UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR ENTRY OF JUDGMENT ON NOTICE ISSUE

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Plaintiffs have since 1999 sought relief for notice violations committed by Xerox—a claim that the Supreme Court explicitly carved out for lower court resolution. Moreover, the specific equitable theories plaintiffs have invoked to justify relief (namely, surcharge, reformation, and estoppel) have the imprimatur of both the Supreme Court and the Second Circuit and have been apparent to Xerox for years. Yet Xerox asks this court to summarily disregard argument and evidence pertaining those equitable theories, overlooking the fact the Second Circuit remanded the case to Your Honor to adjudicate precisely that, in a case in which a trial has still not occurred. Xerox also contends, for a variety of half-hearted reasons, that plaintiffs are not on the merits entitled to relief under these equitable theories. Xerox's reasoning is unpersuasive.

The essence of Xerox's opposition is that plaintiffs should not be awarded anything other than New Hire. The problem with that is quite simple. According to the Second Circuit, Xerox violated its disclosure obligations under ERISA by not telling plaintiffs that their pensions would be subject to an appreciated offset (or *any* offset), and therefore, Xerox cannot give plaintiffs an interest-rate-reduced pension. The New Hire remedy fails under the same test: Xerox never told plaintiffs that their pensions would only include *some* years of service; ergo, a service-reduced pension is not an appropriate solution to a "notice" failure.

Nor is New Hire fair and equitable in the broader sense. Equity requires that wrongdoers not benefit from the confusion they created. Plaintiffs worked at Xerox for most of their careers on the belief that all years of service would be counted and no appreciated offset would be imposed. To allow Xerox to impose an never-disclosed service reduction because Xerox breached its disclosure obligations is simply not fair. If a restaurant promises a free twelve ounce steak to attract customers but uses horsemeat, the cure is not to make the restaurant use beef but cut the steaks in half. Plaintiffs should not suffer because Xerox cannot follow the law. New Hire provides the wrong incentives for fiduciaries and punishes innocent pensioners.

Equity matches the remedy to the wrongdoing. If, as here, a fiduciary fails to disclose a material term -- whether it be an interest rate or a service reduction -- in a pension deal, the deal should be enforced without said term. That is what ERISA presumes; that is what the Second Circuit implied; and that is what reformation, surcharge, and estoppel all justify here. *See generally* Pltf. Brf. (proposing No Offset, *Layaou*, and Actual-Annuity Offset as awards that neither involve an undisclosed interest rate nor an undisclosed service reduction).

I. Xerox's Procedural Objections Are Meritless.

Plaintiffs suffered a notice violation that destroyed their pensions, and seek relief under equity for surcharge, reformation, and estoppel. The Second Circuit has already expressly found liability on this issue. *Frommert v. Conkright*, 738 F.3d 522, 531 (2nd Cir. 2013). Xerox contends that no remedy should be awarded for this undisputed liability because plaintiffs allegedly failed to place "*defendants* on notice of any claim for equitable remedies of surcharge, reformation or estoppel." Xerox Brf. at 12. Xerox's newfound concern for notice is misplaced.

Since day one, plaintiffs have alleged that Xerox misled them about the size of the offset -- which originally took the form of the illegal "phantom account" but has since mutated -- and alleged entitlement to relief for that violation. There is no dispute on this: the Supreme Court *itself* acknowledged that plaintiffs made a live notice argument. *Conkright v. Frommert*, 559 U.S. 506, 522 n.2 (2010) (preserving notice for consideration on remand). Each of the various complaints in this action similarly expressly asserts an ERISA notice violation and seeks equitable relief therefor. *See, e.g.,* Doc. 85 at ¶¶ 51-65 & 91-111 (First Consolidated

Complaint). For fifteen years, and for four years with Supreme Court approval, Xerox has thus known that plaintiffs seek equitable relief under a notice theory.

Xerox argues that the absence of the specific words surcharge, reformation, or estoppel from plaintiffs' complaint means plaintiffs cannot recover under such theories. Xerox Brf. at 13. That is not how complaints work. A plaintiff need not identify the specific theories of relief (or even the relevant statute) in a complaint in order to be entitled to relief. *See, e.g., Johnson v. City of Shelby*, 574 U.S. ____, 2014 WL 5798626, *1 (2014) (per curiam) (reversal based on the long-settled rule that "it is unnecessary to set out a legal theory" in the complaint). It would be textbook error to conclude otherwise—as the Supreme Court reminded the Fifth Circuit one week ago. *Id.* (summarily reversing the Fifth Circuit for wrongly requiring an invocation of the statutory provision that gave rise to plaintiff's asserted claim). Nor, in any event, has Xerox even attempted to demonstrate the prejudice necessary in order to bar plaintiffs from seeking equitable relief even were the complaint somehow deficient. *Cf.* FED. R. CIV. P. 15(b)(1) (permitting amending of pleadings at trial absent prejudice).

