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 PREJUDGMENT INTEREST

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Plaintiffs hereby request, pursuant to this Court's Order of January 5, 2016, that plaintiffs be awarded (1) prejudgment interest at the New York statutory rate of nine percent, compounded annually, and (2) "[a]n additional, lump-sum payment" of twenty-five percent that, as this Court noted, "might well be in order to make up the difference between what plaintiffs have received and what they equitably should have received." Decision and Order of January 5, 2016 ("Order") at 28.

Statement of Facts

This Court is familiar with the long history of this sixteen-year litigation, which need not be fully recounted herein. Briefly put, this Court and the Second Circuit have held that Xerox violated its fiduciary duties to its former employees, as well as ERISA, by repeatedly failing to pay these employees the retirement benefits owed to them. This failure to pay, and Xerox's breaches of its fiduciary obligations, constituted "equitable fraud." Opinion at 15-17.

This Court accordingly imposed a "new hire" remedy that instructs that plaintiffs be treated no worse than similarly-situated new hires at Xerox. Opinion at 20. This Court simultaneously recognized, however, that standing alone, such a remedy may well be inadequate given both the time value of money as well as the harm that plaintiffs have suffered as a result of not being given their benefits when they retired. Opinion at 28.

This Court accordingly requested briefing on (1) whether prejudgment interest should be awarded and, if so, at what rate, Opinion at 28-29; and (2) whether "[a]n additional, lump-sum payment might well be in order, to make up the difference between what plaintiffs have received and what they equitably should have received." Opinion at 28.[1]

[1] These inquiries are related, but distinct. This Court noted that a set lump-sum payment might well be appropriate and, thereafter, explained that "there is also the question of prejudgment interest." Order at 28. Although both remedies will presumably result in payment of money, the Court noted that the first remedy is designed to "compensate those plaintiffs fully for the harm they have suffered," while the second is to account for the "time value of money." Order at 28.

Argument

Prejudgment interest should be applied at the New York statutory rate of nine percent compounded annually. In addition, a twenty-five percent lump sum should be added to compensate plaintiffs for the harm they suffered during the decades they were deprived of the retirement benefits to which they were entitled upon their retirement from Xerox.

A. Prejudgment Interest Should Be Awarded.

This Court has correctly noted that it has discretion to award prejudgment interest. Opinion at 28-29 (citing cases). Such an award would clearly be equitable and appropriate in the present case.

The Second Circuit's seminal opinion in *Slupinski v. First Unum Life Ins. Co.*, 554 F.3d 38 (2nd Cir. 2009), dictates that an award of prejudgment interest – at a substantial interest rate – be made in the present matter. In *Slupinski*, the district court held that the defendant had wrongfully failed to pay benefits in violation of ERISA and ordered such benefits to be paid, but denied prejudgment interest on this amount. *Id*. at 53-56. The Second Circuit reversed. *Id*. The *Slupinski* court noted that while an award of prejudgment interest is typically discretionary, it ordinarily constitutes an abuse of that discretion to fail to award such relief in ERISA benefits cases. The Second Circuit held:

> Like an award of attorney's fees for a successful ERISA claim by an employee benefit plan participant, 'prejudgment interest is an 'an element of the plaintiff's complete compensation.''' [*Jones v. Unum Life Ins. Co.*, 233 F.3d 130, 139 (2nd Cir. 2000)] As the Supreme Court has explained, 'a monetary award does *not* fully compensate for an injury **unless it includes an interest component**.' *Kansas v. Colorado,* 533 U.S. 1, 10 (2001) (emphases added); *see also, e.g., City of Milwaukee v. Cement Division, National Gypsum Co*., 515 U.S. 189, 195 (1995) ('The essential rationale for awarding prejudgment interest is to ensure that an injured party is fully compensated for his loss.") Thus, in employment-related cases, 'we have consistently stated that 'to the extent that the damages awarded to the plaintiff represent compensation for lost wages, it is ordinarily an abuse of discretion *not* to include pre-judgment interest.' [citing cases].

Slupinski, 554 F.3d at 54 (emphases in original).

