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**

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR CLARIFICATION OR RECONSIDERATION RE: PREJUDGMENT INTEREST ORDER

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This Court entered a Decision and Order regarding prejudgment interest (Dkt. No. 319) on November 3, 2016 (the "Order"). The Order set the prejudgment interest rate as the prime interest rate on the date of each plaintiff's prior distribution, and instructed "the parties to arrive at the correct figures for the individual plaintiffs." Order at 10.

Plaintiffs have diligently attempted to comply with this Court's Order, but the parties have reached an impasse with respect to three discrete issues. As this Court has observed, throughout this case, Xerox has strenuously fought every single issue in order to frustrate plaintiffs' efforts to obtain an appropriate benefit. This behavior – yielding grudgingly, "block by metaphorical block" – continues to this day.

Plaintiffs accordingly seek this Court's guidance with respect to the three pending interest disputes, and move for clarification and/or reconsideration of the Order.

Statement of Facts

Plaintiffs are each rehired Xerox employees. Every plaintiff took his or her full distribution of retirement benefits as a lump sum upon first leaving Xerox. In violation of ERISA, Xerox then appreciated this prior distribution using a "phantom account."

Every relevant plaintiff has by now left Xerox for the final time. (Eight plaintiffs are still employed by Xerox, but these plaintiffs will not receive prejudgment interest, so this motion does not concern them.) When they left Xerox, every plaintiff except one again took a lump sum distribution of his or her retirement benefits. But every one of these plaintiffs was underpaid. Although plaintiffs left Xerox as early as 1994, they were not paid the "new hire" benefits to which they were entitled until 2016.

Because ERISA requires an award of prejudgment interest to compensate for this delay, *see* Order at 2-3, this Court awarded interest "calculated using the prime interest rate, as published by the Federal Reserve, as to each plaintiff, calculated from the date of the plaintiff's distribution up to January 5, 2016." Order at 10. The Court instructed the parties to attempt to arrive at a mutually-agreeable award for each plaintiff, recognizing the unique retirement dates and interest rates applicable to each plaintiff. Order at 9-10.

The parties have attempted to do so, but have not been able to reach agreement with respect to three issues. These three issues are substantial, and result in a difference of millions of dollars in total prejudgment interest amongst the various plaintiffs. *See* Declaration of Shaun P. Martin dated November 27, 2016 ("Martin Decl."), ¶ 2. Plaintiffs accordingly seek clarification and/or reconsideration of this Court's Order of November 3, 2016 in order to finally resolve the discrete entitlement of each plaintiff to a set amount of prejudgment interest. These three disputed issues involve (1) the rate of prejudgment interest; in particular, whether it is fixed or variable; (2) the date of prejudgment interest; in particular, whether it starts on the date plaintiffs left Xerox; and (3) interest for the allegedly "overpaid" – but in fact underpaid – "*Layaou*" plaintiffs.

A. The Rate of Prejudgment Interest.

The parties first disagree about how to interpret the Order with respect the rate of prejudgment interest. The Order states: "The award should be calculated using the prime interest rate, as published by Federal Reserve, as to each plaintiff, calculated from the date of the plaintiff's distribution up to January 5, 2016." Order at 10. Plaintiffs believe that the correct way to apply this Order is to employ a single interest rate: *e.g.*, the prime rate that existed on the date of the relevant plaintiff's distribution of retirement benefits. Xerox, by contrast, asserts that this Order means that the relevant interest rate changes for each plaintiff every time the Federal Reserve changes interest rates.

An example may make help make the dispute concrete. Plaintiff Tom Dalton stopped working for Xerox on February 12, 2002. Mr. Dalton was entitled to "new hire" benefits on this date – and a similarly-situated new hire would have received them -- but Xerox neither offered nor paid Mr. Dalton this amount in 2002. Rather, Xerox paid Mr. Dalton nothing in 2002, since the (illegal) phantom account reduced Mr. Dalton's benefits to $0. As a result, Mr. Dalton received his full "new hire" benefits not in 2002, but rather only in 2016, after this Court compelled Xerox to pay him these benefits.