To be clear: Plaintiffs do not merely win pursuant to the law. As a factual matter, Xerox has also known for years the precise equitable doctrines upon which plaintiffs seek relief. In 2011, the Supreme Court defined the scope of equitable remedies under ERISA, definitively ruling that surcharge, reformation, and estoppel were cognizable equitable theories, and explaining what a plaintiff needed to show to recover thereunder. *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1879-80 (2011). Within weeks of that opinion, plaintiffs filed a short brief with this Court explicitly confirming that they were seeking *Amara* relief. Doc. 226 (arguing that *Amara* required a ruling in favor of plaintiffs). Xerox responded by saying that "defendants believe that they have adequately addressed plaintiffs' claims with regard to the recent Supreme Court decision in *CIGNA v. Amara*." Doc. 229. These entries belie Xerox's newfound arguments.

Moreover, before the Second Circuit in 2012, plaintiffs urged reversal and expressly sought the equitable relief sanctioned by *Amara*. Brief for Petitioners Frommert et al., 2012 WL 1650023, *7 (arguing that the "appropriate remedies for defective notice in ERISA cases like this one include the equitable remedies of reformation, estoppel, and surcharge"). The Second Circuit—after holding without qualification that Xerox failed to notice plaintiffs of *any* reduction in their RIGP entitlement—acknowledged that *Amara* relief was a new development in ERISA remedy law, and therefore remanded the case to this court to entitle plaintiffs to pursue (and this Court to rule on) *Amara* relief. That was quite literally the whole point of Section III of the Second Circuit's opinion. *Frommert v. Conkright*, 738 F.3d 522, 534 (2nd Cir. 2013).

Were plaintiffs unable to seek *Amara* relief because plaintiffs failed to "notice" Xerox, the Second Circuit would have simply entered judgment for defendants. It is not surprising they declined to do so. No appellate court anywhere would deny plaintiffs the opportunity to obtain relief based on an intervening Supreme Court opinion that occurred during the pendency of their case. Instead, as the Second Circuit held, this court's duty on remand is to determine on the merits whether surcharge, reformation, and/or estoppel entitle plaintiffs to relief.

Xerox next asserts that the declarations of plaintiffs should be disregarded because they were not introduced in any prior motion. Xerox tellingly does not cite any legal authority for such a position. None exists. *Amara* changed the law. The Second Circuit ordered a remand to determine what equitable remedies should be applied, guided by *Amara*. Plaintiffs may properly submit evidence on this point. Plaintiffs are individual plaintiffs entitled to individual trials (which they have not yet received), and are also entitled to submit such evidence in connection with a motion for pretrial disposition. Xerox's contention that this relevant evidence should be ignored finds no support in the federal rules or inherent principles of fairness.

Xerox's procedural objections conclude with its claim that plaintiffs never wanted more than a new hire remedy. The operative complaints – the only relevant documents in this regard – belie this assertion. *See, e.g.,* Doc. 85, ¶¶ 98-111 (First Consolidated Complaint) (seeking *Layaou* relief). So too do literally dozens of docket entries in this case in which plaintiffs expressly request, at length, a remedy that is *not* New Hire. *See, e.g.*, Doc. 232 (seeking *Layaou* and Actual Annuity Offset). Xerox does not explain why all the evidence offered at the 2006 hearing before Your Honor related to the *Layaou* and Actual Annuity remedies if all plaintiffs ever wanted was New Hire. *See* Doc. 127-28 (RT, 7/11&12/2006). Xerox similarly fails to explain why, if plaintiffs never wanted (or asserted) more than New Hire, Your Honor ordered the *Layaou* remedy in this case in 2007. *Frommert v. Conkright*, 472 F.Supp.2d 452 (W.D.N.Y. 2007). This remedy was ordered because plaintiffs requested it, and properly so. So too here.

Xerox concludes by selectively citing to a multi-thousand-page record in a fifteen year case in which particular plaintiffs have begged to be treated at least as well as new hires to argue that all plaintiffs ever *really* wanted was New Hire. Of course, it is the operative complaints, not non-pleading requests of isolated clients, that actually matter, and they have properly requested the relief sought herein. Moreover, the critical words of the client requests cited by Xerox are "at least": these veteran Xerox employees found it *particularly* galling that they were not treated at least as well as brand new hires, and hence requested pensions *at least* as high. Plaintiffs are hardly constrained by presaging in 1999 precisely what the Second Circuit ordered in 2014: that they are entitled to pensions that *at an absolute minimum* are those paid to new hires.