The plaintiff in *Slupinski* was not paid the benefits to which he was entitled for nearly ten years, and the Second Circuit held that it was an abuse of discretion to fail to award prejudgment interest in such a setting. *Id*. at 55. The plaintiffs in the present case have not been paid the retirement benefits to which they are entitled for an even longer period. *See* Declaration of Shaun P. Martin dated January 24, 2016 ("Martin Decl."), ¶2 (average *Frommert* plaintiff retired from Xerox in 2004). As *Slupinski* explains, an award of benefits in the present case would thus not fully compensate plaintiffs, as required by ERISA, unless it also awarded prejudgment interest.

A failure to award prejudgment interest in the present case would also violate the Second Circuit's command that defendants not be allowed to benefit from violations of ERISA. As the Second Circuit explained in *Slupinski*:

> In addition, an award of prejudgment interest may be needed to ensure that the defendant not enjoy a windfall as a result of its wrongdoing. *See, e.g., Skretvedt v. E.I. DuPont*, 372 F.3d 193, 206 (3rd Cir. 2001) (it "is undisputed that prejudgment interest typically is granted to make a plaintiff whole because the defendant may wrongly benefit from use of plaintiff's money"); *Algie v. RCA Global Communications, Inc*., 891 F. Supp. 875, 899 (S.D.N.Y. 1994) ("an award of prejudgment interest is particularly appropriate as a means of ensuring that plaintiffs are made whole and that **defendants do not profit by their failure to comply with their ERISA obligations**"); *aff'd*, 60 F.3d 956, 960 (2nd Cir. 1995) (affirming and adopting the reasoning of [the district court]); *see generally Donovan v. Sovereign Security, Ltd*., 726 F.3d 55, 58 (2nd Cir. 1984) ("Failure to award interest would create an incentive to violate federal law, because violators in effect would enjoy an interest-free loan for as long as they could delay paying out.")

Slupinski, 554 F.3d at 54 (emphases in original). In the present case, Xerox has enjoyed an interest-free loan on the money it should have paid to plaintiffs when they retired from Xerox. An award of prejudgment interest would thus be appropriate for this reason as well.

The Second Circuit in *Slupinski* held that the discretion to deny prejudgment interest in ERISA cases is limited:

> There may be circumstances in which an award of prejudgment interest should not be made, such as where the funds at issue have been placed in an interest-bearing account and the judgment orders that the entire account

> be paid to the plaintiff, or where the funds have been deposited with the court and the plaintiff could have, but did not, seek a court order requiring that they be held in an interest-bearing account. And if the record revealed that the plaintiff had engaged in tactics that were dilatory, i.e., for the purpose of gaining time or deferring decision or action, with the hope of obtaining an award of court-ordered interest at a rate higher than he could obtain in the financial marketplace, the court would plainly have discretion either to deny interest for the specific years of delay attributable to the plaintiff's dilatory tactics, or to deny it altogether, or to set an interest rate that does not result in a windfall to the plaintiff.

Slupinski, 554 F.3d at 54 (citations omitted). Plainly, none of these exceptions apply in the present case.

The Second Circuit in *Slupinski* held that prejudgment interest was required notwithstanding the fact that the plaintiff therein waited two years to bring suit and did absolutely nothing in the litigation for three full years. *Id*. at 55. This precedent strongly dictates a similar award of prejudgment interest in the present case, in which the plaintiffs not only promptly brought suit, but have diligently litigated this matter for over sixteen years in this Court, the Second Circuit, and the Supreme Court.

Prejudgment interest is not only equitable, as well as required by Second Circuit precedent, but it is also compelled in light of the prior decisions in the present case. Most recently, the Second Circuit held that it would be unreasonable to interpret the Plan in a manner that treated plaintiffs worse than similarly-situated new hires, and this Court has similarly so held. *Frommert v. Conkright*, 738 F.3d 522, 530-31 (2nd Cir. 2013); Opinion at 9-11 & 22. Similarly-situated new hires were paid their full benefits when they retired. They were able to invest this money, spend it, or do whatever they liked with it. Plaintiffs, by contrast, were deprived of these rights. They did not receive their money when they were entitled to it. Instead, they had to wait, and litigate, for over sixteen years to finally obtain these funds.

