. *Conkright v. Frommert*, 559 U.S. 506, 511 (2010). On that question, five justices agreed with Xerox. *Id.* at 522 (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 the Second Circuit did not rule on the merits of the notice question, the Supreme Court expressly left that issue "to be decided, if necessary, on remand." *Id.* at 522 n.2. The Supreme Court also took specific pains to point out that, even on the plan interpretation question, Xerox still had a duty to offer a reasonable interpretation of the plan; arbitrary constructions were unacceptable. *Id.* at 521 ("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.") The case was remanded for further proceedings consistent with the opinion. *Id.* at 522.

**Frommert III**

On remand, plaintiffs filed a motion with this Court seeking that it reenter its January 2007 judgment—in which Your Honor held that the appropriate offset in this case was the *Layaou* Offset—on notice grounds. Xerox cross-moved and sought an order that the PAA be applied. This Court granted Xerox's motion and ordered that the PAA be applied and plaintiffs be paid benefits accordingly.

The Second Circuit reversed, holding that "the [PAA] offset is an unreasonable interpretation of the retirement plan and it violates ERISA's notice provisions." *Frommert v. Conkright*, 738 F.3d 522, 525 (2d Cir. 2013) (*Frommert III*).

*The Second Circuit on Notice.* On notice, the Second Circuit's holding was blunt and categorical: Xerox *grossly* violated ERISA's notice provisions. As the Second Circuit put it, the relevant "SPDs fail to clearly identify the circumstances that will result in an offset, are insufficiently accurate and comprehensive, and fail to explain the 'full import' of Section 9.6 of the Plan [i.e., the plan's offset provision]." *Id.* at 532. The Second Circuit continued:

> First and foremost, the SPDs do not state that the amount of the lump-sum distribution will reduce the RIGP benefit, stating only that it "may" result in a reduction. This is a critical omission because RIGP is a formula and not an account (like CBRA and TRA). We do not see how a beneficiary would know, given the SPDs' use of the word "may," that a prior distribution from an account would reduce his benefit under a formula unless the SPD made clear the interaction between the two. Thus, *any* interpretation of the Plan that necessarily reduces the RIGP benefit would violate ERISA's notice requirements.
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> Second and relatedly, even assuming that the SPDs prescribe an offset to RIGP, the SPDs fail to describe the mechanics of any offset. Specifically, the SPDs fail to state the interest rate to be used to make the actuarial equivalence. A higher interest rate would lead to a much larger offset than a lower one, leading to a correspondingly greater reduction of benefits. The SPDs are therefore insufficiently accurate and comprehensive.

*Id.* at 532 (emphasis in original).

*Frommert III* thus held that Xerox failed to intelligibly explain that there would be an offset of *any kind*, let alone an *appreciated* offset. That is a gross failure of notice, and one that—as the Second Circuit took pains to point out—is in no way excused or affected by "Supreme Court dicta about offset appreciation." The panel pointedly remarked that passing observations about the time value of money were and are "entirely inapposite to the issue of notice." *Id.* at 533-34.

*The Second Circuit on Notice Remedies.* Left to this Court's resolution was the question of remedy:

> In order to impose an equitable remedy, the district court must consider two questions: (1) what remedy is appropriate; (2) whether Plaintiffs have established the requisite level of harm as a result of the notice violations….[I]n considering whether Plaintiffs have made a sufficient showing of harm, the district court must consider this question in tandem with the equitable remedies it may impose."

*Id.* at 534. As explained below, plaintiffs satisfy the necessary elements of the equitable remedies of "surcharge," "reformation," and "estoppel."

*The Second Circuit on Plan Interpretation.* Aside from the issue of notice, the Second Circuit also held that the PAA was arbitrary and capricious. First, the PAA led to the unreasonable result of putting plaintiffs in a worse position than new hires. *Id.* at 530. Second, the PAA improperly used an interest rate in calculating the offset. Section 9.6 of the Plan by its terms permits an offset of one's past "accrued benefit" only. *Id.* at 530 (quoting Section 9.6). The PAA method—which tacked discretionary interest rates onto plaintiffs' past distributions—was unreasonable in part because the plan "defines the RIGP 'accrued benefit' *only* with reference to the RIGP formula," *id.* at 531 (emphasis added), and the RIGP formula, of course, provides no offset interest rate.