Mr. Dalton eventually received $160,296.35 in new hire benefits. Since he was entitled to, but did not, receive these benefits in 2002, plaintiffs believe that Mr. Dalton is entitled to prejudgment interest at the Federal Reserve prime rate that existed when he left Xerox on February 12, 2002, which was 4.75%. Xerox, by contrast, contends that instead of using one interest rate (4.75%), the proper rate under this Court's Order for Mr. Dalton is thirty-one different interest rates, rates that change each time the Federal Reserve changed the federal prime rate. Martin Decl., ¶ 3.

Although the plan administrator owes a fiduciary duty to the plan members (not Xerox), he now insists on using "variable" interest rates that favor Xerox every single time, and for every single plaintiff (a pattern that has been true throughout this 17-year litigation) . For example, for Mr. Dalton, Xerox's interest rate methodology deprives him of $115,440.33 in prejudgment interest that has accumulated on his behalf over the past 14 years.[1] For the other plaintiffs, Xerox's methodology similarly collectively deprives them of over $4 million in prejudgment interest. Martin Decl., ¶ 5 (attaching individualized calculations for the 44 plaintiffs for which Xerox has provided prejudgment interest calculations). Every single plaintiff loses money as a result of Xerox's decision to use variable interest rates as opposed to a single fixed interest rate when calculating prejudgment interest.

Because the parties are unable to agree, they require this Court's guidance. Plaintiffs contend that their methodology for calculating prejudgment interest rates is the appropriate one, rather than Xerox's competing methodology. Plaintiffs accordingly seek clarification and/or reconsideration of this Court's Order of November 3, 2016.

This Court should adopt the methodology employed by plaintiffs for four reasons. First, it is the proper interpretation of the language of this Court's Order. The Order repeatedly refers a fixed interest rate applicable to each plaintiff. The Order states that "[d]etermining [] <u>the</u> interest rate . . . should be a relatively simple matter," in part because "[t]he dates on which the plaintiffs took distributions are a matter of record, as is <u>the</u> historic prime rate." Order at 10 (emphasis added). The Conclusion to the Order similarly commands that "[t]he award should be calculated using <u>the</u> prime interest rate,

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1 Xerox paid Mr. Dalton $56,263.61 on May 1, 2012 (the "Plan Adminstrator" remedy) and was obligated to pay him an additional $104,432.74 on the date of this Court's "new hire" Order on January 5, 2016. At 4.75 percent, the interest on these amounts from 2002 totals $128,451.15. But by instead employing thirty-one different interest rates, Xerox contends that Mr. Dalton is entitled to only $13,010.82 in interest for the 14 years Xerox failed to pay his new hire benefits of $160,296.35. Martin Decl., ¶ 4.

as published by the Federal Reserve, as to each plaintiff." Order at 10. The Order repeatedly refers to a single interest rate for each plaintiff, not thirty-one (or more) different interest rates per plaintiff. That is accordingly the proper way to interpret the Order, not the contrary methodology employed by Xerox to its benefit.

Second, the methodology employed by plaintiffs makes economic sense, unlike the contrary interpretation employed by Xerox. When plaintiffs were not paid the new hire benefits to which ERISA entitled them upon their departure from Xerox – benefits that Xerox had yearly promised them in annual benefits statements – they had to borrow money in order to receive the equivalent of that withheld entitlement. That borrowing would have occurred on the date they ceased working from Xerox, and the rate of that borrowing would have been the prevailing interest rate on that date. The interest rate should thus similarly be the prevailing rate on the date of their departure, not thirty-one different rates on subsequent different dates.

Third, Xerox's methodology impermissibly (and tellingly) conflicts with its own application and interpretation of the Plan. Under the Plan Administrator approach, Xerox appreciated an employee's prior distribution by a fixed – not variable -- interest rate, and the fixed PBGC interest rate that Xerox has selected was the single interest rate (generally 8%) that existed on the date of the prior distribution. Martin Decl., ¶ 6. Even when interest rates progressively diminished over time (as they have), Xerox continued to appreciate all prior distributions by the fixed interest rate that existed at the time of the distribution, rather than the lower interest rates subsequently available. Similarly, even now, to calculate plaintiffs' "new hire" benefits, Xerox uses a fixed – not variable – interest rate to determine the lump sum due by discounting the present value of the monthly annuity created by the formula benefit.