It would be inequitable, as well as unreasonable, to treat plaintiffs worse than new hires by giving these individuals the same amount of money in 2016, after sixteen years of excruciating litigation, that similarly-situated new hires painlessly received when they retired from Xerox in 1996.[2] Decades matter. Plaintiffs have been without their money for years. The Second Circuit ordered that plaintiffs be treated no worse than similarly-situated new hires. To deny plaintiffs prejudgment interest would be to treat them worse than similarly-situated new hires who received the full amount of their retirement benefits when they retired decades ago.

As this Court has repeatedly noted, the Supreme Court declared that it would be "heresy" to fail to account for the time value of money. *Conkright v. Frommert*, 559 U.S. 506, 519 (2010). A failure to award prejudgment interest would be even more egregious apostasy. Plaintiffs were entitled to retirement benefits when they retired in the 1990s. They will not, however, receive these benefits until 2016. They should receive interest on these delayed amounts. To do otherwise would be both inequitable and contrary to the Supreme Court's prior decision in Xerox's favor in 2010.

This Court has previously awarded prejudgment interest to ERISA plaintiffs in circumstances even less compelling than those in the present case. In *Critchlow v. First UNUM Life Ins. Co.*, 377 F.Supp.2d 337 (W.D.N.Y. 2005) (Larimer, J.), this Court initially granted summary judgment in an ERISA case against a parent whose teenage child died while engaged in autoerotic asphyxiation, but the Second Circuit – in a divided opinion – subsequently reversed. *Id*. at 340. On remand, this Court elected to award prejudgment interest to the plaintiff, holding:

> I find that an award of prejudgment interest is warranted. It has now been six years since UNUM denied plaintiff's claim for benefits. She has therefore not had use of that money throughout that time. Considering the remedial purpose of ERISA, the balance of the equities, and the need to make plaintiff whole, I find that plaintiff is entitled to prejudgment interest. *See Algie v. RCA Global Communications, Inc.*, 891 F.Supp. 875 (S.D.N.Y. 1994) ("In view of the long delay in plaintiffs' receipt of benefits that have now been determined to have been due in 1988, such an award is particularly appropriate as a means of ensuring that plaintiffs are made whole and that defendants do not profit by their failure to comply with their ERISA obligations. These concerns are, by themselves, sufficient to justify the award."); *aff'd*, 60 F.3d 956 (2nd Cir. 1995).

[2] Many plaintiffs herein retired from Xerox in the late 1990s; indeed, some plaintiffs retired from Xerox even earlier. Martin Decl., ¶ 2. These plaintiffs have waited two decades, or longer, to receive the retirement benefits that their similarly-situated "new hire" brethren received in – and have enjoyed since -- the twentieth century.

Id. at 347-48 (Larimer, J.). This Court's reasoning in *Critchlow* is equally, if not more, applicable here.

A failure to award prejudgment interest in the present case would fail to fully compensate plaintiffs as required by ERISA. It would grant an impermissible windfall to Xerox, which has had an interest-free loan on this money for decades. It would fail to treat plaintiffs as favorably as similarly-situated new hires. And it would, in the language of the Supreme Court, heretically fail to account for the time value of money.

This Court should accordingly award prejudgment interest, consistent with both Second Circuit precedent as well as the prior holdings of this Court, the Second Circuit, and the United States Supreme Court.

B. The New York Statutory Prejudgment Interest Rate Is Appropriate.

The Second Circuit has noted that "[s]ince prejudgment interest is an element of [the plaintiff's] complete compensation, the same considerations that inform the court's decision whether or not to award interest at all should inform the court's choice of interest rate." *Jones v. Unum Life Ins. Co.*, 233 F.3d 130, 139 (2nd Cir. 2000); *see also Critchlow v. First UNUM Life Ins. Co.*, 377 F.Supp.2d 337, 348 (W.D.N.Y. 2005) (same) (Larimer, J.). The prejudgment interest rate should be whatever is "fair, equitable and necessary to compensate the wronged party fully." *Mendez v. Teachers Ins. & Annuity Ass'n*, 982 F.2d 783, 790 (2nd Cir. 1992).