Finally, the Second Circuit explained that only if sufficient equitable remedies are unavailable to plaintiffs need this Court resolve the plan-interpretation issue. *Id.* at 534. As demonstrated herein, however, such remedies are indeed available, and judgment should be entered accordingly.

## SUMMARY OF ARGUMENT

ERISA requires that Xerox accurately and comprehensively disclose any offset to plaintiffs' pensions in a manner that an "average plan participant" would understand. Xerox's disclosures were so bad that the Second Circuit concluded that an average plan participant would be have had no idea that *any* offset would apply to their RIGP benefits, let alone an appreciated offset.

Three traditional equitable remedies—surcharge, reformation, and estoppel—entitle plaintiffs to relief. Surcharge is a remedy used to ensure fiduciaries do not benefit from breaching their duties. In this case, Xerox should get no benefit from its failure to disclose an offset; an appropriate surcharge would be to bar Xerox from applying any offset to plaintiffs' pensions. Reformation is a remedy used to conform the terms of the promise to the understanding of the misled party. In this case, the SPDs objectively failed to disclose an interest rate, leaving average plan participants like plaintiffs to understand that, at most, the only offset would be the nominal amount of their past distributions. Plaintiffs also reasonably relied on Xerox's misleading disclosures, to their detriment, entitling them to recover under an estoppel theory.

Plaintiffs are accordingly entitled to either no offset or the nominal *Layaou* offset. At an absolute minimum, they are entitled to – at worst – an Actual Annuity Offset. The equitable nature of these remedies is explained below.

## ARGUMENT

Plaintiffs suing under ERISA are permitted to seek "appropriate equitable relief." 29 U.S.C. 1132(a)(3). In 2011, in *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011) the Supreme Court clarified and broadened the equitable relief available to ERISA plaintiffs. *Cf. McCravy v. Metro. Life Ins. Co.*, 690 F.3d 176, 180 (4th Cir. 2012) (describing *Amara* as a "striking development" wherein the Supreme Court expanded the equitable relief available to plaintiffs misled by fiduciaries).

First, citing the old maxim that "equity suffers not a right to be without a remedy," the Supreme Court held that lower courts should take a broad view of the equitable relief available to wronged participants. *Amara, 131 S. Ct.* at 1879 (quoting R. FRANCIS, MAXIMS OF EQUITY 29 (1st Am. ed. 1823). Second, the Court specifically identified three species of equitable relief available to ERISA beneficiaries: surcharge, reformation, and estoppel. *Id.* at 1879-81. As explained below, plaintiffs are entitled to recover under all of them. *Cf. Osberg v. Foot Locker, Inc.*, 555 F. App'x 77, 80 (2d Cir. 2014) (describing the *Amara* decision as the Supreme Court "recognizing surcharge and reformation as traditional equitable remedies that may allow for awarding monetary compensation based on misleading disclosures").

## I. The Remedy of Surcharge Entitles Plaintiffs To At Least *Layaou*

In equity courts, surcharging a trustee for breach of his fiduciary duty was a common remedy. *See* G. BOGERT, TRUSTS AND TRUSTEES § 863, 17 (2d ed. 1962) (discussing surcharge); 4 JOHN N. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1080, at 229 (5th ed. 1941) (same); 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 1266-78, at 519-34 (12th ed. 1877) (same). Surcharge includes monetary relief "for a loss resulting from a trustee's breach of duty, or to prevent the trustee's unjust enrichment." *Amara,* 131 S. Ct. at 1880. As the Supreme Court explained, while surcharge is only available "upon a showing of actual harm" by plaintiffs, such harm need not be "detrimental reliance." *Id.* at 1881. Harm "might also come from the loss of a right protected by ERISA or its trust-law antecedents." *Id.*

Plaintiffs were harmed because they lost the central right protected by ERISA: 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. That harm justifies the equitable remedy of surcharge.