"What is good for the goose is good for the gander." *In Re 650 Fifth Avenue*, 2013 WL 1870090, *3 (S.D.N.Y. 2013). Xerox uses high, fixed interest rates to appreciate its employees' prior distributions, and maintains that this is the appropriate way to account for the time value of money. The same should be true here, in which Xerox has failed to pay such a prior distribution. Xerox should not be permitted to use lower variable interest rates for prior distributions, as here, when it benefits Xerox while it simultaneously using higher fixed rates – again, to Xerox's benefit -- to value prior distributions under the Plan. Since Xerox uses a single, fixed interest rate set on the date of the distribution under the Plan, that same methodology is appropriate here.

Finally, employing Xerox's low, variable-rate interest methodology would be inequitable. This Court has already selected a low interest rate: the prime rate, which is the rate that banks charge their best, most creditworthy customers. Few, if any, of the plaintiffs could in fact obtain loans at such a low rate, particularly when (as here) they faced a speculative, 17-year ordeal with no certainty of ultimately recovering such benefits at the conclusion of this litigation. Rather than borrow at the prime rate, plaintiffs were instead forced to borrow at higher interest rates, max out their credit cards, or simply do without. Martin Decl., ¶ 6. Meanwhile, as plaintiffs have previously demonstrated, Xerox was earning interest on the retirement benefits it wrongfully withheld at rates far in excess of the prime rate. *See* Dkt. Nos. 284 & 292 (noting that Xerox and the Plan both earned well over 8% on unpaid retirement benefits during the relevant period).

This Court's election of a fixed prime interest rate for each plaintiff may perhaps have the benefit of simplicity. But it would be inequitable, as well as needlessly complicated, to then permit Xerox to dilute these benefits by repeatedly resetting this prime rate dozens of time as a means of yet again ensuring that its former employees do not obtain a pension that will permit them to live out their lives with a modicum of decency.

To the degree that there is uncertainty as to whether a fixed or variable interest rate is most appropriate, that uncertainty should be resolved against the wrongdoer, Xerox, not its blameless employees. *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946) ("The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.").

This Court should accordingly clarify and/or reconsider its Order and provide that the prejudgment interest rate is a fixed prime rate for each plaintiff.

B. The Date of Prejudgment Interest.

The second disagreement between the parties that requires judicial intervention involves the appropriate starting date for prejudgment interest. (The parties agree that the ending point for prejudgment interest is the date of this Court's Order on January 5, 2016, even though Xerox did not, in fact, pay these benefits until sometime after this date.)

1. The Differential Payments to Various Plaintiffs.

The Order refers to the fact that each plaintiff at some point took a distribution of benefits from the Plan. Order at 10. That is accurate, but only in part. For example, when each plaintiff <u>first</u> left Xerox, every plaintiff took his or her benefit as a lump-sum distribution, and that distribution was then appreciated by Xerox using the phantom account. However, the amount of that initial distribution for each plaintiff was calculated correctly; as a result, the date on which plaintiffs took their first distribution is not an appropriate date upon which to commence prejudgment interest.

By contrast, when plaintiffs <u>subsequently</u> left Xerox, matters are different. Most critically, when plaintiffs later left Xerox, Xerox told each plaintiff that they were only entitled to retirement benefits in an amount offset by the phantom account. As a result of this wrongful conduct, none of the plaintiffs were permitted to withdraw the benefits to which they were entitled on the date they left Xerox's employ.

Plaintiffs responded to Xerox's misconduct in one of three different ways. Xerox's proposed treatment of these three groups is markedly different.