The context of the pleas cited by Xerox also bear mention. For example, Xerox repeatedly refers to lead plaintiff Paul Frommert's desperate pleas to resolve things before litigation started. Xerox Brf. at 20. Xerox had told Mr. Frommert that he was due a pension exceeding $2,000 a month, but then actually paid him literally $5 a month. Facing financial ruin and a $5 dollar pension, Mr. Frommert begged Xerox to treat him humanely, that is, to not make him worse off than a new hire. Xerox refused, and Paul began a fifteen-year saga to get the pension he was promised. One party looks bad in that story, and it is not Paul Frommert. That he begged to take New Hire over utter impoverishment proves precisely nothing. Nor is it at all legally relevant. Equity does not allow a mugger to keep your wallet because you ask him to at least return your wedding ring.

The honest truth is that plaintiffs have always been *hurt* – emotionally and financially -- by the fact that their employer has treated them so badly for so long. The way that hurt has manifested itself is often through expressions of bafflement as to why: plaintiffs have said, repeatedly, that they cannot imagine that Xerox would ever *want* to treat them worse than New Hires. Which is true: plaintiffs, to this day, cannot understand why it took fifteen years and three court decisions to *force* Xerox to grudgingly pay them (*i.e.*, loyal, veteran employees) at least as well as rookie employees. That does not mean, however, that plaintiffs believed they should be treated no better than new hires, then, now, or ever. Plaintiffs have always expected what the SPDs objectively disclosed: namely, no more than a nominal offset. This objective belief is what Your Honor found in 2004, *Layaou v. Xerox Corp.*, 330 F.Supp.2d 297, 303 (W.D.N.Y. 2004), what Your Honor found again in 2007, *Frommert*, 472 F.Supp.2d at 458-59, and what the Second Circuit in effect recommended last December. So it should be ordered here, to bring this case to a merciful close.

II. Plaintiffs Are Entitled To Recover Under Surcharge, Reformation, and Estoppel

Xerox's argues on the merits that plaintiffs are not entitled to recover under reformation, surcharge, or estoppel, Xerox Brf. at 20-29. Xerox is mistaken. To summarize why:

Reformation. Xerox's primary argument that reformation is unwarranted is based on its belief that reformation is only available upon a showing of fraud. That is incorrect; inequitable conduct can justify reformation, and inequitable conduct is present here.

Surcharge. Xerox's primary objection to surcharge is that surcharge can only remedy injuries to the trust estate. That is incorrect; surcharge can also ensure that a breaching fiduciary does not benefit from wrongdoing, and Xerox benefited here.

Estoppel. Xerox's primary objection to estoppel is that it is not justified upon this record. That is incorrect; plaintiffs have shown, via their actions and affidavits, that they detrimentally relied on Xerox's pension misrepresentations.

A. Plaintiffs Are Entitled to Recover Under a Theory of Reformation

Reformation requires (1) inequitable conduct on the part of the defendant, and (2) a misunderstanding on the part of the victim. As plaintiff has already explained at length, reformation-triggering inequitable conduct need *not* rise to the level of fraud; instead, a violation of ERISA (or a failure to disclose where there is a duty to do so) will suffice. Pltf. Brf. at 15-18. The Secretary of Labor agrees, and said so in this litigation. *See* Brief for the Secretary of Labor as Amicus Curiae, *Frommert v. Conkright*, 2012 WL 1831658, *29 (explaining that inequitable conduct, such as a non-malicious misrepresentation, justifies reformation). Xerox does not even *address* that portion of plaintiffs' brief, nor the numerous authorities plaintiffs cited for that point. Instead, Xerox merely asserts that fraud, and fraud alone, justifies reformation. That is simply erroneous.

Xerox also argues that this case does not present a "clear and convincing" case for reformation. Xerox Brf. at 20. On this point, plaintiffs are legitimately confused. This is not a he-said/she-said case involving oral representations of dubious veracity. What happened here is more than "clear;" it is indisputable and in writing. To wit: Xerox (1) did not explain that rehires would necessarily suffer an offset; (2) did not mention an interest rate for any offset; and (3) did not provide an example of said offset. Given those objective predicates, the Second Circuit held, as a matter of fact, that no plaintiff reading Xerox's disclosures would have understood there would be *any* offset to his/her RIGP entitlement. *Frommert III*, 738 F.3d at 534. And this Court, of course, held years ago – in multiple cases -- that the plaintiffs reasonably expected no worse than a *Layaou* offset. *Layaou,* 330 F.Supp.2d at 303; *Frommert*, 472 F.Supp.2d at 457. Thus, on the basis of uniform, plain-English SPDs whose contents are not in dispute, two courts have held that plaintiffs reasonably understood they would be subject to no worse than a *Layaou* offset. It is difficult to imagine a stronger basis for reformation than that.