One of ERISA's central aims is to ensure that beneficiaries can *know* their pension entitlements and *plan* accordingly. *See Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995) (explaining that "one of ERISA's central goals is to enable plan beneficiaries to learn their rights and obligations at any time"); *Burke v. Kodak Retirement Plan*, 336 F.3d 103, 114 (2nd Cir. 2003) (holding 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"); H.R. REP. NO. 533, 93TH CONG., 2ND SESS. 1974, 1974 U.S.C.C.A.N. 4639, 4646 ("It is grossly

unfair to hold an employee accountable for acts which disqualify him from benefits, if he had no knowledge of these acts, or if these conditions were stated in a misleading or incomprehensible manner in plan booklets.").

By statutorily guaranteeing working people a right to know their entitlements and plan their retirement futures, ERISA ensures that beneficiaries always have the option to negotiate for more generous benefits, or, if that is not possible, to make alternative arrangements to ensure that one's retirement income is sufficient (such as seeking another job or making different savings and consumption choices). Xerox's notice failures are so profound and material that they completely *destroyed* the right of any plaintiff to understand, plan for, or alter his retirement future, while simultaneously capturing for Xerox the benefit of plaintiffs' career labors. This is precisely the "loss of a right protected by ERISA" that the *Amara* Court explained surcharge is available to remediate.

A central aim of surcharge relief is to ensure that fiduciaries do not benefit from breaches. *See* RESTATEMENT (SECOND) OF TRUSTS § 205 (1959) (fiduciary chargeable with "any profit made by him through the breach of trust"); 2 SCOTT ON TRUSTS § 170.25, 1419 (3d ed. 1967) (breaching trustee chargeable for "any profit he made, even if the transaction was fair and reasonable"). Here, the fiduciary – Xerox – was under a duty not merely to disclose the existence and workings of any offset, but to do so plainly and unambiguously. 29 U.S.C. § 1022 (requiring SPDs be accurate, comprehensive, and understandable to the average plan participant).

Yet Xerox failed *egregiously* on *two* fronts: (1) it failed to make clear that there necessarily would be an offset for rehires, and (2) it provided no indication that said offset would be appreciated. *Frommert III,* 738 F.3d at 532, 534. The former justifies a

surcharge equal to No Offset, *i.e.,* to deny Xerox any financial benefit from failing to disclose an offset. The latter justifies a surcharge equal to the *Layaou* Offset, *i.e.,* to deny Xerox any financial benefit from failing to disclose an offset interest rate.

The appeal and sense of the *Layaou* Offset requires little elaboration: (1) it's not hard to disclose an interest rate; (2) Xerox was obligated to do so but did not; and (3) it should not prosper from that failure. Surcharge accordingly easily authorizes plaintiffs to receive *at least* the *Layaou* remedy.

Surcharge would also authorize a more generous remedy: No Offset. The No Offset remedy is implicitly sanctioned by both (1) ERISA, as well as (2) the Second Circuit, in this very case.

The ERISA statute itself supports the equitable No Offset remedy by adopting this precise remedy in analogous contexts. For example, when companies formally amend their plans to reduce benefit accruals, they must meet certain notice requirements. 29 U.S.C. § 1054(h). Among other things, that notice must be "written in a manner calculated to be understood by the average plan participant and…provide sufficient information to allow applicable individuals to understand the effect of the plan amendment." 29 U.S.C. § 1054(h)(2). If said notice "fail[s] to provide most of the individuals with most of the information they are entitled to receive," ERISA deems that an "egregious" failure. 29 U.S.C. § 1054(h)(6)(B). Not coincidentally, the penalty for such a notice failure tracks the precise remedy being urged here: plan participants are expressly entitled to "the greater of: (i) the benefits to which they would have been entitled without regard to such amendment, or (ii) the benefits under the plan with regard to such amendment." 29 U.S.C. § 1054(h)(6)(A). Although the context is slightly

different, the lesson is not: destroying participants' ability to know their entitlements and to plan their future calls for a strong remedy. That remedy equitably may be that the employer cannot benefit *at all* from the improperly noticed offset, *i.e.,* the offset is ignored. That is precisely the No Offset remedy.