Neither ERISA nor the federal rules specify a prejudgment interest rate. Moreover, federal courts have repeatedly rejected use of the federal *post*-judgement interest rate as the appropriate rate of *pre*-judgment interest in ERISA cases. *Rood v. New York State Teamsters Conference Pension & Retirement Fund*, 39 F.Supp.3d 241, 254 (N.D.N.Y. 2014). Instead, in ERISA cases, district courts "commonly look to state statutory prejudgment interest provisions as guidelines for a reasonable rate" to be used in federal ERISA awards. *Weber v. GE Group Life. Ins. Co*., 541 F.3d 1002, 1016 (10th Cir. 2008).

Recovery of prejudgment interest in New York is mandatory and accrues at a statutory rate of nine percent compounded annually.[3] Federal district courts in New York typically award prejudgment interest in ERISA cases at precisely this statutory rate. *See, e.g.*, *Henry v. Champlain Enterprises*, 445 F.3d 610, 622-23 (2nd Cir. 2006); *Barbu v. Life Ins. Co.*, 2015 WL 778325, *7 (E.D.N.Y., Feb. 24, 2015); *Rood*, 39 F.Supp.3d at 254; *Alfano v. CIGNA Life Ins. Co.*, 2009 WL 890626, *7 (S.D.N.Y., April 2, 2009).

Recovery of prejudgment interest at the mandatory New York statutory interest rate of nine percent per year is far from excessive. Indeed, in ERISA cases, numerous courts have awarded prejudgment interest at substantially higher – double-digit – interest rates. *See, e.g.*, *Weber*, 541 F.3d at 1016 (awarding prejudgment interest in ERISA case at state statutory rate of fifteen percent per year); *Fox v. Fox*, 167 F.3d 880, 884 (4th Cir. 1999) (same, twelve percent); *Smith v. American Int'l Life Ins. Co*, 50 F.3d 956, 957-59 (same, twelve percent); *Florence Nightingale Nursing Svcs. v. Blue Cross*, 41 F.3d 1476, 1484 (11th Cir. 1995) (same, eighteen percent).

Federal courts in New York ordinarily apply the state statutory nine percent rate in ERISA cases not only due to the default reference to state law, but also because that rate reflects a neutral and reasoned legislative judgment of the appropriate prejudgment interest rate. For example, in *Severstal Wheeling, Inc. Retirement Committee v. WPN Corp.*, 2015 WL 4726860 (S.D.N.Y., Aug. 10, 2015), the district court elected to award prejudgment interest in that ERISA case at the New York statutory rate of nine percent because that rate "is the product of a considered judgment on the part of the legislature as to what is necessary to compensate a plaintiff fully for loss." *Id*. at *29. That same reasoning underlies the decision of numerous other district courts in New York – and throughout the rest of the nation – to similarly award prejudgment interest in ERISA cases at the default state statutory rate. *See Alfano v. CIGNA Life Ins. Co.*, 2009 WL 890626, *7 (S.D.N.Y., April 2, 2009) ("[N]umerous courts have awarded prejudgment interest at a rate of 9%") (citing New York federal district court cases); *Rood*, 39 F.Supp.3d at 254 (same).

[3] *See* N.Y. Civil Practice Law § 5004 (McKinney 2016); *Remsen Funding Corp. v. Ocean West Holding Corp.*, 2009 WL 874212, *1 (S.D.N.Y., March 31, 2009).

