12-0067-cv

United States Court of Appeals

for the

Second Circuit

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(For Continuation of Caption See Inside Cover)

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

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

PETER K. STRIS
BRENDAN MAHER
STRIS & MAHER LLP
Attorneys for Plaintiffs-Appellants
19210 S. Vermont Avenue, Building E
Gardena, California 90248
(424) 212-7090

THOMAS F. McGEE, VINCENT G. JOHNSON, F. COLT HITCHCOCK, RONNIE TABAK, MARTHA LEE TAYLOR, KATHY FAY THOMPSON, MARY BETH ALLEN, CRAIG SPENCER, LINDA S. BOURQUE, THOMAS MICHAEL VASTA, FRANK C. DARLING, CLARK C. DINGMAN, CAROL E. GANNON, JOSEPH E. WRIGHT, DAVID M. ROHAN, DAVID B. RUDDOCK, CHARLES HOBBS, CHARLES ZABINSKI, CHARLES J. MADDALOZZO, JOYCE M. PRUETT, WILLIAM A. CRAVEN, MAUREEN A. LOUGHLIN JONES, KENNETH W. PIETROWSKI, BONNIE COHEN, LAWRENCE R. HOLLAND, GAIL A. NASMAN, STEVEN D. BARLEY, DONNA S. LIPARI, ANDREW C. MATTELIANO, MICHAEL HORROCKS, CANDICE J. WHITE, DENNIS E. BAINES, KATHLEEN E. HUNTER, JOHN L. CRISAFULLI, DEBORAH J. DAVIS, BRENDA H. McCONNELL, KATHLEEN A. BOWEN, ROBERT P. CARANDDO, TERENCE J. KURTZ, WILLIAM J. CHESLOCK, THOMAS E. DALTON, LYNN BARNSDALE, BRUCE D. CRAIG, GARY P. HARDIN, CLAUDETTE M. LONG, DALE PLATTETER, MARY ANN SERGEANT, MOLLY WHITE KEHOE, DAVID K. YOUNG, LESLIE ANN WUNSCH, RICHARD J. GLIKIN, EUGENE H. UPDYKE, MICHAEL R. BENSON, ALVIN M. ADAMS, RONNIE KOLNIAK, JAMES J. FARRELL, ROBERT L. BRACKHAHN, BENJAMIN C. ROTH, CARMEN J. SOFIA, KATHLEEN W. LEVEA, FREDERICK SCACCHITTI, PAUL DEFINA, JAMES G. WALLS,

Plaintiffs-Appellants,

– v. –

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

Defendants-Appellees.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

INTRODUCTION

Plaintiffs-Appellees ("Plaintiffs") submit this Reply Brief in support of their appeal.

Plaintiffs are rehired employees who worked for Xerox more than once. After their first stints, plaintiffs received modest monies from a now-defunct profit-sharing plan. Upon returning to and staying at Xerox, plaintiffs did not expect that old money—any more than long ago received bonuses or company cars or medical benefits—would be "appreciated" in value at 8.5% annually and deducted from their current pensions.[1] And under no circumstances did plaintiffs contemplate that they would be treated worse than new hires with respect to their retirement benefits. No one reasonable would.

There is no serious dispute that the notice plaintiffs received from Xerox about their pensions confirmed the plaintiffs' common sense expectations. The SPDs and personal benefits statements at issue here neither mentioned any appreciated offset—either in general or specifically—nor gave plaintiffs any reason to believe that they would be worse off than new hires. Plaintiffs planned and worked accordingly.

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[1] This is the "PAA Offset." *See* Pl. Br. at 16.

Yet Xerox asks this Court to affirm a lower court ruling that allows Xerox to have put plaintiffs in a never-mentioned, multi-million dollar hole because of their past service. As the United States put it: the PAA "treated rehired employees as if they owed the plan benefits upon rehire even though they were not informed of that situation when they accepted reemployment." *Conkright v. Frommert*, 130 S. Ct. 1640, U.S. Amicus Br. 33-34, 2009 WL 4030393, at *33-*34 (citation and quotation omitted). Xerox's own charts show the millions of dollars these roughly one hundred plaintiffs would have needed to "pay back" to the plan before they could earn retirement parity with new hires.[2]

That cannot possibly be right, under law, equity, or common sense. And, indeed, the lower court's opinion is rife with error: it conflates issues of notice and interpretation, it ignores the Supreme Court's holdings in this very case and in *CIGNA Corp. v. Amara,* 131 S. Ct. 1866 (2011), it misreads the plan language, it ignores ERISA law on