B. Plaintiffs Are Entitled to Recover Under a Theory of Surcharge

Xerox claims that surcharge can only remedy a loss to the trust estate, Xerox Brf. at 22-27, but Xerox is simply wrong. Surcharge can remedy three things: (1) an injury to the trust, (2) an injury to a beneficiary, or (3) a benefit to the breaching fiduciary. So says the Supreme Court, the Secretary of Labor, Your Honor, and the relevant treatise writers.

In *Amara* itself, the Supreme Court explained that surcharge justifies 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 (emphasis added). As the Secretary of Labor has elaborated: "The term 'surcharge' means a monetary remedy against a trustee imposed by a court in equity to compensate for a loss resulting from the trustee's breach of fiduciary duty or to prevent the trustee's unjust enrichment. The trust does not have to suffer a loss." Brief for the Secretary of Labor as Amicus Curiae, *CIGNA v. Amara*, 2013 WL 6221347, *25. Your Honor has also (correctly) held that surcharge is available upon a showing of some "benefit to the [breaching fiduciary] or damages to plaintiff." *Miles v. Corning Inc. Long Term Disability Plan,* 948 F. Supp. 2d 295 (W.D.N.Y. 2013).[1]

Importantly, unjust enrichment in the surcharge setting is broadly construed: it is any benefit the fiduciary enjoys that the flows from the breach. *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").

Xerox obviously unjustly benefited because it told employees one thing on benefits and did another. Assume a company promised a prospective employee a bonus of 10% of his collective salary (at $100,000 a year) if he stays three years. At the end of those three years, after the employee has performed, the company refuses to pay the $30,000 bonus. The company has clearly benefited, and the traditional measure of that benefit is equal to the $30,000 it saves by not paying the promised bonus. The same is true here: a fair measure of the unjust benefit to Xerox is the amount it saves by not paying employees the pension they understood they were

[1] *Miles* stands in near perfect contrast to this case. "Surcharge" is not a magic word that authorizes relief for every plaintiff who uncovers a peripheral or hyper-technical notice failure. Surcharge applies to material and substantial breaches that benefit the fiduciary or injure the plaintiff in a cognizable way. ERISA was not enacted to ensure that participants everywhere could internalize the standard of review that governs benefit disputes; ERISA, however, *was* enacted *to ensure that plan participants could calculate their pension entitlement to the dollar*. *See, e.g.,* 29 U.S.C. § 1025(a) (participants entitled to calculation of pension). *Miles* involved the former; this case involves the latter. As Your Honor correctly intuited in *Miles*, not every disclosure violation will justify surcharge, but that does not mean that no disclosure violation will justify surcharge. A disclosure violation that guts the fundamental, ERISA-created right to *know your pension amount*; that reduces plaintiffs' apparent pensions by a readily calculable number; and that helps the employer by keeping misled employees at the company clearly both substantially injures the plaintiff and benefits the fiduciary.

getting when they agreed to return and stay at Xerox. That is the amount if should be surcharged (which is at least equal to the *Layaou* offset).[2]

Importantly, as plaintiffs explain below, any uncertainty as to the benefit Xerox enjoyed (and thus the amount it may be surcharged for) should be reasonably resolved in favor of plaintiffs. As the Second Circuit has held, "once a breach of trust is established, uncertainties in fixing damages will be resolved against the wrongdoer." *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985). So it must be here.[3]

C. Plaintiffs Are Entitled To Recover Under A Theory of Estoppel.

The core of plaintiffs' estoppel claim is that they detrimentally relied on Xerox's representation that their pensions would face no worse than a nominal offset. Objectively speaking, plaintiffs received written, formal, uniform disclosures that made no mention of any appreciated offset to their pensions. An average plan participant would thus assume that "no

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[2] Xerox's suggestion that there are no cases where "the equitable remedy of surcharge was awarded in the form of monetary relief to beneficiaries," Xerox Brf. at 25, is simply wrong. *See, e.g., McCravy v. Metro. Life Ins. Co.*, 690 F.3d 176, 181 (4th Cir. 2012) (beneficiary may recover lost life insurance proceeds under theory of surcharge); *United States v. Mitchell*, 463 U.S. 206, 226 (1983) (relying on trust law in holding that individual beneficiaries could sue for monetary compensation for losses allegedly caused by government's mismanagement of timber); *Gates v. Plainfield Trust Co.*, 194 A. 65 (N.J. 1937) (per curiam) (upholding decree that required executor to pay income to life beneficiary); *Kendall v. DeForest*, 101 F. 167, 170 (2d Cir. 1900) (upholding decree that held trustee liable to beneficiaries for income deficiency in annuity fund).

