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United States Court of Appeals

FOR THE SECOND CIRCUIT

PAUL J. FROMMERT; DONALD S. FOOTE; THOMAS I. BARNES; RONALD J. CAMPBELL; FRANK D. COMMESSO; WILLIAM F. COONS; JAMES D. GAGNIER; BRIAN L. GAITA; WILLIAM J. LADUE; GERALD A. LEONARDO, JR.; FRANK MAWDESLEY; HAROLD S. MITCHELL; WALTER J. PETROFF; RICHARD C. SPRING; PATRICIA M. JOHNSON; F. PATRICIA M. TOBIN; NANCY A. REVELLA; ANATOLI G. PUSCHKIN; WILLIAM R. PLUMMER; MICHAEL J. MCCOY; ALAN H. CLAIR; LARRY J. GALLAGHER; NAPOLEON B. BARBOSA; ALEXANDRA SPEARMAN HARRICK; JANIS A. EDELMAN; PATRICIA H. JOHNSTON; KENNETH P. PARNETT; JOYCE D. CATHCART; FLOYD SWAIM; JULIE A. MCMILLIAN; DENNIS E. BAINES; RUBY JEAN MURPHY; MATTHEW D. ALFIERI; IRSHAD QURESHI; RICHARD C. CRATER; GAIL J. LEVY;

(*For Continuation of Caption See Inside Cover*)

On Appeal from the United States District Court
for the Western District of New York
Hon. David G. Larimer, No. 6:00-CV-06311

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Plaintiffs-Appellants,

v.

SALLY L. CONKRIGHT, Xerox Corporation Pension Plan Administrator; PATRICIA M. NAZEMENTZ, Xerox Corporation Pension Plan Administrator; XEROX CORPORATION; LAWRENCE M. BECKER, Xerox Corporation Plan Administrator; XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN,

Defendants-Appellees.

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INTRODUCTION

Plaintiffs are current and former employees who worked at Xerox, left, and returned. Under Xerox's ERISA pension plan (the "Plan"), Plaintiffs are entitled to receive pensions for all of the years they worked at Xerox, at their highest average pay for all of those years. But Xerox wants to subject those pensions to an "offset" based on Plaintiffs' first period of service, and to refuse entirely to count the years (or pay rate) of that same first service period. Certain offsets are permissible under ERISA, but only if they are properly disclosed and in the plan.

For 15 years, Xerox tried to impose upon Plaintiffs an appreciated offset, an offset that (1) used an interest rate to appreciate a plan distribution that Plaintiffs had received decades ago and (2) was then deducted from Plaintiffs' current entitlements. In December 2013, this Court held, *inter alia*, that Xerox failed to tell Plaintiffs that their pensions would be subject to any offset at all, let alone an appreciated one. It then ordered the district court to determine a remedy for Xerox's notice failure pursuant to *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011). Liability was found. The only issue was remedy.

The "remedy" that Xerox proposed below was no remedy at all. Specifically, Xerox proposed that Plaintiffs' first period of service should be entirely disregarded, and Plaintiffs should instead receive a pension based only on their second period of service, i.e., they should be treated as "new hires." Again: the "remedy" that Xerox wanted for failing to have disclosed the existence of an offset that would slash Plaintiffs' pensions was for Xerox to be permitted to disregard years of service to slash Plaintiffs' pensions. The district court erroneously agreed with Xerox, and entered its requested remedy.

Under law, equity, and common sense, however, disregarding years of service is not a permissible remedy in such circumstances. Xerox's failure to disclose an interest rate should lead to a nominal offset, not ignoring of Plaintiffs' service. The equitable theories of surcharge, reformation, and estoppel all require, at a minimum, that Plaintiffs' pensions be subject to no more than a nominal offset; by contrast, none of those theories justifies tossing the Plaintiffs' first stint at Xerox.

Xerox always insisted that all years of service would count, and the plan specifically requires the same. A "remedy" that leaves a beneficiary worse off than what Xerox promised, and what the Plan itself provides, is no remedy at all. For this reason alone, reversal is warranted. And the fact that the district court (1) erroneously refused to decide *at all* Plaintiffs' cause of action for plan interpretation and (2) awarded an inadequate amount of prejudgment interest only further requires that the district court's decision below be reversed.

JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. § 1331. This Court has jurisdiction to review the district court's final judgment under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

1. Whether the district court awarded an inadequate remedy for Defendants' violations of ERISA's notice requirements.

2. Whether the district court erred by refusing to interpret the ERISA Plan.

3. Whether the district court award of prejudgment interest was insufficient.

STATEMENT OF THE CASE

Plaintiffs are rehired employees of Xerox seeking the pensions they earned. Each Plaintiff worked at Xerox for years, left, and then was induced by Xerox to return. When Plaintiffs went to collect their pensions after decades (and two stints) of service, however, Xerox refused to pay.

More specifically, Xerox has attempted to use the fact that Plaintiffs received small lump sums (from a now-defunct plan) decades ago after they first left Xerox as a basis for imposing a massive "offset" on Plaintiffs' pensions. Although the details of the offset Xerox has attempted to impose throughout this 18-year litigation have varied, the theme has not. Xerox is currently working on its *third* proposed offset, this time in the guise of a "remedy." In every instance, Xerox has sought to impose an "offset" that Xerox (1) failed to disclose in plain English and (2) failed to write into the plan.