[2] In 2006, Xerox produced comparative offset calculations. A513-515; *see also* Pl. Br. at n.1 (explaining chart). The second line from the bottom on A515 reflects the totals of the comparative pension entitlements using various methods. The column offsets include "No Remedy" (the phantom account offset), "Our Offset Approach No 98 Cutoff" (the PAA), "Jaffe Layaou" (the Layaou Offset), and the two "New Hire…No 98 Cutoff" columns provide approximations as to what "new hire" relief would be worth to plaintiffs, e.g., roughly $5-6 million more than the PAA. Of course, the actual numbers will be higher since several years have passed since the preparation of the chart.

conflict and bad faith, and it runs utterly counter to the point of a statute designed to protect the pension expectations of working Americans. If an employer is going to reduce employees' pensions by millions of dollars through the discretionary use of an interest rate, *it must tell them.*

Reversal is warranted.

SUMMARY OF ARGUMENT

It is clear that the district court did not believe that the plaintiffs received anything resembling actual notice of the appreciated offset imposed upon them; rather, Judge Larimer believed, wrongly, that participant awareness of "some" offset was sufficient to require him to defer to whatever appreciated offset Xerox could manufacture. SPA17. As plaintiffs explained in their initial brief, this was error. Pl. Br. at 24-40. Plaintiffs were, and are, entitled to be notified of the terms of any offset applied to them and are entitled to equitable relief in the absence of such notice.

Neither Xerox nor its *amici* seriously contend in their papers that plaintiffs had the slightest idea that the PAA would be imposed, or that plaintiffs were informed they would be treated worse than rookie employees. Instead, Xerox's central strategy was and is to argue that

the language of the plan is all that matters; notice is irrelevant. *See, e.g.,* Resp. Br. at 51.[3] From that mistaken predicate, Xerox urges affirmance because the plan reasonably provides for the imposition of a PAA offset. Resp. Br. at 24-46. To be clear: the plan does *not* reasonably provide for the PAA offset. *See, infra,* pages 21-24 (Section II). As explained below, however, Xerox makes a more fundamental error.

The Supreme Court has made clear that ERISA requires that (1) pension terms actually be in the plan *and* that (2) all material terms be plainly communicated to plan participants. Pl. Br. at 24-43. The former is akin to a "contract" obligation and the latter to a "disclosure/notice" obligation. They are separate and independent obligations. The presence of a term in the plan is not enough; it must also be properly disclosed or plaintiffs are entitled to equitable relief. *Conkright v. Frommert*, 130 S. Ct. 1640, 1652 n.2 (2010) acknowledged this reality and *Amara* explicated it. *See, infra,* pages 6-10 (Section I.A). Xerox asks this Court to ignore both opinions and erase the notice requirement Congress wrote into ERISA. Fealty to the Supreme Court and the legislature is the more sensible course.

[3] Plaintiffs cite to Xerox's brief in this appeal as "Resp. Br. at [page number]."

As a back-up approach, Xerox and its *amici* make various buckshot arguments as to why, even if notice is a separate obligation, plaintiffs in this case are not entitled to relief. Resp. Br. at 47-56; Bus. Br. at 24-30.[4] None has merit, as each depends on a mistaken reading of *Amara* and a forgetfulness about various facts that Xerox has long admitted or never contested. *See, infra,* pages 5-21 (Section I). Plaintiffs are entitled to equitable relief that, at a minimum, treats each no worse off than newly hired employees. And, should remand be necessary, plaintiffs are entitled to discovery as part of those proceedings. *See, infra,* pages 25-27 (Section III).

ARGUMENT

I. Plaintiffs Received No Notice of Xerox's "Plan Administrator Approach" Offset And Are Entitled To Relief.

Here is how the PAA works: (1) it takes, as its starting point, monies plaintiffs received a long time ago when they first left Xerox; (2) it hypothetically appreciates that amount by 8.5% annually; (3) it deducts that hypothetical sum from plaintiffs' current pension. Pl. Br. at 16. For a worker attempting to plan his retirement, that interest rate

[4] The Business Roundtable, the Chamber Of Commerce of the United States of America, the ERISA Industry Committee, and the American Benefits Council submitted an amicus brief in support of Xerox. Plaintiffs cite to that brief as "Bus. Br. at [page number]."

is of crucial importance. It determines the size of his pension reduction.

In the SPDs at issue here, Xerox never explained that past monies received would be "appreciated" and deducted from a plaintiff's current entitlement. Pl. Br. at 29. It never mentioned an 8.5% interest rate or illustrated how it would work to diminish a plaintiff's pension. *Id.* To the contrary, Xerox said only that there "may" be an offset and provided plaintiffs with personal benefits statements with numerical calculations that reflected *no* offset. *Id.* at 30; DOL Br. at 14-18.