[3] One last point relates to Xerox's hyper-technical claim offered in a footnote. Xerox Brf. at 24 n.4. Xerox asserts that while Xerox the company benefited from misleading employees, the actual fiduciary who did the misleading is Xerox the plan; thus, according to Xerox's lawyers, the breaching fiduciary (the plan) did not benefit, and so surcharge is inappropriate. That argument fails. First, were this so, then surcharge would *never* be available in a misrepresentation setting, because it is always plans, *not* companies, that issue SPDs. And that simply cannot be, because in *Amara* itself, the crux of dispute involved deficient SPDs issued by the plan, and the Court confirmed surcharge was available. *Amara*, 131 S. Ct. at 1876-80 (discussing deficient SPDs). Second, here both the fiduciary breach and the unjust benefit are undeniably attributable to the same entity: Xerox. Denying surcharge on the basis of company/plan hair-splitting is precisely the thing the Supreme Court warned against in *Amara* when it reminded lower courts fashioning equitable relief that "equity suffers not a right to be without a remedy." *Amara,* 131 S. Ct. at 1879 (quoting R. FRANCIS, MAXIMS OF EQUITY 29 (1st Am. ed. 1823).

Moreover, although Xerox argues that surcharge can only justify a recovery by the fiduciary's trust and not by Plan members, the principal authority on which Xerox relies (Xerox Brf. at 24) says exactly the opposite: beneficiaries may seek such 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." 4 Scott & Ascher on Trusts § 24.9 at 1693 (5th ed. 2007) (emphasis added). The reason to require a fiduciary to rectify losses to his trust is so that the appropriate amount will be made available to make proper distributions to beneficiaries.

appreciated offset" was the "pension deal." As Your Honor long ago acknowledged, Xerox's disclosure failure "would clearly have misled [a plaintiff] into believing that his monthly benefit would be considerably higher than it turned out to be." *Layaou*, 330 F. Supp. 2d at 304.

By working at Xerox in the wake of this misleading information, plaintiffs have shown by their actions that they accepted and relied on the compensation terms objectively disclosed to them. Indeed, the Second Circuit has specifically explained that actions "may constitute circumstantial proof of reliance upon a financial representation." *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 119 (2nd Cir. 2013). In that case, defendants misled plaintiffs via inflated invoices, which plaintiffs showed reliance upon by paying. In this case, defendants misled plaintiffs via inflated pension promises, which plaintiffs "paid for" (and showed reliance on) by returning to and staying at Xerox.

Plaintiffs' case is even stronger, as they submitted representative declarations providing detailed accounts of how profoundly they relied on Xerox's misrepresentations. Because Xerox misled them to believe that their pensions would subject to no more than a nominal offset, plaintiffs forewent other job offers; they purchased homes, vacations, and other assets; they altered savings decisions; and they conducted personal affairs—such as the resolution of divorces—differently. Xerox cannot complain that it is too late in the game for such affidavits: at any time in the past fifteen years, Xerox could have sent interrogatories to or deposed any plaintiff it wanted. It chose not to, and Xerox sitting on its discovery rights does not somehow rob plaintiffs of their right to tell their stories in advance of trial. Xerox knows this, so it offers a fallback claim: that plaintiffs' declarations can only cover the plaintiffs who submitted them. Xerox Brf. at 16. In that case: (1) as Xerox has submitted no evidence or argument undermining those declarations, then each of those plaintiffs is entitled to estoppel relief upon this motion, and

(2) the remaining plaintiffs, should this court not resolve their claims on reformation or surcharge grounds, can and will happily testify at their individual trials.

But this is unnecessary. Your Honor has already expressly found, as a factual matter, that Xerox's deficient SPDs and violation of ERISA's notice requirement harmed participants. Your Honor has concluded:

> All that a Plan participant would understand from the SPD, then, is that his benefit would be reduced because of the prior distribution. He would not know how or to what extent the benefit would be reduced, although he might reasonably assume that the administrator would simply subtract out the value of the prior distribution. . . . [T]he conspicuous absence of any reference to or explanation of the 'phantom account' offset, coupled with the annual benefits statements that had been provided to Layaou, would clearly have mislead him into believing that his monthly benefit would be considerably higher than it turned out to be. That mistaken belief would likely have affected plaintiff's financial planning for his upcoming retirement.

Layaou, 330 F.Supp.2d at 303-04. What was true in *Layaou* is equally true here. Not only was Your Honor correct in 2004, but Xerox is bound by issue preclusion to these factual findings regarding the objective understanding of the SPDs and the resulting harm to participants. *Parklane Hosiery v. Shore*, 439 U.S. 322, 326-33 (1979) (similarly applying issue preclusion). The remedy in *Layaou* flowed from an objective test; individualized affidavits were not required. So too here. Because, as Your Honor has found, Xerox's violation of ERISA's disclosure requirements harmed the ability of participants to plan for retirement – a central goal of ERISA – the equitable remedy of estoppel justifies the *Layaou* remedy.