<u>(1) Group One: No Benefits Allegedly Due</u>. First, as a result of the phantom account, some plaintiffs were told that they had absolutely no retirement benefit due; *i.e.*, that the value of their retirement benefit was $0. Plaintiff Tom Dalton is an example of this group of plaintiffs. Mr. Dalton tried to withdraw his pension as a lump sum upon finally leaving Xerox in 2002, but was told by Xerox that even though his annual benefits statements showed a lump-sum entitlement to hundreds of thousands of dollars, he was in fact entitled to nothing as a result of the phantom account. So even though Mr. Dalton left Xerox on February 12, 2002, he got paid nothing until this Court's subsequent Orders in 2012 and 2016. Martin Decl., ¶ 7.

Because this group of plaintiffs was not due any pension benefits as a result of Xerox's phantom account, they never received – indeed, could not receive -- a lump-sum distribution from Xerox upon leaving its employ, because their distribution was $0. To put it a different way, when plaintiffs like Mr. Dalton left Xerox in 2002, they "received" their distribution at that time, but that distribution was $0.

Xerox maintains that this group of plaintiffs is entitled to no prejudgment interest at all from the date of their departure from Xerox (i.e., from 2002) until 2012. Xerox says that since these plaintiffs never actually "received" a distribution when they left Xerox (again), the Order only permits prejudgment interest after Xerox disbursed "plan administrator" amounts to these plaintiffs in 2012. According to Xerox, before then, these plaintiffs are entitled to no interest at all, because they never "took" the $0 distribution that they were purportedly owed (pursuant to the phantom account) when they finally left Xerox for the last time (e.g., in 2002).

For example, Mr. Dalton asked for but received no retirement benefits at all in 2002, even though he was eventually paid $160,296.35 in new hire benefits as a result of the present lawsuit. Xerox insists that for the decade between 2002 and 2012 – a period in which Mr. Dalton was entitled to $160,296.35 but received nothing – Mr. Dalton is entitled to exactly $0 in prejudgment interest. Xerox maintains that the same is true for every other plaintiff who (like Mr. Dalton) similarly did not take a distribution from Xerox when he or she finally left Xerox when the phantom account made the balance due to these plaintiffs $0. On Xerox's theory, these plaintiffs are only entitled to interest after 2012, since that is the date on which Xerox deigned to pay these plaintiffs the "Plan Administrator" recovery. At that point, Xerox says, plaintiffs had then "settled" with the plan (e.g., taken a distribution), so only after that date does Xerox maintain that this group of plaintiffs is entitled to prejudgment interest. Martin Decl., ¶ 7.

By contrast, plaintiffs contend that Mr. Dalton, and the other plaintiffs like him, are entitled to prejudgment interest from the date they finally left Xerox until the date they were finally paid those amounts (e.g., January 5, 2016). Martin Decl., ¶ 8. Plaintiffs adopt the common sense approach that the fact that these plaintiffs did not "settle" with the Plan until 2012, and could not take a distribution before that date (because the phantom account reflected that $0 was due), is irrelevant. Plaintiffs insist that this group remains entitled to prejudgment interest under the Order as compensation for the decade-long delay between the date they were in fact entitled to a pension (i.e., the day they left Xerox) and the date they finally received these long-overdue amounts in 2016.

This Court must resolve this dispute. Several million dollars in prejudgment interest hangs in the balance. Martin Decl., ¶ 9.

(2) Group Two: Phantom Account Benefits Due and Paid. By contrast, Xerox's phantom account treated some plaintiffs slightly more favorably, and entitled them to at least a pittance in lump-sum retirement benefits. After they finally left Xerox, a minority of the plaintiffs – 12 of them – requested and received these "phantom account" benefits as a distribution. Martin Decl., ¶ 10.

These 12 plaintiffs are the only ones that Xerox maintains are entitled to any prejudgment interest prior to 2012. Martin Decl., ¶ 11.

Moreover, even as to these 12 plaintiffs, Xerox insists that they not entitled to prejudgment interest on the date they finally left Xerox, but instead claim that they may only recover prejudgment interest from the date they eventually "settled" with the Plan (i.e., took a distribution). Martin Decl., ¶ 11. This was typically years later. Because the present lawsuit was pending, and because these plaintiffs knew that Xerox had calculated their entitlement in an illegal fashion, these plaintiffs only "settled" with the Plan in 2009-12, even though they left Xerox as early as 2002. Martin Decl., ¶ 12.