The above does not constitute notice under any sense of the term, let alone under ERISA's strict requirements. *Cf. Layaou v. Xerox Corp.*, 238 F.3d 205, 211 (2d Cir. 2001) (explaining that Xerox's SPDs provided insufficient notice of an appreciated offset). Indeed, Xerox does not seriously argue that it *actually* notified plaintiffs of the PAA offset. Instead, Xerox and its *amici* offer a smattering of excuses. Not a single one is persuasive.

A. Notice Is A Separate and Independent Ground For Relief

Xerox's primary excuse for its notice failure is an argument that the question of plan interpretation subsumes the notice issue. Resp. Br. at 51. In other words, according to Xerox, if the plan can be

reasonably read to support the PAA, then a notice failure is irrelevant. *See also* Bus. Br. at 21-24 (seeking to read notice out of ERISA for policy reasons).

That is squarely wrong. Justice Roberts said so in this case, *Conkright* 130 S. Ct. at 1652 n.2, and then Justice Breyer (in an opinion joined by Justice Roberts) reaffirmed the point. *Amara*, 131 S. Ct. at 1878 (holding equitable relief available for SPD deficiencies). Under ERISA, pension terms must be in the plan, of course, but those terms must *also* be accurately and plainly communicated to plaintiffs in a way consistent with the requirements of equity. The former is akin to a contract claim; the latter is akin to a disclosure claim. A disclosure failure entitles the plaintiffs to equitable relief, irrespective of the content of the plan.

Throughout this entire case, plaintiffs have argued both that the plan did not include any appreciated offset and that Xerox misleadingly failed to communicate such an offset to plaintiffs in plain English, as ERISA requires. Pl. Br. at 14-15 (describing plaintiffs seeking relief under 28 U.S.C. § 1132(a)(1)(B) for breach of plan terms and 28 U.S.C. § 1132(a)(3) for inadequate disclosure of an appreciated offset). One argument does not subsume or cut off the

other. That was and is the entire point of the Supreme Court's notice carveout in *Conkright* and the central holding of the subsequent notice decision in *Amara*. Xerox is simply wrong to suggest, as it does throughout its entire brief, that there is no "notice" issue in this case.[5]

Xerox and its *amici* dislike the notice obligation on policy grounds, not legal ones. Specifically, Xerox professes a policy worry that treating the question of notice (i.e., what plaintiffs were told about plan terms), distinct from the question of plan interpretation (i.e., what the plan terms were), will "undermine" *Firestone* deference. Resp. Br. at 48-50. *Amici*, even more breathlessly, see the notice issue as part of a nefarious conspiracy to overturn *Conkright* "*sub silentio*." Bus. Br. at 23. But the Supreme Court *explicitly* preserved the notice question in this case. *Conkright,* 130 S. Ct. at 1652 n.2. There was nothing silent about it.

To dispel any lingering confusion about the significance of notice, a year after *Conkright* the Court went on to write an entire opinion about how improper notice entitles plaintiffs to relief, independent of plan terms. In *Amara*, "contract" relief under 28 U.S.C. §

[5] Nor did this Court say otherwise in its *Frommert I* remand. *Frommert v. Conkright*, 433 F.3d 254, 268, 272 (2d Cir. 2006) ("*Frommert I*") (ordering remand proceedings that included consideration of "equitable principles" and "appropriate equitable relief").

1132(a)(1)(B) was unavailable because there was no breach of the operative plan's terms; instead, "[w]hat the District Court did … may be regarded as the reformation of the terms of the plan, in order to remedy the false or misleading information" that violated ERISA's notice requirements. *Amara,* 131 S. Ct. at 1879. That explicitly presumes an independent and actionable notice obligation. The Court expressed no concern that the availability of equitable relief for faulty disclosures would undermine ERISA's regulatory scheme.[6]

That is not surprising. Xerox's policy concerns are unpersuasive. SPDs are supposed to be comprehensible and address material benefit terms, and usually, they do. In those cases, no notice claim lies, and technical ambiguities in a complicated plan document will not empower contentious plaintiffs.[7] However, when an SPD does fail to

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[6] The *Amara* Court rejected the argument, made by the Solicitor General, that a misleading SPD could modify, as a matter of *contract*, plan terms, because the issuance of an SPD is not a contractual act. *Amara*, 131 S. Ct. at 1878. To prevent confusion about the meaning of that holding, however, the Court explained that "[n]one of this is to say that plan administrators can avoid providing complete and accurate summaries of plan terms in the manner required by ERISA and its implementing regulations." *Id.* A failure to do that leads to equitable, not contractual, relief.