III. Xerox Should Bear The Consequences of Failing to Disclose An Appreciated Offset, Not Plaintiffs.

As plaintiffs explained in their opening brief, when explaining offsets to pensioners, it is not hard to make it clear that there will be an offset, and it is not hard to make clear that there will be an appreciated offset. Pltf. Brf. at 13. The former requires the use of "will" language and the latter requires the use of a specified rate and an example. Xerox did neither, so the most sensible award is (1) no-offset, or (2) a *Layaou* offset, either of which are available under surcharge, reformation, or estoppel. Pltf. Brf. at 13-22. Xerox takes superficial and mistaken issue with some of the merits of those specific remedies, to which plaintiffs responded *supra*.

Yet the heart of Xerox's opposition is not technical or legal; it is instead a misguided appeal to fairness. Xerox's argument, in essence, is that it is unjust to give plaintiffs anything other than New Hire. To do otherwise is unfair, says Xerox, because of the "time value of money," and because New Hire makes plaintiffs whole. Neither argument is persuasive.

Interest Rates and the Time Value of Money. Throughout this case, much has been made of the "time value of money." As a concept, it is fairly simple: money received at different times can be worth different amounts. But for the concept to have an everyday meaning, one needs to attach a number to it. Time value of money, in other words, only makes sense when expressed as a numerical rate. Otherwise the concept alone is too nebulous to be practically useful. And it is more than nebulous: when unsophisticated players are involved, it is *dangerous*, because it can destroy value (when, say, pensions are involved) or balloon obligations (when, say, adjustable rate mortgages are involved) very, very quickly, depending on the rate that is picked.

ERISA is well aware of this, so it uniformly requires employers and plans (not employees) to bear interest rate responsibility. For example:

- For defined benefit pensions, ERISA forces the employer and plan to take all the rate risk. If a plan unwisely invests its assets, earning too low a return to pay out the pensions it promised, that is not the employee's problem: the employer is "obligated to make those payments even if the assets set aside to finance them prove to be inadequate." PETER WIEDENBECK, ERISA: PRINCIPLES OF EMPLOYEE BENEFIT LAW 7 (2010).

- The tax law provisions in ERISA impose *severe* consequences if the relevant interest rates are not precisely specified and disclosed. To be tax-qualified, a pension plan must provide "definitively determinable" benefits, which means that *any* interest rate "assumptions [must be] specified in the plan in a way which precludes employer discretion." 26 U.S.C. § 401(a)(25). Put differently: if employers want to use interest rates (or any other assumption) that affect benefits, there can be no wiggle room. Otherwise the plan loses its tax-preferred status.
- As a disclosure matter, SPDs must include statements "clearly identifying circumstances which may result in ... offset ... of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide," 29 C.F.R. § 2520.102–3(l), and otherwise explain the "full import" of a plan term. *Frommert III*, 738 F.3d at 532. Interest rates, as the Second Circuit recently held, fall clearly within this obligation.

Consistent with ERISA's general allocation of responsibility, the equitable response to Xerox not disclosing an interest rate is simple: the remedy is to not let it use an interest rate. When a statute tells a party (1) you bear the risk associated with interest rates, (2) you have to be crystal clear about interest rates to stay tax-preferred, and (3) you must plainly disclose things, like interest rates, that reduce pensions, it is self-evident the statute does not think it "unfair" for employers and plans to fully internalize the consequences of a failure to do so.

Indeed, both Your Honor and the Second Circuit have already so held. "The consequences of an inaccurate SPD must be placed on the employer." *Burke v. Kodak*

Retirement Income Plan, 336 F.3d 103, 113 (2nd Cir. 2003). "It is the employer, not the employee, who must bear responsibility for inaccurate or misleading SPDs." *Layaou*, 330 F.Supp.3d at 304. Xerox failed to disclose that there would be an appreciated offset, much less an interest rate. The remedy is to not permit it to apply an interest rate. That is equity. That is *Layaou*. Xerox, not plaintiffs, should bear the cost of ERISA violations performed by Xerox.

New Hire Is An Insufficient Equitable Remedy. Xerox's ultimate position on remedies is the same as it has been throughout the fifteen-year history of this action: the least generous remedy to its employees that might possibly persuade a judicial officer. But just as Phantom Account begrudgingly led Xerox to Plan Administrator, which in turn begrudgingly led Xerox to New Hire – only because the Second Circuit expressly stated that this was the absolute minimum – so too is this last, least generous, remedy insufficient.