Plaintiff Tom Barnes exemplifies this group. Mr. Barnes left Xerox in March of 2002. He eventually received additional new hire benefits that totaled $116,192.39 in 2016. But he did not "settle" with the Plan – i.e., receive a distribution – until June 4, 2010, because only then was he advised that by accepting this amount he would not waive his rights under the present lawsuit.

Xerox insists that Mr. Barnes is entitled only to prejudgment interest starting in June of 2010, rather than starting on the date of his retirement from Xerox in March of 2002. Plaintiffs disagree, and believe that Mr. Barnes, and the other eleven plaintiffs like him, are entitled to prejudgment interest on their unpaid retirement benefits from the date they left Xerox, regardless of when they "settled" with the Plan and took a distribution under the (illegal) phantom account.

(3) Group Three: Phantom Account Benefits Due But Not Paid. Finally, several plaintiffs were entitled to a pittance from Xerox under the phantom account, but refused to "settle" with the Plan by taking a distribution that they knew was illegally calculated. For example, plaintiff Joyce Pruett retired from Xerox in January of 1998. Ms. Pruett was told that she could "settle" with the Plan by taking a distribution pursuant to the phantom account, but she refused to do so. As a result, even though Xerox eventually paid Ms. Pruett a total of $41,277.58 in additional "new hire" benefits -- $21,734.98 in 2012 and $19,542.60 in 2016 – Xerox insists that Ms. Pruett, and every other plaintiff like her, is not entitled to *any* prejudgment interest from 1998 until 2012, since 2012 was the first date on which Ms. Pruett "settled" with the Plan after finally leaving Xerox (*i.e*, the date on which Xerox made its "plan administrator" payments). Martin Decl., ¶ 13.

What is true for Groups One and Two is similarly true for Group Three. Plaintiffs maintain that these plaintiffs are entitled to prejudgment interest for the entirety of the period that Xerox wrongfully miscalculated and withheld the retirement benefits these plaintiffs were due under ERISA; *i.e.,* from the date these employees left Xerox (e.g., in 1998) until the date these benefits were eventually paid by Xerox in 2016.

2. Prejudgment Interest Starts on the Date Plaintiffs Left Xerox.

Each plaintiff received a lump-sum distribution when he or she first left Xerox, but this is not the appropriate date to commence prejudgment interest, since this initial distribution was correctly calculated. By contrast, on the date each plaintiff subsequently left Xerox, Xerox violated ERISA by applying a phantom account to miscalculate their retirement benefits, and by not paying all amounts due. This Court should clarify and/or reconsider the Order to specify that prejudgment interest for each plaintiff commences on the date that they left Xerox's employ, and not on the date of their first (or subsequent) distribution. This is the appropriate commencement date for four reasons.

First, it is the relevant date, since it is the date of Xerox's misconduct. As this Court has found, Xerox violated ERISA by erroneously calculating the pension benefits due to plaintiffs via the phantom account, and by failing to pay (or even offering to pay) the proper pension due. This caused injury to each rehired plaintiff on the date they left Xerox's employ. On that date, each plaintiff was wrongfully told by Xerox in violation of ERISA that he or she was entitled only to a reduced pension offset by the phantom account. On that same date, each plaintiff was similarly not given the option to receive the new hire benefits to which they were entitled. Finally, on that same date, each plaintiff was deprived not only of the option to receive their rightful pension, but was forced to borrow money, or to do without it, in order to replace the retirement benefits to which they were entitled under ERISA but which Xerox wrongfully insisted were not due. *See* Order at 8 ("A plaintiff who was wrongfully deprived of funds for a period of time, but who wanted or needed to make a major purchase, might have been forced to borrow money at rates well above the post-judgment interest rate."). Accordingly, the date on which each particular plaintiff left Xerox – not some other date – is the appropriate date upon which to commence prejudgment interest.