[7] *Skinner v. Northrop Grumman Retirement Plan B*, 673 F.3d 1162 (9th Cir. 2012), cited by *amici*, Bus. Br. at 26, does not help Xerox. In that case (1) Northrop disclosed pension "formulas" that included an "annuity equivalent offset," *id.* at 1164, (2) plaintiffs testified that they "understood how [their] benefits would be calculated, including the annuity equivalent offset," *id.* at 1165, and (3) there was no showing that any disclosure regarding the offset was misleading, *id.* at 1168.

identify and explain an important pension term, that failure should not be *excused* by the fact that the plan was ambiguous. That makes no sense, as it would provide employers with precisely zero incentive to write either clear plans or sufficient SPDs, and it would give employees no way to reliably calculate their pensions.

B. The PAA Appreciated Offset Was A Material Term.

Xerox's second attempt to excuse its notice failure is to argue that the operative interest rate is a "detail[]" that need not be disclosed under ERISA. Resp. Br. at 49. This argument is wrong.

The relevant regulations specifically require SPDs to describe benefit reductions, to use illustrations for complicated concepts, and to neither minimize nor fail to inform beneficiaries about applicable benefit limitations. 29 C.F.R. § 2520.102-2(a); 29 C.F.R. § 2520.102-2(b).

An offset, by definition, is a benefit reduction. And here it's a big one. The difference between a nominal offset and the PAA is roughly fourteen or fifteen million dollars, or about $140,000 per plaintiff.

A515.[8] The difference between "new hire" treatment and the PAA is roughly five or six million dollars. *Id.*

Consider the three crucial terms needed to calculate any appreciated offset. They are: (1) the offset principal, (2) the interest rate, and (3) the period over which the second is applied to the first. You have left out more than a "detail" if you leave out the second term; you've left out the whole appreciation ballgame. ERISA obviously requires clear and comprehensible disclosure regarding such a term. Pl. Br. at 24-26.

Plaintiffs cited and discussed at length *Wilkins v. Mason Tenders*, 445 F.3d 572 (2d Cir. 2006) in their initial brief. Pl. Br. at 31-33. *Wilkins* is a near-perfect analogy to this case, involving as it did an SPD which utterly failed to inform the plaintiff of the existence or import of a crucial limiting condition on a plaintiff's entitlement to benefits. *Id.* Neither Xerox nor its *amici* mention the case, which amounts to a *de facto* concession that *Wilkins* requires reversal here.

Xerox claims that plaintiffs are asking it to "map out the details of every actuarial conversion." Resp. Br. at 49. That is not true. An appreciated offset depends on an interest rate. An interest rate is a

[8] "Jaffe Layaou" is the nominal offset; "Our Offset Approach No 98 Cutoff" is the PAA. *See also, supra,* page 2, n.2 (explaining the offset chart).

number. Plaintiffs wanted Xerox to have (1) told them there would be an interest rate, (2) told them the number or how to figure it out, and (3) provided a simple example.

Nor does *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184 (2d Cir. 2007) help Xerox. As plaintiffs mentioned in their opening brief, the panel in *McCarthy* took pains to affirmatively distinguish that case and that holding from the facts here. Pl. Br. at 33, n.8. In *McCarthy*, the SPD was explicit that there will (not "may") be a reduction in benefits for early retirees who had previously left the company, and that the reduction would be greater than 3% annually. *McCarthy v. Dun & Bradstreet Corp.*, 2004 WL 2743569, *3-4 (D.Conn. 2004). Nor did the defendant in *McCarthy* issue personalized calculations that misled participants about their entitlements. *Id.* at *4. Accordingly, the *McCarthy* panel easily distinguished Xerox's faulty disclosures here—in which participants were kept completely in the dark, as well as affirmatively misled—from factual circumstances like those of McCarthy. *McCarthy*, 482 F.3d at 195-197.

Bereft of precedent, Xerox predicts woe if it were required to "lard" its SPDs with "minutiae" such as the presence and workings of a multi-million dollar benefit reduction. Resp. Br. at 50. Xerox is

hard to take seriously. After all, Xerox spent three entire SPD pages touting the attractiveness of its benefit plan. A525-527. It even put in a chart boasting of the Xerox plan's impressive "competitive ranking." A526. Xerox was apparently unconcerned that pages of promotional fluff would render the SPD too long or distracting.