Xerox's New Hire remedy essentially attempts to cure the fact that it misled plaintiffs about the size of their pension offset with a remedy that would mislead plaintiffs about the size of their pension offset in a different way. Xerox never mentioned an appreciated offset, so it cannot impose one. The remedy is not to let Xerox then impose a *service* offset, because it never mentioned that, either. New Hire hurts people who did nothing wrong (plaintiffs) for the benefit of someone who did (Xerox). It does not make Xerox internalize the cost of its failure; instead, it would allow Xerox to not comply with a *different* part of the pension promise that it made to its rehired employees: that all years at Xerox will be counted in the calculation of the employee's final pension.

Xerox claims this is justified because anything other than New Hire means plaintiffs will receive a "windfall." As plaintiffs have explained, that is absolutely not true. They worked at Xerox, hard, for most of their working lives *because* they believed they were getting a pension that counted all their years of service and was not subject to an appreciated offset. And it is Xerox, under New Hire, that will *definitely* receive a windfall: veteran talent at rookie prices.

Consider Xerox's argument from a different angle. Plaintiffs say that objectively and subjectively they expected no worse than *Layaou* and acted accordingly. Xerox responds that such a remedy is unfair, and that even given Xerox's notice failures, plaintiffs *should* have expected to be treated like new hires, because anything else would be "duplicative." Xerox also implies that, if originally told New Hire was the deal, plaintiffs would not in reality have behaved any differently than they did. They would have made the same job choices, Xerox contends, the same savings decisions, and the same personal decisions, as they have to date. And thus, according to Xerox, it is a windfall to give plaintiffs any more than New Hire.

For starters, that plaintiffs "should" have expected New Hire does not follow: one obvious way to entice good workers who left for greener pastures is to sweeten the deal by saying "come back, and we'll treat you as if you never left." Which is, in fact, precisely what Xerox did: as Xerox concedes, it gave its rehired employees the same employee numbers, immediately vested them in their retirement benefits, and gave them veteran (not new hire) vacation benefits. This promise is also what Your Honor has already held an objective employee would have understood from Xerox's SPDs and annual personal retirement benefits statements.

The most sensible expectation of an average plan participant is thus that Xerox would simply subtract the nominal value of the money received the first time around. *Layaou*, 330 F.Supp.2d at 303 (employee would "reasonably assume that the administrator would simply subtract out the value of the prior distribution"). This is precisely the *Layaou* remedy.

As for Xerox's subtle insinuation that plaintiffs would have behaved exactly the same as they did were New Hire disclosed, courts have a rule for dealing with self-serving counterfactuals offered by breaching fiduciaries: they largely ignore them. As Judge Friendly memorably put it, "[c]ourts do not take kindly to arguments by fiduciaries who have breached their obligations that, if they had not done this, everything would have been the same." *In re Beck Indus., Inc.*, 605 F.2d 624, 636 (2d Cir. 1979).

Thus, the metaphysical fact that it is impossible to know for certain how things would have gone had Xerox been forthright, *i.e.*, how the world would have looked had it disclosed an appreciated offset, or alternatively, had it explained that veteran rehires would be treated like new hires, does not help Xerox. In such cases—where one party's wrongdoing makes it difficult or impossible to know how things would have gone otherwise—what courts do is clear: they construe uncertainties against the wrongdoer when fashioning relief. Indeed, in a seminal ERISA opinion, the Second Circuit has said exactly that.

In *Donovan v. Bierwith*, the defendant plan fiduciaries violated their fiduciary duties in connection with buying stock to fend off a takeover bid. *Donovan v. Bierwirth*, 754 F.2d 1049, 1050 (2nd Cir. 1985). Notwithstanding that the purchase was a breach, the defendants argued against recovery by plaintiffs because the purchase turned out to be profitable; *i.e.*, the wrongly-bought stock was ultimately sold at a substantial profit. *Id.* at 1051-52. The Second Circuit disagreed. It explained that it did not matter that the wrongful purchase was profitable; instead, what mattered was whether speculative but plausible alternative uses of those funds would have been more profitable. Id. at 1056. Importantly, it commanded the lower court to "*presume* that the funds would have been used in the *most profitable*" of those speculative alternatives. *Id.* (emphasis added). It went on to explain, in general terms, how courts should award relief in the aftermath of a breach of fiduciary duty:

> [As for] fiduciaries found to be in breach of their duty...[a]ny doubt or ambiguity should be resolved against them. See Wootton Land & Fuel Co. v. Ownbey, 265

> F. 91, 99 (8th Cir.1920) (burden of proof in an accounting is on fiduciary to prove the amount of any credit); Vinlis Construction Co. v. Roreck, 30 App.Div.2d 668, 291 N.Y.S.2d 924 (2d Dep't 1968) (burden of proof in an accounting is on fiduciary to show he has derived no unfair advantage from his relationship), modified on other grounds, 27 N.Y.2d 687, 262 N.E.2d 215, 314 N.Y.S.2d 8 (1970); cf. Armory v. Delamirie, 93 Eng.Rep. 664 (1722) (the "Chimney Sweep's Jewel Case") (plaintiff bailed jewel with defendant, who failed to return it: held "unless the defendant ... produce the jewel, and shew it not to be of the finest water, [the jury] should presume the strongest against him, and make the value of the best jewels the measure of [plaintiff's] damages"). This is nothing more than application of the principle that, once a breach of trust is established, uncertainties in fixing damages will be resolved against the wrongdoer. See Leigh v. Engle, 727 F.2d at 138; McMerty v. Herzog, 710 F.2d 429, 431 (8th Cir.1983).