As for the Second Circuit: while the court of appeals left the adoption of appropriate equitable remedy to this Court's discretion, it *strongly* hinted that the measure of relief here should be no offset at all. As the Second Circuit pointedly noted, a critical failure of the relevant SPDs was their use of the word "may" instead of "will," leaving any particular plaintiff in the dark as to whether his particular entitlement would be subject to an offset *at all*, let alone with any meaningful chance of figuring out what the *size* of the offset would be:

> First and foremost, the SPDs do not state that the amount of the lump-sum distribution will reduce the RIGP benefit, stating only that it "may" result in a reduction. This is a critical omission because RIGP is a formula and not an account (like CBRA and TRA). We do not see how a beneficiary would know, given the SPDs' use of the word "may," that a prior distribution from an account would reduce his benefit under a formula unless the SPD made clear the interaction between the two. Thus, *any* interpretation of the Plan that necessarily reduces the RIGP benefit would violate ERISA's notice requirements.
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> Second and relatedly, even assuming that the SPDs prescribe an offset to RIGP, the SPDs fail to describe the mechanics of any offset. Specifically, the SPDs fail to state the interest rate to be used to make the actuarial equivalence. A higher interest rate would lead to a much larger offset than a lower one, leading to a correspondingly greater reduction of benefits. The SPDs are therefore insufficiently accurate and comprehensive.

*Frommert III*, 738 F.3d at 532 (emphasis in original). That is why the Second Circuit was moved to remark—not once but twice—that *any* offset of the RIGP benefit violates ERISA's notice provisions. *Id.* at 532 (holding that "any interpretation of the Plan that necessarily reduces the RIGP benefit would violate ERISA's notice requirements") and

*id.* at 534 (holding that "any offset of the RIGP benefit violated ERISA's notice provisions). Defendants could properly be surcharged accordingly.

Surcharge is clearly applicable. Plaintiffs were harmed by being deprived of their right to be able to plan for retirement. This deprivation entitles plaintiffs to, at a minimum, the *Layaou* remedy. The Second Circuit and ERISA strongly suggest that plaintiffs are even entitled to more than this: the No Offset remedy. This Court should accordingly apply the equitable remedy of surcharge and impose one of these two remedies.

## II. The Remedy of Reformation Entitles Plaintiffs To At Least *Layaou*

Reformation is an equitable remedy where the subject instrument—here, the pension plan—is reformed to reflect the understanding of the misled party. *Amara,* 131 S. Ct. at 1879; 4 JOHN N. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 2097 (5th ed. 1941). Here the plaintiffs were misled by Xerox's disclosures and seek reformation of the plan to conform to their objective understanding of the SPDs and related disclosures.

Reformation is appropriate where the victimized party's misunderstanding results from the "fraud or inequitable conduct" of the defendant. *See, e.g., Simmons Creek Coal Co. v. Doran,* 142 U.S. 417, 435 (1892) (fraud or inequitable conduct sufficient ground for reformation); *Home Owners' Loan Corp. v. Stevens*, 179 A. 330, 331-32 (1935) (same); *Heake v. Atl. Cas. Ins. Co.*, 29 N.J. Super. 242, 260 (N.J. Super. Ct. App. Div. 1954) *aff'd*, 15 N.J. 475 (1954) (same).

Inequitable conduct need not rise to the level of fraud to warrant reformation. *See, e.g., Tokio Marine & Fire Ins. Co. v. Nat'l Union Fire Ins. Co.*, 91 F.2d 964, 966 (2d Cir.

1937) (finding reformation in the aftermath of "a wrongful representation [that was] unmalicious and nonfraudulent"); *Esoldi v. Esoldi*, 930 F. Supp. 1015, 1021 (D.N.J. 1996) (explaining that "the fact that the [misunderstanding] was induced or contributed to in some way by the other party is generally sufficient to justify reformation"); 3 JOHN N. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 873 at 421 (5th ed. 1941) (observing that reformation-triggering conduct includes "obtaining an undue advantage by means of some intentional act or omission that was unconscientious").