Xerox's insistence that the interest rate is an immaterial detail contradicts its own position. According to Xerox, a rate for the time value of money is so important that it would be horribly unfair to not include it in plaintiffs' benefit calculations. Resp. Br. at 37. If so, then surely the rate was important enough for Xerox to have disclosed it.

C. The Remaining Notice Objections Lack Merit.

As explained in plaintiffs' opening brief, *Amara* makes clear that the appropriate remedy for a notice failure is equitable relief, which includes reformation, estoppel, and surcharge. Pl. Br. at 34-39. Plaintiffs explained the contours of those remedies and how the record in the case objectively supports relief along those lines. *Id.* Xerox and its *amici* offer a series of specious arguments in response.

First, Xerox argues that because this case involved a 204(h) violation—i.e., an invalid plan amendment—the appropriate remedy

is to determine what plaintiffs are entitled to under the unamended plan. Resp. Br. at 47. This is true as far as it goes, but it does not go far. Here's why: it is obvious that plan participants cannot be bound by an improper amendment, of course, and an inquiry into the terms of the old, unamended plan answers that question. But that inquiry—i.e., what is the content of the old, unamended plan?—is separate from the question of whether the terms of the old plan were properly communicated to participants, i.e., was proper notice given of the terms of the old, unamended plan?

An invalid amendment does not strip victimized plaintiffs of their notice rights. Whatever the terms of the unamended plan, those terms must *also* have been properly noticed to plaintiffs. Xerox is *again* attempting to argue the presence of a plan interpretation question sweeps notice failures under the rug. That is wrong.

Second, Xerox claims that *Amara* does not help plaintiffs because plaintiffs need have shown "actual harm" to obtain equitable relief. Resp. Br. at 55. Xerox ignores the record. *Xerox* produced a chart that showed the actual monetary harm suffered by each and every plaintiff as a result of using the PAA (as opposed to other offsets). A513-515; *see also, supra,* page 2, n.2. Xerox cannot claim no actual

harm has been shown when its own chart proves otherwise. Moreover, Xerox itself proposed the "new hire" approach and affirmatively asserted during the *Frommert I* remand and on appeal that, as a matter of fact, the "new hire approach meets appellees' prior expectations." Pl. Br. at 36; Xerox Brief in *Frommert v. Conkright,* 535 F.3d 111 (2d Cir. 2008), 2007 WL 6216089 at *14-17 ("F. A New Hire Approach Meets Appellees' Prior Expectations"). To summarize: (1) Xerox claimed the rehired plaintiffs expected "new hire" treatment, and (2) Xerox showed that harm was suffered because that expectation was not met.

More generally, in 2006, on remand from this court, the district court held an evidentiary hearing to determine what equitable relief was appropriate. During that hearing, the district judge permitted plaintiff Alan Clair to testify, as a representative plaintiff.[9] Mr. Clair's testimony was perfectly consistent with what the voluminous documentary evidence in the case objectively showed, namely that no rehired employee expected to be treated worse than a new employee.

[9] In 2006, plaintiffs' counsel offered to produce two representative plaintiffs, Mr. Clair and Mr. Swaim, but only Mr. Clair was permitted to testify. A278. Although the court would in 2011 informally refer to the 2006 hearing as a trial, A769-770, in 2006 the court explained that the hearing was not a full-blown "trial" and that he would only hear "brief testimony" from Mr. Clair. A281-282.

A307. *See also* A218 (letter from Paul Frommert expressing disbelief that veteran employees would be treated worse than new hires). Moreover, the documentary and testimonial evidence further established that plaintiffs' "new hire" expectation was an outer bound; they expected to be treated no worse than new hires, but possessed the operative expectation that the offset would be nominal. A299; A307. Plaintiffs would not have rejoined Xerox had they objectively expected to be treated worse than new hires.

On the basis of that hearing and the case record to date, Judge Larimer concluded two things. First, he concluded that, as a legal matter, the plan provided for no appreciated offset. Second, he concluded that, as a matter of fact, none of the plaintiffs in the case expected any type of appreciated offset:

> 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) (emphasis added).[10]

[10] Judge Larimer's 2011 decision did not disturb his 2006 factual findings. SPA 1-18. Rather, he made an error of law in 2011. Judge Larimer wrongly believed

Xerox did not dispute that finding of fact on appeal; instead it made the strategic decision to treat this case as a dispute entirely about the district court's construction of the plan, and then to concomitantly argue that its hoped-for (and achieved) plan interpretation victory would render the admitted facts of plaintiffs' notice-expectations and injuries irrelevant. Pl. Br. at 18-19. Contrary to Xerox's gamble otherwise, the notice issue survived, and Xerox cannot now resurrect evidentiary objections it waived during the 2006 remand.