Second, plaintiffs' methodology not only properly commences interest on the appropriate date, but is also consistent with precedent. Prejudgment interest in ERISA notice cases properly commences on the date the plaintiff leaves his employer, as the district court held in *Amara* itself. *Amara v. CIGNA Corp.*, 559 F.Supp.2d 192, 220 (D. Conn. 2008); *aff'd*, 348 F.Appx. 627 (2nd Cir. 2009). Plaintiffs in such cases are harmed on the date they leave their employment and are not notified of the appropriate benefits due them; accordingly, prejudgment interest properly accrues on that date. *Id*. The Second Circuit has repeatedly reversed district courts in ERISA cases for failing to award prejudgment interest at the appropriate time. *See, e.g., Slupinski v. First Unum Life Ins. Co.*, 554 F.3d 38, 53-54 (2nd Cir. 2009). Because plaintiffs were not given the option to receive their full retirement benefits on the date they left Xerox, prejudgment interest must be granted for all time periods subsequent to that date. *Id*. To do otherwise would impermissibly permit Xerox to benefit from its misconduct through its use of these funds in the interim. *Id*.

Third, Xerox's contrary methodology would also conflict with the Second Circuit's mandate in the present case. The Second Circuit held that plaintiffs on remand must be placed in at least the same position as similarly-situated new hires. *Frommert v. Conkright*, 738 F.3d 522, 530-31 (2nd Cir. 2013). On the date they left Xerox, new hires -- unlike plaintiffs – were notified of the correct level of their pension benefits. New hires, unlike plaintiffs, were permitted to withdraw those new hire benefits on that date. New hires, unlike plaintiffs, were permitted to invest these assets and receive interest on those amounts. Accordingly, unless plaintiffs are granted prejudgment interest from the date they left Xerox, they will be treated worse than new hires, a result that is both inequitable as well as contrary to the Second Circuit's mandate.

Finally, Xerox's methodology conflicts with fundamental common sense. Imagine five nearly identical Xerox employees. Employee A is a new hire, and when he leaves Xerox in 2002, he is properly paid $100,000 in a lump-sum pension. Employee A can then invest this $100,000 and receive interest on it, from 2002 to the present. He can also use this money to reduce his borrowing costs, costs that would similarly accrue from the date he left Xerox (2002) until the present. Employee A effectively obtains interest that commences on the date he left Xerox.

Employee B is identical to Employee A, except he is a rehire, so when he leaves Xerox (on the same day as Employee A), Employee B is told that he is entitled to a pension of $0 due to the phantom account. So Employee B gets nothing. Depressed, Employee B is forced to file suit, and fights Xerox for 14 years. Finally, in 2016, Employee B wins the lawsuit, and is paid $100,000. According to Xerox, Employee B is entitled to no prejudgment interest, since he never received a prior distribution when he left Xerox in 2002. He simply is entitled to $100,000 in 2016, with no interest. This makes no sense. It fails to account for the time value of money. It is heresy. Yet this is precisely what Xerox's methodology does. Both to Employee B as well as to a plethora of plaintiffs who are in this same identical position.

Employee C is identical to Employees A and B, but (like B) C is a rehire. When Employee C leaves Xerox in 2002 – on the same day as Employees A and B -- he is told by Xerox that the phantom account entitles him to exactly $0.01 in lump-sum pension benefits. Depressed, Employee C also files suit, but on the same day he leaves Xerox, C figures that $0.01 is better than nothing, so he requests and receives a distribution of this penny in 2002. Xerox admits that Employee C is entitled to 14 years of prejudgment interest on the $100,000 he subsequently received in 2016 – a hefty sum. Yet the only difference between Employee C, who gets tens of thousands of dollars in interest, and Employee B, who gets nothing, is a single penny in 2002. This makes no sense. It is not economically rational that the time value of a single penny distributed in 2002 is tens of thousands of dollars. Yet this is precisely the result of Xerox's methodology.