Numerous district court ERISA cases have similarly rejected arguments for the use of lower rates – e.g., federal post-judgment interest rates and/or federal Treasury bill rates – as insufficient. First, such rates necessarily reflect the cost of risk-free capital, whereas an award of prejudgment interest, particularly after years of litigation, is both contingent and far from risk-free. Moreover, as the district court held in *Alfano*:

> [W]hile there is no applicable federal statute establishing a prejudgment interest rate [in ERISA cases], New York has adopted a statutory prejudgment interest rate of 9%, N.Y. C.P.L.R. § 5004, thus making an objective legislative judgment that 9% is an appropriate rate. Although CIGNA argues that the Treasury rate constitutes a more appropriate rate, there is no reason to think that that rate more accurately captures the time value of money in New York, or the true loss to plaintiff, particularly given the New York Legislature's determination otherwise. Accordingly, plaintiff's request for prejudgment interest at a rate of 9% is granted.

Alfano, 2009 WL 890626 at *7. The reasoning in *Alfano* is equally applicable here.

Application of the New York statutory prejudgment interest rate is appropriate for several additional reasons as well. First, it is consistent with Xerox's own internal cost of capital. When Xerox failed to pay plaintiffs the full benefits to which they were entitled when they retired, it was able to use these funds for its own benefit; similarly, this money diminished the extent of Xerox's contemporary access other sources of capital (e.g., debt and equity). *Cf. Slupinski*, 554 F.3d at 54 (prejudgment interest typically awarded "because the defendant may wrongly benefit from use of plaintiff's money"); *Critchlow* 377 F.Supp.2d at 347-48 ("[S]uch an award is particularly appropriate as a means of ensuring that plaintiffs are made whole and that defendants do not profit by their failure to comply with their ERISA obligations.") (Larimer, J.).

An 185-page academic study concludes that Xerox's weighted average cost of capital is 8.88% -- nearly identical to the New York statutory prejudgment interest rate.[4] In other words, Xerox requires capital for its business, pays an average annual interest rate of 8.88% for this capital, and every dollar Xerox saves (or takes from its retirees)

[4] Martin Decl, ¶ 3 (noting that Xerox's cost of equity capital was 13.67%, its cost of debt capital was 6.49%, its weighted average capital cost was 8.88%, and that corporate bonds issued by Xerox had interest rates ranging from 5.3 to 8%); *see also* Tyler Haynes, et. al., *Xerox Corporation* (Fall 2007) at 127-131 (describing Xerox capital costs in detail) (available at http://mmoore.ba.ttu.edu/ValuationReports/Fall2007/Xerox.pdf).

reduces its need to pay 8.88% each year on these funds to other investors in Xerox. An award of prejudgment interest at the New York statutory rate would thus be required not only to compensate the plaintiffs, but also to ensure that Xerox did not benefit from its "equitable fraud." Opinion at 15; *see also Novella v. Westchester County*, 661 F.3d 128, 150 (2nd Cir. 2014) ("We similarly conclude that the district court's determination that the proper [prejudgment] interest rate is 7.5 percent – the Fund's assumed rate of return – was within its discretion. In light of the other options before the court, this rate seems to us entirely consistent with the principle that plaintiffs should be 'made whole' and that defendants 'should not profit by their failure to comply with their ERISA obligations.'") (citations omitted).

Similarly, application of the New York statutory prejudgment interest rate would be appropriate given the interest rates that the Plan itself used throughout this litigation and in its application of the Plan. For example, the "phantom account" appreciated prior distributions by double-digit annual interest rates far higher than the statutory prejudgment interest rate requested herein.[5] The subsequent "plan administrator" approach similarly appreciated prior distributions by an annual interest rate "capped" at 8.5 percent – nearly identical to the New York statutory prejudgment interest rate of 9 percent.[6] Although this Court and the Second Circuit rightly concluded that an appreciated offset is impermissible, Opinion at 20-21, Xerox cannot credibly object to a "time value of money" of nine percent per year when it has itself applied nearly identical – indeed, higher – interest rates to the "time value of money" at issue in this litigation.