In any event, to the extent this court believes the *Amara* decision imposes some unmet evidentiary burden upon plaintiffs, justice requires a remand with instructions to the lower court that plaintiffs be permitted to introduce such evidence. During the June 2011 hearing that led to the decision which prompted this appeal, plaintiffs were permitted to offer argument but not additional evidence. A759-858.[11]

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that because plaintiffs were aware of "some" offset—not an appreciated offset, but *any* offset—that the *Conkright* decision required him to bind plaintiffs —even on the issue of notice—to any appreciated offset that Xerox could reasonably read from the plan. Pl. Br. at 20-22 (quoting transcript of the June 2011 hearing and the November 2011 decision).

[11] During the June 2011 hearing, plaintiffs requested an opportunity to further develop the factual record, including issues relating to appropriate offset calculations. A768. The district court ultimately declined to "reopen … discovery and trial." A769-770. By "trial," the court was referring to the 2006 hearing, which the court believed was "concluded" prior to the June 2011 hearing. A763-764. Plaintiffs did not have a meaningful opportunity to supplement the

Plaintiffs are more than happy to supplement the existing record on remand, in accordance with this Court's instructions, and at whatever level of detail is necessary.

Xerox's *amici* also speculate that *Amara*'s holding does not help plaintiffs. They are mistaken. First, the *amici* hypothesize that reformation cannot lie here because the "administrator" rather than the "plan sponsor" issued the defective notice. Bus. Br. at 26-29. Such would mean reformation would never lie in the case of a defective SPD, because it is *always* the case that the plan and its administrators (rather than someone acting as a plan sponsor), issue SPDs. *Amara* contemplates no such restriction; the crux of that case involved deficient SPDs issued by the plan. *Amara*, 131 S. Ct. at 1876-1878 (discussing deficient SPDs).[12]

It is worth noting that not only did the Supreme Court specifically endorse equitable reformation as a remedy in *Amara*, it took pains to caution against the invocation of meaningless technicalities such as

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record in accordance with any new requirements imposed by *Amara*, which was decided shortly before the June 2011 hearing.

[12] *Amici* quote language in *Amara* distinguishing between the plan sponsor and the administrator, Bus. Br. at 27, but that portion of the opinion corresponds to the Supreme Court explaining why remedies such as reformation are remedies not properly sought under 29 U.S.C. § 1132(a)(1)(B), but rather under 29 U.S.C. § 1132(a)(3). Administrators lack *contractual* power to amend plans with SPDs, but their representations, if deficient, can give rise to equitable remedies such as reformation, estoppel, and surcharge. *Amara*, 131 S. Ct. at 1877-1879.

those urged by *amici* to deny relief; Justice Breyer reminded lower courts, when fashioning equitable relief in response to a notice violation, that "[e]quity suffers not a right to be without a remedy." *Id.* at 1879 (citing R. FRANCIS, MAXIMS OF EQUITY 29 (1st Am. ed. 1823)). As the Fourth Circuit recently put it: "[b]efore Amara, various lower courts, including [the Fourth Circuit], had (mis)construed Supreme Court precedent to limit severely the remedies available to plaintiffs suing fiduciaries." *McCravy v. Metropolitan Life Ins. Co.*, ---- F.3d ----, 2012 WL 2589226, *3 (4th Cir. 2012) (explaining that in a "striking development, the Supreme Court in *Amara* expanded the relief and remedies available to plaintiffs asserting breach of fiduciary duty.").

Even on the technicalities, Xerox's *amici* are wrong. Plaintiffs here sued the employer-plan sponsor (Xerox), the plan itself, and the human administrators. The SPDs were prepared and issued by either Xerox or its agents, namely, the Xerox pension plan and human administrators.[13] There is no dispute the latter are entirely controlled and funded by Xerox, nor that the plan exists and is administered for

[13] The December 1989 SPD was written by the "Corporate Communications" department of Xerox. A524.

the purpose of attracting and retaining employees *to work at Xerox*. Reformation necessarily tracks such agency.

Amici's other reformation objection—that reformation cannot lie here because there was, according to *amici*, no malicious misrepresentation—ignores the facts and misapprehends the predicate for reformation. Bus. Br. at 25. "Inequitable conduct" as well as conduct "violative of ERISA" can be grounds for reformation. *See, e.g., Nechis v. Oxford Health Plans*, Inc., 421 F.3d 96, 103-04 (2d Cir. 2005) (conduct violative of ERISA one predicate for reformation claim); *Simmons Creek Coal Co. v. Doran*, 142 U.S. 417, 435 (1892) (inequitable conduct sufficient ground for reformation).