To be clear: the elements of the equitable remedy of reformation are simply (1) inequitable conduct, and (2) misunderstanding by plaintiffs. [1] Both exist here.

*Inequitable Conduct.* Xerox had a strict duty to accurately and "clearly identify[] circumstances which may result in...offset...of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide." *Frommert III*, 738 F.3d at 532, (quoting C.F.R. § 2520.102–3(l)). Xerox failed spectacularly to satisfy this duty, and that failure indisputably constitutes inequitable conduct. *See Nechis v. Oxford Health Plans, Inc.*, 421 F.3d 96, 103 (2d Cir.2005) (recognizing conduct "violative of ERISA" as a basis for reformation); *Tokio* at 966; *Esoldi* at 1021; POMEROY, §873 at 412; *Washington Mut. Sav. Bank v. Hedreen*, 125 Wash. 2d 521, 529 (1994) (holding that a party with a "duty to inform" who breached that duty "has engaged in inequitable conduct" warranting reformation).

[1] Reformation is a "preparatory step" that "establishes the real contract." *Amara*, 131 S. Ct. at at 1880-81. Reformation accordingly requires only inequitable conduct with a corresponding misunderstanding on the part of the victim; no further showing of "harm" is necessary:

> To obtain contract reformation, equity does not demand a showing of actual harm. *See* Restatement (Second) of Contracts § 155 cmt. e (1981) (stating that party seeking reformation "need not show that the mistake has resulted in an inequality that adversely affects him").

*Osberg v. Foot Locker, Inc.*, 555 F. App'x 77, 80 (2d Cir. 2014).

*Plaintiffs' Misunderstanding.* ERISA presumes that participants will understand their pension entitlements based on plain-English SPDs written for the average plan participant. 29 U.S.C. § 1022; *Burke*, 336 F.3d at 114. Read objectively and from the perspective of an average plan participant, the relevant SPDs convey no more than a nominal offset.[2] As plaintiffs have pointed out tirelessly, there is no line of text, no example, no pointer to another document—nothing—in the relevant SPDs that would have permitted a participant to determine that (1) an interest rate would be used to offset their past distributions, or (2) what that interest rate would be. That stark reality—combined with the fact that Xerox for years provided plaintiffs with individualized benefit statements enumerating their monthly pension entitlement without any offset deduction[3]—is why then-Judge Sotomayor proposed the *Layaou* Offset in 2001, *Layaou v. Xerox Corp.*, 238 F.3d 205 (2d Cir. 2001); why Your Honor imposed the *Layaou* Offset in 2007, *Frommert v. Conkright*, 472 F.Supp.2d 452, 457 (W.D.N.Y. 2007); and why the Second Circuit held last December that any appreciated offset in this case would violate ERISA's notice requirements. *Frommert III*, 738 F.3d at 532.

As the Second Circuit starkly observed in *Frommert III*, the Supreme Court's *dicta* about the "time value of money" are "entirely inapposite to the issue of notice" and the proper remedy for Xerox's violations thereof. *Id.* at 533-34. Plaintiffs were not told that

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[2] While reformation is often based on the "objective, reasonable" expectations of the victim, *Amara v. CIGNA Corp.*, 925 F. Supp. 2d 242, 253 (D. Conn. 2012), plaintiffs' subjective beliefs justify the same result. As the attached declarations reveal, *no* plaintiff read the SPDs or personal benefit statements to mean that some imaginary interest rate would be tacked onto distributions they received long ago from a different & defunct "profit-sharing" plan.

[3] The "Your 1993 Value Added Statement" received in 1993 by Floyd Swaim is a representative example. That document explained that "Under the RIGP formula, the monthly benefit you have earned to date, payable at age 65 is $2183 per month. This benefit will grow as your length of service and earnings increase." There is no mention or numerical calculation of any offset to the RIGP benefit. *See* Declaration of Floyd Swaim.

any offset would be appreciated. Moreover, as Your Honor expressly held in 2004, the *Layaou* Offset "most clearly reflects what a reasonable employee would have anticipated." *Frommert v. Conkright*, 328 F.Supp.2d 420, 458 (W.D.N.Y. 2004).