But it gets worse. Employee D is identical to Employee C. Employee D was also entitled to a penny in 2002, since he left Xerox on the very same day. But Employee D never asked for his penny, either because he was angry, was worried that Xerox might argue that he had "settled with the Plan" by taking his penny, or simply because he knew (correctly) that he was in fact entitled to more than $0.01 under ERISA. Employee D files suit as well, and like the other rehired employees, gets $100,000 in 2016. Xerox again insists that Employee D is entitled to no prejudgment interest at all, because he did not "take his distribution" – the penny to which Xerox admitted the phantom account entitled him – in 2002. This result again is unfair, irrational, and utterly fails to account for the time value of money that Employee D did not receive when he left Xerox in 2002.

Finally, there is Employee E, who is again identical to the other employees. Employee E is also entitled to a single penny when he leaves Xerox in 2002, but he refrains from taking it, and files suit. But in 2009, Employee E takes the penny, either on advice of counsel (who tells him that he will not thereby have "settled" with the Plan, despite what Xerox has said) or simply because he then needs the penny. Finally, in 2016, like the other rehired employees, E finally receives his $100,000 in new hire benefits. According to Xerox, Employee E is entitled no prejudgment interest at all from 2002 to 2009, but is entitled to prejudgment interest from 2009 to 2016. All because of a single penny. This again makes no economic or rational sense. Much less is it fair to award each of these employees – A, B, C, D, and E – radically different amounts of prejudgment interest when they were all entitled to the exact same *relevant* thing: $100,000 when they left Xerox in 2002.

No reasonable observer would defend such a result. Yet that is precisely what Xerox's methodology does. All to the benefit of Xerox. Employee B is Group One, Employee E is Group Two, and Employee D is Group Three. *See supra* at 5-8.

Xerox admits that Employee A (the new hire) and Employee C (the employee who takes the penny in 2002) are entitled to receive 14 years of interest from 2002 to 2016. So too should B, D, and E. Plaintiffs' methodology achieves this result. Xerox's methodology deliberately, and wrongfully, avoids it.

This Court should accordingly clarify and/or reconsider its Order and provide that the prejudgment interest rate for each plaintiff is set at and commences on the date each such plaintiff left his or her employment at Xerox.

C. The Allegedly "Overpaid" Plaintiffs.

Finally, there is the *Layaou* Group, which Xerox refers to as the "overpaid" plaintiffs. A final dispute between the parties exists with respect to the prejudgment interest payable to these plaintiffs.

The 23 plaintiffs in the *Layaou* Group each requested and received a lump-sum distribution of their retirement benefits when they first left Xerox, and then did the same thing after they were subsequently rehired and then left Xerox again. These 23 plaintiffs accordingly each received a distribution of their "phantom account" benefits shortly after they left Xerox for the final time. Thereafter, in 2009, before the Supreme Court granted certiorari, Xerox paid each of these plaintiffs another distribution consistent with the *Layaou* methodology pursuant to the then-existing mandate of the Second Circuit. Martin Decl., ¶ 14.

The principal amount of the *Layaou* benefits paid to these plaintiffs in 2009 was generally greater than the "new hire" benefits to which they would ultimately be entitled under this Court's January 5, 2016 Order. That is why, in the most recent Order of November 3, 2016, this Court stated – based upon the submissions of Xerox – that "any plaintiffs who have taken a distribution of benefits, who received an amount equal to or greater than what they would have been due under the Court's 'new hire' remedy, as set forth in the January decision, are not entitled to prejudgment interest." Order at 6.

The remaining dispute between plaintiffs and Xerox relates to the interpretation and application of that Order. Some of the *Layaou* Group plaintiffs are in fact entitled to <u>greater</u> benefits under new hire, plus interest, than the amount they received as *Layaou* benefits in 2009. Plaintiffs thus claim that they should be paid the higher amount (including interest), since these plaintiffs did not receive "an amount equal to or greater than what they would have been due under the Court's 'new hire' remedy." By contrast, Xerox refuses to pay any additional amounts to any of the *Layaou* Group plaintiffs, even for those plaintiffs in that Group whom Xerox admits are better off under new hire.