Finally, the New York statutory prejudgment interest rate roughly approximates the rate required to make the retirement benefits of plaintiffs economically equivalent to those granted to similarly-situated new hires. When new hires retired, they were promptly paid their retirement benefits, typically in a lump sum, and these funds directly rolled over from the Plan into an IRA (in order to avoid taxation) and were invested by the participant therein.[7] It is, of course, impossible to know exactly how similarly-situated new hires invested this money. But, according to the Federal Reserve, interest

[5] Martin Decl., ¶ 4; *Frommert v. Conkright*, 433 F.3d 254, 266-69 (2nd Cir. 2006).
[6] Martin Decl., ¶ 4; Declaration of Lawrence Becker (Docket No. 166-1), ¶¶ 13-16.
[7] Martin Decl., ¶ 5.

rates on AAA corporate bonds paid an average annual interest rate of 12.8% during the 1980s and 8.5% during the 1990s, and if invested in the stock market on January 1, 1990, a new hire would have earned an annual compound return of 9.3% to the end of 2015.[8] That is approximately the same "time value of money" that the New York Legislature has determined is the appropriate mandatory prejudgment interest rate in Section 5004 of the New York Civil Practice Law.

Xerox did not pay plaintiffs the retirement benefits that it owed them and instead has been able to earn profits from these funds for decades. Similarly-situated new hires who retired from Xerox were promptly paid their benefits and similarly earned profits on these assets.

By contrast, plaintiffs here were not paid their retirement benefits when they retired. Unlike Xerox and similarly-situated new hires, they could not earn interest, or participate in equity appreciation, on these funds. Instead, these elderly retirees were required to live on their existing assets, and sold homes, ran up credit card debt (at exorbitant interest rates), and gave up substantial portions of their economic and personal lives in order to make ends meet. *See infra*.

The selection of a prejudgment interest rate must "fully compensate" an ERISA plaintiff for her losses. *Slupinski*, 554 F.3d at 54. The New York statutory prejudgment interest rate will not completely do so. But it is a start. Pursuant to the prevailing view of district courts in ERISA cases, both in New York and elsewhere, this is the interest rate that this Court should select.

C. An Additional Twenty-Five Percent Lump Sum Should Be Awarded.

This Court has correctly noted that "for the Court simply to order defendants to begin paying retired plaintiffs an increased benefit would not necessarily compensate those plaintiffs fully for the harm they have suffered." Opinion at 28. This Court's conclusion in that regard is consistent with the plethora of evidence submitted by

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8 Martin Decl., ¶ 5; *see also* Federal Reserve Annual Yield Data (available at http://www.federalreserve.gov/releases/h15/data.htm); Stock Market Compound Annual Growth Rate Calculator (available at http://www.moneychimp.com/features/market_cagr.htm)

plaintiffs regarding the severe disruptions to their lives that arose from Xerox's failure to pay the benefits that were owed to these elderly retirees.[9] For this reason and others, this Court has stated that "[a]n additional, lump-sum payment might well be in order, to make up the difference between what plaintiffs have received and what they equitably should have received." Opinion at 28.

This Court should indeed make such an equitable award. Plaintiffs submit that a lump-sum amount corresponding to twenty-five percent of the gross "new hire" benefits to which plaintiffs are entitled would be appropriate to help "make up the difference between what plaintiffs have received and what they equitably should have received."

Plaintiffs need not again recount to this Court the many burdens that they have been forced to endure as a result of the "equitable fraud" foisted upon them by Xerox – a fraud to which Xerox has yielded "only when compelled to do so by court decisions . . . [and] grudgingly, block by metaphorical block." Opinion at 17. It is sufficient for present purposes to note only that this harm – unlike the "time value of money" – can never be fully rectified.

Plaintiff Paul Frommert cannot go back and raise his children in the home he was forced to sell because he was not given the retirement benefits he was promised. Plaintiff Floyd Swaim cannot go back in time and remain a vice president at Home Savings of America, rather than join Xerox, based upon what he now knows about the retirement benefits he will actually receive (as opposed to those he was promised). Plaintiff Bill Plummer cannot renegotiate his long-final divorce agreement now that he knows he will only receive "new hire" rather than the retirement benefits that Xerox quantified for him at the time (which he then split with his now former spouse). Plaintiff Linda Borque cannot retroactively enable her nieces and nephews to afford the college of their choice.[10]

A similarly-situated new hire received the retirement benefits they were promised. They worked for Xerox, and Xerox, as their fiduciary, timely paid them the amounts they were owed. These similarly-situated employees lived the lives they were promised.