Accordingly, there is both inequitable conduct and a resulting misunderstanding by plaintiffs. The equitable remedy of reformation thereby entitles plaintiffs to either the *Layaou* or No Offset remedy.

### III. The Remedy of Estoppel Entitles Plaintiffs To At Least *Layaou*

"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). Estoppel requires a promise or misrepresentation by the defendant, reliance by the plaintiff on same, resulting injury, and injustice in permitting the defendant to not be held to its word. *Schonholz v. Long Island Jewish Med. Ctr.*, 87 F.3d 72, 78-79 (2d Cir. 1996); *United States v. Georgia-Pac. Co.*, 421 F.2d 92, 96 (9th Cir. 1970).

SPDs must include all material terms, including offsets. *Frommert III*, 738 F.3d at 532 (citing C.F.R. § 2520.102–3(l)). Not mentioning an appreciated offset in an SPD is a misrepresentation akin to promising employees that there is no appreciated offset to their pensions. Plaintiffs unquestionably relied on this false promise in planning their careers and lives. Because the plaintiffs were individually and collectively misled, they were injured: they had no incentive to and thus did not bargain with Xerox for better pay or benefits; they did not pursue, obtain, or accept other jobs; and they saved less money, thinking their pensions would be sufficient. As the attached representative affidavits

attest, plaintiffs assumed no more than a nominal offset when calculating their pensions and making related employment, savings, and life decisions. For example:

Floyd Swaim's decision to rejoin Xerox was explicitly pension-driven. The job he left—a VP position at Home Savings of America—had paid him a salary 60% higher than the salary he would receive at Xerox. And a competing offer from a third company interesting in hiring Mr. Swaim promised him a salary *twice* the size of his Xerox salary. Mr. Swaim nonetheless rejoined Xerox: the difference was Xerox's attractive pension terms. *See* Declaration of Floyd Swaim. Similarly, Jim Farrell rejected an offer from a Xerox competitor, Copier Services Unlimited, to rejoin Xerox. Like Mr. Swaim, Mr. Farrell chose Xerox because of its attractive pension terms; he had no inkling there would be any offset. *See* Declaration of Jim Farrell.

Paul Frommert abandoned a successful business to rejoin Xerox and thereafter, comfortable with his promised monthly pension, chose to -- in addition to staying with Xerox -- adopt his grandson; to purchase a boat; and to take more expensive family vacations. Mr. Frommert made those choices assuming his monthly RIGP benefit would not be subject to an offset. The subsequent fight over his pension has broken Mr. Frommert financially: Xerox's failure to pay him what he is due has forced to sell his home and other assets, default on numerous credit obligations, and earn money doing odd jobs. *See* Declaration of Paul Frommert. As the attached declarations reveal, other plaintiffs made similar life choices based on Xerox's misrepresentations. Bill Plummer, for example, resolved his divorce while relying on a pension with no offset: he would not have made the same agreement had he known there was an offset. *See* Declaration of Bill Plummer.

The injustice in not holding Xerox to its word is obvious. What happened here was not a marginal notice failure—it was profound, persistent, and profitable to Xerox. The reality is that:

- being definitive about the existence of an offset is not difficult—it requires saying "will" instead of "may";
- disclosing an interest rate with respect to an offset is not difficult—it requires disclosing a number;
- ERISA specifically requires these sorts of things to be disclosed;
- ERISA expressly requires these sorts of things be disclosed in a way that an average worker can understand,
- Xerox failed to do all the above for *years*;
- in addition to defective SPDs, Xerox also sent misleading personal benefit statements to plaintiffs setting forth their individualized monthly pension entitlement with no corresponding offset calculation; and
- as a result of the above, Xerox was able to induce veteran employees who could have gone elsewhere to rejoin Xerox, stay, *and* not agitate for higher compensation.