An example may again make the issue concrete. Plaintiff Richard Glickin left Xerox on January 1, 1997 and requested and received his "phantom account" distribution later that year. At that time, in 1997, the federal prime interest rate was 8.25%. Under this Court's Order, Xerox calculates that Mr. Glickin should have received – but did not – an additional $16,716.96 in "new hire" benefits in 1997. Martin Decl., ¶ 15.

Mr. Glickin was ultimately paid slightly more than this *principal* amount in 2009. In 2009, as part of the *Layaou* Group, Xerox paid Mr. Glickin $17,920.00. This is why Xerox asserts that Mr. Glickin, like the other *Layaou* Group plaintiffs, was "overpaid" in 2009, by (in his case) $1,203.04. That is also why Xerox asserts that Mr. Glickin, and others like him, are not entitled to prejudgment interest; because they allegedly received more in 2009 than they were due under "new hire" in 2016. Martin Decl., ¶ 15.

But Xerox is wrong. Mr. Glickin was, by Xerox's own calculations, due an additional $16,716.96 in "new hire" benefits in 1997. He asked for these benefits in 1997 but Xerox wrongfully did not pay them. He is accordingly entitled to interest, at 8.25% (since this was the prime rate in 1997), to compensate him for the delay in the benefits he was due in 1997 but were not then paid.

Mr. Glickin did eventually receive $17,920, in 2009. But by 2009, *including interest on new hire*, Mr. Glickin was owed far more than what he was then paid. As of early 2009, he was owed a total of $43,280.49 -- $16,716.96 in principal, plus interest at the prime rate of 8.25% for the twelve years from when he left Xerox in 1997 to when he was paid in 2009 (total interest of $26,563.53). So under "new hire," Mr. Glickin was due $43,280.49 in 2009 but was only paid $17,920 in that same year. He was thus not "overpaid" in 2009. He was underpaid. By over $25,000. Martin Decl., ¶ 16.

Put simply, Mr. Glickin – like many of the other plaintiffs in the *Layaou* Group – receives more under new hire than he received in 2009 under *Layaou*. He is better off under this Court's Orders – the "new hire" Order of January 5, 2016 and the "interest" Order of November 3, 2016 – than he was under the Second Circuit's now-vacated decision in December of 2008. Mr. Glickin and others in the *Layaou* Group simply did not, in fact, receive in 2009 "an amount equal to or greater than what they would have been due under the Court's 'new hire' remedy." Order at 6.

Prejudgment interest is required in ERISA cases to fully compensate plaintiffs for the time value of the retirement benefits they did not receive. *Slupinski v. First Unum Life Ins. Co.*, 554 F.3d 38, 53-54 (2nd Cir. 2009); Order at 2-3. Most, if not all, of the *Layaou* Group are entitled to greater benefits under new hire plus interest than they received in 2009 under *Layaou*. Martin Decl., ¶ 16. They should accordingly receive this amount. To do otherwise would treat these plaintiffs worse than new hires, would conflict with the Second Circuit's mandate in the present case, and would wrongfully deprive them of the prejudgment interest required in ERISA cases.

This Court should accordingly clarify and/or reconsider its Order and provide that the 23 plaintiffs in the *Layaou* Group who are entitled to greater benefits under new hire plus prejudgment interest than the amount they received in 2009 remain entitled to the greater "new hire" award.

Conclusion

Plaintiffs did not receive the benefits to which ERISA entitled them when they left Xerox, and Xerox violated ERISA by failing to notify plaintiffs of the proper benefits due them. Plaintiffs have waited literally decades for those benefits to be paid. They are entitled to prejudgment interest on those amounts, calculated not in a manner that without exception favors Xerox, but rather in the fair and equitable manner described herein.

This Court should accordingly clarify and/or reconsider its Order of November 3, 2016 to provide:

(1) That the prejudgment interest rate is a fixed prime rate for each plaintiff;

(2) That the prejudgment interest rate for each plaintiff is set at and commences on the date each such plaintiff left his or her employment at Xerox; and

(3) That the plaintiffs in the *Layaou* Group who are entitled to greater benefits under new hire plus prejudgment interest than the amount they received in 2009 remain entitled to the greater "new hire" award.

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