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[9] See, e.g., Plaintiffs' Memorandum In Support of Motion for Entry of Judgment on Notice Issue (Docket No. 267-1) at 18-20 (and supporting Declarations).

[10] See Plaintiffs' Memorandum In Support of Motion for Entry of Judgment on Notice Issue (Docket No. 267-1) at 18-20 (and supporting Declarations).

By contrast, plaintiffs worked equally hard, but were not paid what they were owed. They could not live their retirement years in the manner they had been promised by Xerox. They have instead spent the first decade and a half of their retirement – critically important years – fighting tooth and nail against their former employer and the fiduciaries who were supposed to act on their behalf.

This Court can, and should, grant prejudgment interest in order to make the money that plaintiffs receive economically equivalent to that received by similarly-situated new hires. But make no mistake. Money received in 2016, even if economically the same as money received in 1996, will not make the plaintiffs whole. They cannot go back in time. They cannot relive the lives they were promised. Money given to them in what is likely the final years of their retirement is simply not the same – can never be the same – as the money they were owed when these individuals needed and had the ability to enjoy it.

And even then it is far too late.

Plaintiff Napoleon Barbosa was born in 1936. He worked for Xerox for decades until he finally retired from Xerox in 2000. When he retired, rather than pay him what was owed, Xerox paid Mr. Barbosa a pittance – the result of a "phantom account" that Xerox applied to the $11,000 that Mr. Barbosa initially received in 1984 when he left Xerox, prior to rejoining the company less than three years later. Mr. Barbosa was forced to file suit, alongside his fellow plaintiffs, and watch Xerox argue daily, monthly, and yearly that it had done absolutely nothing wrong. As Xerox has done for the entirety of the past sixteen-plus years of this litigation.

That was Mr. Barbosa's retirement benefit. He did not receive money with which he and his spouse, Dorothy, might live. He instead received the frustration of a lawsuit and the daily observation of an intransigent fiduciary determined to keep his family destitute.

Napoleon Barbosa is now entitled, in 2016, to a "new hire" benefit. But this will do him little good, even with an appropriate rate of prejudgment interest. Mr. Barbosa died nine years ago, in February of 2007. His widow, Dorothy, is 78 years old.[11] Mr. Barbosa will not get to travel with his wife. They will not live their golden years together

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[11] Martin Decl., ¶ 6.

with a secure retirement income. Even an "economically equivalent" award that accounts for the "time value of money" cannot compensate Mr. Barbosa for what he has lost.

Mr. Barbosa died having no idea whether his widow would ever receive even a penny of the retirement benefits that Xerox promised him. Mrs. Barbosa can, at this point, obtain an interest-enhanced award of what her husband should have received when he retired from Xerox in 2000. But this will not, by any means, take the place of the money that should have been received by Mr. and Mrs. Barbosa sixteen years ago. It will not. It cannot.

And the experience of Mr. and Mrs. Barbosa is replicated throughout the dozens of plaintiffs who have died, lost their spouses, and have seen time – and their ability to enjoy their retirement – irretrievably pass them by during the sixteen years of this litigation.

Economic equivalence to what a new similarly-situated new hire received long ago is insufficient. Instead, "[a]n additional, lump-sum payment might well be in order, to make up the difference between what plaintiffs have received and what they equitably should have received." Opinion at 28. Plaintiffs submit that this additional lump-sum amount should be twenty-five percent of the gross "new hire" benefits to which plaintiffs are entitled.

D. Calculation of the Award.

One final point need be mentioned. The assessment of prejudgment interest begins on the date of plaintiff's retirement from Xerox until the amounts owed to them were paid. As a result, the precise manner in which prejudgment interest will be applied will vary slightly depending upon the individual circumstances of the particular plaintiff. Nonetheless, a uniform method of calculating prejudgment interest must be applied.