Plaintiffs thus satisfy the traditional elements of estoppel.

Beyond those traditional elements, some courts have concluded that estoppel also requires "extraordinary circumstances." *Devlin v. Empire Blue Cross and Blue Shield*, 274 F.3d 76, 86 (2d Cir. 2001).[4] While the meaning of "extraordinary circumstances"

[4] The "extraordinary circumstances" element was not historically an element of estoppel in equity courts. *Amara's* observation that "equity suffers not a right to be without a remedy," *Amara*, 131 S.Ct. at 1879, suggests the Supreme Court's disapproval of lower courts adding extra conditions

has not been strictly defined, the following circumstances qualify: (1) cases involving "a promise that the defendant reasonably should have expected to induce action or forbearance on the plaintiff's part," *id*. at 86, (2) cases involving "misrepresentations…over an extended course of dealing," *Pell v. E.I. DuPont de Nemours & Co. Inc.*, 539 F.3d 292, 303-04 (3d Cir. 2008), or (3) the fact "that plaintiffs are particularly vulnerable." *Id.* All three are true here.

Plaintiffs, as elderly workers and retirees, are particularly vulnerable to misrepresentations regarding pension calculations—misrepresentations that occurred over an extended period of years smack dab in the primes of their careers. Aside from the fact that plaintiffs are not financial experts (and thus easy to victimize via backdoor financial chicanery), they are also particularly vulnerable to the exact post-hoc imposition of pension reduction that Xerox seeks here. Plaintiffs cannot go back in time to save more money on their own, negotiate for higher lifetime wages, or take advantage of job opportunities long filled by others. They're stuck with the pensions they have. And all reasonable employers—and even unreasonable ones—know that pensions induce employee commitment and the foregoing of other job opportunities. That's why employers offer them. In fact, the Restatement uses annuities in the employment context as a classic example of when estoppel is warranted:

> 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 (SECOND) OF CONTRACTS § 90, ill. 2 (1932). The situation here is exactly the same except the equities are even worse: the plaintiffs are all rehires. Thus the

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to equitable relief. Here the question is moot, however, because extraordinary circumstances exist.

resignation induced was from a competing company, rather than Xerox, which simultaneously advantaged Xerox, hurt the employee, and deprived a competitor of veteran talent.

For the foregoing reasons, Xerox should be estopped from imposing any offset worse than *Layaou.*

## IV. An Equitable Alternative: The Actual Annuity Offset

The Supreme Court and the Second Circuit have made clear that notice failures are to be remediated equitably. As Plaintiffs have explained, the traditional equitable theories of surcharge, reformation, and estoppel justify the imposition here of either the *Layaou* Offset or No Offset.

Plaintiffs anticipate Xerox will propose that plaintiffs be treated as new hires, *i.e.*, their entitlements will be calculated as if plaintiffs had no prior period of service at the company. Only the years of service of their second stint would "count" toward their pension entitlement.

It is true that the Second Circuit made clear that under *no* circumstances may plaintiffs be treated worse than new hires. So plaintiffs agree that, whatever remedy this court imposes, each plaintiff must be treated at least as well as new hire. That said, New Hire—while appropriate as a bound—is not an appropriate remedy.

New Hire is not appropriate as a remedy because it does not match Xerox's wrongful conduct. Regarding offsets for past service, Xerox was required to (1) explain clearly that there would be an offset, and (2) explain clearly the manner in which that offset would be appreciated, if at all. Xerox did neither, and so the matching remedy should be either to abolish the offset or abolish the interest rate. The New Hire remedy does

neither; instead, it punishes plaintiffs by disregarding years of work and rewards Xerox by allowing it to have recaptured veteran talent at rookie prices.

Xerox knows this. So Xerox promotes New Hire not on its own merit, but instead by disparaging other remedies as not accounting for "the time value of money" and thus being "windfalls." This is untrue for several reasons.