ERISA is designed to promote transparency and planning in employment arrangements. The *point* of providing accurate information in SPDs is to inform workers of their entitlements, so as to permit them to make accurate choices about whether to stay with the company or make alternative decisions. For Xerox to not inform rehires about an appreciated offset which reduced their pensions by millions of dollars—and to follow that up by sending each plaintiff personal benefits statements that showed each plaintiff a personalized pension number with no offset—is both inequitable and violative of

ERISA's letter and spirit. Pl. Br. at 28-33. Reformation (and surcharge for monies due under the reformed plan) is accordingly available. Pl. Br. at 33-39. Caselaw in this circuit similarly supports plaintiffs' claims for relief under an equitable estoppel theory. *Id.*

II. The PAA Approach Is Unreasonable.

The vast majority of Xerox's brief is spent arguing that the PAA is fair and reasonable. Even if that were true, Xerox would lose on notice. *See, supra,* pages 6-21 (Section I).

As to the reasonability of the PAA, Xerox's core argument is that the interest rate used to appreciate plaintiff's past distributions comes from PBGC rates that were used to convert TRA accounts into annuities after 1989. Resp. Br. at 28. The problem with this argument, as plaintiffs pointed out in their brief and Xerox ignored, is that *plaintiffs did not have any money in TRA accounts*. Pl. Br. at 13, 47.[14] Accordingly, Xerox never explains how any reasonable person could have possibly guessed that the interest rate applicable to "transitional" accounts created years after plaintiffs first left the company would somehow apply to monies they received years earlier.

[14] A few plaintiffs who returned before 1989 did have some money in their TRA accounts, money which was earned *after* their return to Xerox. But those sums were small and in no way related to money that had been paid out to them when they first left the company years earlier.

Pl. Br. at 48-49. Nor does Xerox address the fact that the interest rate the plan sets as applicable to the TRA accounts to annuitize said monies reflects described *an actual entitlement*, rather than a hypothetical offset.

Indeed, as plaintiffs pointed out, the only language in the plan that reasonably connects past distributions to a current benefit is Section 9.6. Section 9.6 specifically defines the offset as the "accrued benefit" attributable to the prior distribution. Pl. Br. at 41; A152.

Something cannot be an accrued benefit if a person was never entitled to actually receive it. Pl. Br. at 41-42. Xerox never responds to this argument; it merely asserts that an accrued benefit can be something that plaintiffs were never entitled to, with no attempt to explain the logical impossibility of such a claim. As plaintiffs previously explained, upon their initial departure, plaintiffs were only entitled to receive either (1) their PSP balance (i.e., the Layaou Offset) or (2) the RIGP/HAP annuity (i.e., the Actual-Annuity Offset). That was it. Plaintiffs, of course, proposed both offsets below. Pl. Br. at 9-10.

In addition to actually satisfying the language of the plan, unlike the PAA, neither of those offsets requires the selection of a

discretionary interest rate, and thus neither runs afoul of the tax code. Pl. Br. at 46-48. Xerox claims plaintiffs have no standing to claim a tax code violation, but Xerox misunderstands plaintiffs' argument. Resp. Br. at 33. Plaintiffs are not claiming they are entitled to relief because Xerox's PAA violates the tax code; plaintiffs are claiming that the PAA is unreasonable because it violates the tax code. Pl. Br. at 47-48. Nor, as both plaintiffs and the Department of Labor pointed out, is it reasonable to interpret a plan without any acknowledgement of the labor market realities that govern the bargains veteran employees strike. Pl. Br. at 49-54; DOL Br. at 20-22.

Finally, Xerox generally attempts to demonize plaintiffs by claiming that they are seeking a "windfall," should either the Actual-Annuity Offset or the Layaou Offset be used. To begin, neither is a windfall, because both provide plaintiffs with pensions paid for years of work and were part of a compensation package offered by Xerox to get successful veteran employees to return to Xerox in lieu of alternative employment. Financial enticements to acquire proven talent are used routinely in business; that's how the free market works.