Some of the plaintiffs are still employed at Xerox and have not yet become eligible to receive their benefits under the Xerox pension plan. Plaintiffs do not request prejudgment interest for these individuals.[12] These individuals will simply receive the "new hire" relief that this Court has ordered upon their eventual retirement.

Other plaintiffs have retired from Xerox but previously received partial payments from the Plan. Some retired plaintiffs received a "phantom account" payment when they originally retired from Xerox. Some plaintiffs received a "Layaou" payment in 2009, prior to the grant of certiorari by the Supreme Court. Some plaintiffs received a payment of "plan administrator" amounts in 2011. And some plaintiffs will now receive a payment of "new hire" benefits in 2016.

Prejudgment interest should be calculated from the date of the individual plaintiff's retirement from Xerox – which is when benefits are legally due – to the date of payment by the Plan. Once payment, or partial payment, has been made by the Plan, prejudgment interest on this amount should cease to accrue. This is the proper method for calculation of prejudgment interest. *Klimbach v. Sherion Corp.*, 467 F.Supp.2d 323, 334 (W.D.N.Y. 2006) ("Setting the accrual date in this manner not only advances the general purposes of prejudgment interest, but also serves ERISA's remedial objectives by making a participant whole for the period during which the fiduciary withholds money legally due.").

For example, imagine that Plaintiff A retired from Xerox in 1995, received a lump-sum "phantom account" payment of $10,000 at that time, subsequently received an additional $20,000 from the Plan in 2011 pursuant to the "plan administrator" remedy, and then received an additional $60,000 from the Plan in 2016 under to the "new hire" remedy – a total retirement benefit of $90,000. In such circumstances, Plaintiff A would be entitled to (1) prejudgment interest on $20,000 from 1995 to 2011 (at nine percent compounded annually), and (2) prejudgment interest (at the same rate) on $60,000 from

[12] It bears mention, however, that these plaintiffs too have had the rug pulled out from under their feet. For these employees and their families, planning for retirement has been severely disrupted by Xerox's unreasonable positions and intransigence. They and their spouses have had to defer retirement, take second jobs, or severely tighten their belts to cope with the uncertainty caused by Xerox's position. While prejudgment interest will not apply to their eventual benefit payments, they rightfully deserve a judgment that will compensate them for the troubles they have had to endure.

1995 to 2016. By contrast, she would not be entitled to prejudgment interest on the original $10,000, nor prejudgment interest on the $20,000 after 2011.[13]

Plaintiffs mention this issue because there is a need for clarity in the manner in which interest calculations should be made in this case, consistent with the requirement that prejudgment interest awards "fully compensate" ERISA beneficiaries. This Court should accordingly specify that any lump-sum prejudgment interest award should be calculated pursuant to the method indicated in Section (D) of this submission.

Conclusion

Plaintiffs should receive prejudgment interest at the New York statutory rate of nine percent on those benefits to which they are entitled as a result of this litigation, compounded annually until paid, as well as "[a]n additional, lump-sum payment" of twenty-five percent of the gross "new hire" benefits to which plaintiffs are entitled. Such an award would be equitable as well as advance the foundational objectives of ERISA that beneficiaries be fully compensated for their losses and defendants not benefit from their violation of federal law.

[13] Similarly, imagine that Plaintiff B retired from Xerox in 2000, received a lump-sum "phantom account" payment of $25,000 at that time, received a "Layaou" payment of $100,000 in 2009, and then Xerox calculated a total "new hire" entitlement of $75,000 (including the prior "phantom account" payment). Because Plaintiff B was owed $75,000 in 2000, but was only paid $25,000 at the time, he is entitled to prejudgment interest on the difference ($50,000), at nine percent annually, from 2000 until this amount is paid. If the principal ($50,000) plus interest on this amount is less than the $100,000 Plaintiff B was paid in 2009, then Plaintiff B is entitled to no further relief. By contrast, if principal plus interest exceeds what he was paid in 2009, then Plaintiff B is currently entitled to payment of the remainder (plus interest from 2009 to 2016).

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