First, labor is not a fixed cost; it is always negotiable, and employees in free markets necessarily have choices. Xerox did not disclose an appreciated offset, and the Plan promised employees all years of service would count toward their pensions. (Sections 1.44 & 1.45, 1989 Plan). Plaintiffs—like all free market employees—made their career choices accordingly, by working for *decades* at Xerox. Xerox unquestionably benefited from that labor. By not counting past service, Xerox now wants to pay a rookie price for veteran labor—and thereby secure a windfall for itself.[5] That's not an equitable result, particularly when Xerox is to blame for this whole mess.

Second, the Second Circuit explicitly recognized Xerox's "time value of money" argument for the canard that it is. *Frommert III*, 738 F.3d at 533-34. What matters in a notice setting is what the fiduciary told participants about how it would reduce their pensions. To have an offset, Xerox was required to tell participants clearly that money received long ago from a defunct plan would be appreciated at X rate and deducted from their current entitlements. There is no "default" offset amount or "default" offset appreciation rate. Vague notions of the time value of money cannot justify the imposition of a constructive interest rate upon plaintiffs. Otherwise the average worker is punished for not reading Xerox's mind, and Xerox is rewarded for being misleading.

[5] Such a result would be particularly inequitable because one of Xerox's central goals during the time period in question was precisely to obtain the return of veteran employees and their proven talents. *See* Declaration of Richard Spring.

New Hire is simply a different way of punishing workers. Instead of reducing their pensions with an undisclosed interest rate, it reduces their pensions by lopping off prior years of service. Xerox should bear the cost of notice failures, not misled employees.

Finally, there *is* an offset solution that both accounts for past service and implicitly includes a time value of money (without reliance on an undisclosed interest rate): the Actual Annuity Offset. The Actual Annuity Offset—originally proposed by expert actuary Philip Cofield—is simple and equitable.[6] When plaintiffs first left Xerox, they were entitled to an annuity from the RIGP, *i.e.*, a monthly payment (based on average pay and tenure) that commenced upon retirement. That "old" annuity entitlement naturally incorporates the time value of money, because it promised to make payments in the future, when the participant retired.

Accordingly, there is no need to "appreciate" that annuity promise. One can simply take that "old" annuity and deduct it from the RIGP annuity a plaintiff is currently entitled to receive upon retirement. If, when an employee first left Xerox, he was entitled to a RIGP annuity that would pay him $500 a month upon retirement at age 65, rejoined Xerox, and then (upon ultimate retirement) was entitled under the RIGP to an annuity that (counting all years of service) would pay him $3,000 a month upon retirement at age 65, the Actual Annuity approach would entitle him to $2,500 a month; *i.e.*, $3,000/month minus $500/month.

Because both entitlements are fixed and payable at the same time, subtracting the former from the latter results in a net annuity that fairly offsets past service without using an undisclosed interest rate. Should this court choose to do something other than the

[6] *See* Letter Brief of Phillip Cofield (Doc. 231) (explaining Actual Annuity Offset); RT 7/11/2006 at 41-107 (direct examination and cross-examination of Phillip Cofield).

*Layaou* Offset or No Offset, the Actual Annuity Offset is an equitable alternative sensitive to the circumstances of this case and consonant with the Supreme Court's decision in *Amara*.

## CONCLUSION

This Court has already (correctly) held that the *Layaou* Offset "most clearly reflects what a reasonable employee would have anticipated." *Frommert v. Conkright*, 328 F.Supp.2d 420, 458 (W.D.N.Y. 2004). The equitable remedies of surcharge, reformation and estoppel each independently authorize such relief.

Xerox indisputably violated ERISA. As a result of Xerox's violations of ERISA, reasonable employees expected that their pensions would, at worst, be offset by the nominal value of their prior distribution. These Xerox employees lived their lives, and planned their retirement, accordingly.

Either Xerox or its employees must bear the burden of Xerox's violations of ERISA. The culpable party that violated ERISA and caused the problem – Xerox – should bear that burden, not its innocent employees. Plaintiffs have waited long enough for the pensions that Xerox told them for *decades* they would receive. It is time that Xerox paid them. Judgment should accordingly be entered in favor of plaintiffs.

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