That aside, Xerox complains about the Actual-Annuity Offset because it does not precisely reflect the amount of money plaintiffs

received when they first left the company. Xerox declines to specify the magnitude of this difference, because it is, in most instances, a modest sum—a difference which becomes meaningful as an offset only when a high imaginary interest rate is used to project its future value. In other words, Xerox claims the Actual-Annuity Offset is unfair—that is, that the Actual-Annuity Offset only considers a "fraction" of the value of what plaintiffs received when they first left, Resp. Br. at 38—because Xerox assumes and seeks to impose a high interest rate on past monies received, which begs the question. The plan did not specify an interest rate to annuitize past PSP distributions, Pl. Br. at 45, whereas it did provide a clear, unmistakable RIGP/HAP annuity that could easily be deducted from future pension entitlements. A reasonable reading of the plan favors the clarity (and fixed time value of money) of the Actual-Annuity Offset. Pl. Br. at 42-44.

III. The Lower Court Erred in Refusing Discovery and In According No Weight to the Conflict in This Case.

Plaintiffs are entitled to conduct discovery as to the presence and depth of the conflict in this case. Pl. Br. at 54-57. They were never given the opportunity to do so after two Supreme Court decisions—*Metropolitan Life Ins. Co., v. Glenn,* 554 U.S. 105 (2008) and *Conkright*—changed the contours of the conflict inquiry.

Glenn holds that a court's weighing of conflict in a benefits case must occur on a "case-specific" basis. *Glenn*, 554 U.S. at 117. The presence of a conflict does not remove *Firestone* deference; but the weightier the conflict, the more carefully a court should scrutinize the administrator's decision. *Durakovic v. Building Service*, 609 F.3d 133, 135 (2d Cir. 2010). In contrast, *Conkright* made clear that the presence of bad faith, for example, is something that *can* eliminate Firestone deference. *Conkright*, 130 S. Ct. at 1647. The doctrinal result of the two cases—i.e., the *Glenn-Conkright* deference-conflict regime—is that, in appropriate circumstances, plaintiffs are entitled to pursue conflict discovery to (1) ensure the severity of the conflict is known to the court and appropriately weighed, and/or (2) to ensure that *Firestone* deference is not given if the administrator "acted in bad

faith or would not fairly exercise his discretion to interpret the terms of the Plan." *Conkright*, 130 S. Ct. at 1648.

As all the parties involved well know, the *Conkright* majority vacated the *Frommert II* holding of this court, namely that, in the aftermath of a plan administrator's first unreasonable construction of a plan, a court need not defer to the administrator's second interpretation. *Frommert v. Conkright*, 535 F.3d 111, 119 (2008) ("*Frommert II*"). The Supreme Court reversed, holding that while prior unreasonable conduct would not alone eliminate *Firestone* deference, a conflict rising to the level of bad faith, for example, would.

This, of course, was a change in the law. Prior to *Conkright*, there was no reason for plaintiffs to have sought discovery to show bad faith, because no legal standard required them to show it. Nor did plaintiffs ever have an opportunity to seek *Glenn* discovery—which was also new law on the purpose and necessity of conflict review—because that case was decided while this case was on appeal.

Xerox reads *Conkright* to somehow foreclose discovery on bad faith, but that makes no sense. Resp. Br. at 56-60. "Bad faith" was a *new* standard first announced in *Conkright*. Plaintiffs cannot be

faulted for not seeking discovery on legal standards created late in their case.[15] In the post-*Conkright* remand before the district court, plaintiffs' request for additional discovery was denied. Dkt #217, pages 21-23. That was error. Similarly, the district court's refusal to consider in any meaningful way the many immediately apparent conflicts in this case was also error. Pl. Br. at 56-57; DOL Br. at 21-25.

CONCLUSION

Reversal is warranted.

Dated: August 2, 2012

Respectfully submitted,

/s/ Peter K. Stris

Peter K. Stris
Brendan S. Maher
STRIS & MAHER LLP
19210 S. Vermont Ave.; Bldg. E
Gardena, CA 90248
424.212.7090 (direct)
peter.stris@strismaher.com
Attorneys for Plaintiffs-Appellees

[15] Xerox suggests that the contours of the law on conflict articulated in *Glenn* was "established" law of this circuit in 2004. Resp. Br. at 60. Xerox then cites to an unpublished summary order and a district court case, which disproves its claim that such was "established" law. *Id.* More importantly, plaintiffs are entitled to conduct discovery under the *Glenn-Conkright* regime, and no law in this circuit (or any other, for that matter) used that approach prior to 2010.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the foregoing brief is in 14-Point Times Roman proportional font and contains 5,884 words and thus is in compliance with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure.

Dated: New York, New York
August 2, 2012

s/ Peter K. Stris
Peter K. Stris

Attorney for Amicus Curiae