Id. Here, Xerox breached its duties and in so doing, failed to disclose the existence of an appreciated offset or a service reduction, *i.e.*, it led plaintiffs to understand that things would be no worse than a *Layaou* offset. To the extent there is any uncertainty, when fashioning relief this court must presume (1) that plaintiffs acted in expectation of same, and (2) that Xerox benefited accordingly. To do otherwise is to resolve uncertainties in favor of Xerox, and to punish Plaintiffs for Xerox's breach.

Most centrally, as a practical matter, the New Hire remedy that the Second Circuit has set as an absolute minimum is insufficiently equitable. Under the New Hire remedy:

- Actual new hires at Xerox obtain a final pension calculated on all of their years of service at Xerox, as the Plan requires. Plaintiffs, by contrast, do not; under New Hire, only their second years of service will count. An equitable remedy that deprives retirees of benefits the Plan expressly provides is not equitable. *See* Xerox's Petition for Certiorari, *Conkright v. Frommert*, 2009 WL 2954165, *59 (admitting that the plan "calculates benefits for rehired employees by taking account of all of the employees' service to Xerox, including service rendered before their rehire date").

- Actual new hires at Xerox have their Highest Average Pay ("HAP") applied to all years at Xerox, including those served at lower pay grades, as the Plan requires. This is a significant benefit of a defined benefit plan. Plaintiffs, by contrast, have their HAP applied to only a fraction of their years, with the remainder calculated at the significantly lower pay grades obtained during their first stint. This change guts plaintiffs' pensions, and is not equitable.
- Actual new hires at Xerox were promised a pension of some specific $X and obtained that promised pension. Plaintiffs, by contrast, were promised a pension of some specific $X but obtained a pension of some lesser $Y. This result is the antithesis of equity.
- Actual new hires at Xerox could accurately plan for their retirement because they knew what their benefits would be. By contrast, as Your Honor has already found, Xerox's notice violations prevented rehired employees like plaintiff from planning. *Layaou*, 330 F.Supp.2d at 304. Treating employees who received the central benefit provided by ERISA the same as employees who did not would not be equitable.

The New Hire remedy does not, in fact, equitably treat plaintiffs like new hires. A new hire who was promised a pension of $1500/month by Xerox and who received this amount when he retired at 65 could plan. When he retired, he could pay his mortgage. He could afford to visit his grandchildren. If $1500/month was insufficient, he could save more money or do any of the plethora of other things that routine planning for retirement entails.

By contrast, as Your Honor has already found, plaintiffs were given annual individual benefits statements and SPDs that a reasonable observer would believe entitled them to a pension in a specific dollar amount without an appreciated offset of their prior distribution. *Frommert*, 472 F.Supp.2d at 458-59. That's what *they* had to plan for retirement.

But, unlike new hires, Xerox didn't pay this amount. Paul Frommert was promised and planned on a pension of $2,000/month. But Xerox paid him only $5/month. A new hire did not lose his house; Paul Frommert did. A new hire could visit his grandchildren; Paul Frommert could not. To treat these employees equally is not equitable. They were not treated equally by Xerox. They are not entitled to identical relief under ERISA.

The "time value of money" is, as the Second Circuit has held, "entirely inapposite" to the proper equitable remedy for notice. *Frommert*, 738 F.3d at 534. A consideration of the time value of life, by contrast, is in manifest order. Paul Frommert cannot go back in time and watch his grandchildren grow up. Mr. Frommert cannot stop the foreclosure of his home; the bank has already sold it, and his family was forced to move. Actual new hires got to live the lives that Xerox promised them. The New Hire remedy grants no similar relief to plaintiffs.

The *Layaou* remedy that Your Honor previously ordered is not perfect. Plaintiffs still are forced to endure the previous *decades* of life in retirement without what they were promised. But it at least gives them, albeit belatedly, the pension that Your Honor has found that a reasonable rehired employee would have believed they were entitled to based upon the disclosures that ERISA requires. Xerox should have given its former employees that pension decades ago. Equity at least entitles plaintiffs to it now.

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