This is a serious problem for Xerox, because ERISA has both "in the plan" and "notice" requirements. And Plaintiffs indisputably have sought relief on both grounds, as this Court has itself repeatedly noted. *See, e.g.*, *Frommert v. Conkright*, 738 F.3d 522, 529-34 (2d Cir. 2013) (*Frommert III*) (containing Section I, "Reasonable Interpretation" [of the Plan], and Section II, "Notice").

Put differently, fiduciaries must both *notice* beneficiaries of plan terms and, of course, actually put those terms *in the plan*. A failure to notice beneficiaries of material reductions in their pensions (such as an offset) entitles plaintiffs to relief under *Amara*, 563 U.S. at 440-42 (recognizing relief under alternative theories of surcharge, reformation, and estoppel). Similarly, a failure to put an offset in the plan means—just like with any other contract—that an offset cannot be applied to the plaintiffs, period. *See* 29 U.S.C. § 1132(a)(1)(B) (permitting suit "by a participant or beneficiary to recover benefits due him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan").

In December 2013, this Court (upon hearing the matter for the third time) greatly simplified the case, along precisely those lines. First, on the question of notice, the panel categorically held that Xerox failed to inform Plaintiffs of *any* offset, let alone an appreciated one, to their pensions. *Frommert III*, 738 F.3d at 532. Second, on the question of plan interpretation, the panel held that *any* interpretation of the Plan that awarded pensions to Plaintiffs in amounts lower than the pensions that "new hires" (newly-hired employees who had hypothetically started upon Plaintiffs' second period of service) would have received was arbitrary and capricious. *Id.* at 529-31.

On remand, logically and legally, the district court had a two-part job. First, it needed to determine the scope of the *Amara* remedy to which Plaintiffs were entitled as a matter of notice. Second, it needed to interpret the Plan to ensure that the remedy it awarded did not make Plaintiffs worse off than what they were already entitled to under the actual language of the Plan. Any remedy that did otherwise would violate ERISA's fundamental rule that a beneficiary can never receive less than what the plan promises.

The district court erred on both counts.

Notice. First, as a remedy for Xerox's notice failure, the district court awarded Plaintiffs what the parties have called "New Hire." Again, this remedial approach treats Plaintiffs as they would be treated as if they were "new hires." That is, their pension entitlement is based exclusively on their second stint of service. To do that, of course, Xerox does not "count" their first period of service.

But this award is neither sensible nor equitable. The case was on remand below because this Court agreed with Plaintiffs' claim that Xerox used an *undisclosed interest rate* to gut their pensions and ordered the district court to determine an adequate remedy. The remedy for that failure cannot possibly be that Xerox is allowed to use an *undisclosed service reduction* to similarly gut Plaintiffs' pensions.

To start, Plaintiffs were not put on notice of *that* either. Not only did Xerox never inform Plaintiffs that their past service would be disregarded, Plaintiffs were also repeatedly assured that all of their years of service would count. One cannot remedy one notice failure by committing another.

Instead, every equitable theory sanctioned by *Amara*—namely, surcharge, reformation, and estoppel—entitles Plaintiffs to one of two equitable offsets. The first is the "Layaou Offset," inspired by then-Judge Sotomayor's opinion in *Layaou v. Xerox Corp.*, 238 F.3d 205, 209-12 (2d Cir. 2001). The Layaou approach makes the offset the nominal (i.e., actual) sum each Plaintiff originally received upon first leaving Xerox. The other possible equitable offset is the "Actual-Annuity Offset," which deducts from Plaintiffs' current pension the fixed, plan-based annuity they were entitled to receive when they first left Xerox years ago.

Those are the only two equitable remedies permitted by *Amara*, not a remedy that "solves" one notice violation by committing a worse one.

Plan interpretation. Even if New Hire was somehow an appropriate equitable remedy for Xerox's *notice* failure, ERISA independently requires that a court confirm that the plan itself permits awarding a New Hire benefit. *See* 29 U.S.C.

§ 1132(a)(1)(B). Here, it [the Plan] indisputably does not. And, as in any other case, Plaintiffs are entitled to the greater of the amounts they were contractually promised under the Plan, 29 U.S.C. § 1132(a)(1)(B), or the amounts to which they are equitably entitled for Xerox's violations of ERISA's statutory notice requirements, 29 U.S.C. § 1024; *Frommert III*, 738 F.3d at 531-34 (discussing notice claims).

The question of plan interpretation is constrained by the law of this case. This Court has already held that any plan interpretation that would treat Plaintiffs worse than New Hire is arbitrary and capricious. *Id.* at 529-31. Thus, the relevant question is: in terms of "New Hire or better" interpretations of the plan, which ones are in fact reasonable?

There are precisely two reasonable readings of the Plan regarding offsets. The first is the Layaou Offset; the second is the Actual-Annuity Offset. Both make Plaintiffs better off than New Hire. The district court's refusal to properly interpret the Plan, SA7-SA8, and its decision to award Plaintiffs only New Hire, SA8-SA11, was therefore an error because it [the Plan] violates ERISA's most fundamental rule: a beneficiary can never receive less than what the plan promises.

Xerox will likely argue on appeal that New Hire is in fact a reasonable interpretation of the Plan. It is not. The Plan specifically says otherwise, and a New Hire reading fails, even under a deferential standard of review. Moreover, Xerox is not entitled to any deference, by any court, as its acts of bad faith mean deferential review is no longer appropriate. So this Court can and should put a much-deserved end to this 18-year (and counting) litigation by finding that Plaintiffs are entitled to either the Layaou or the Actual-Annuity Offset, the only reasonable interpretations of the terms of the Plan awarding such relief.

But, at a minimum, the district court's inexplicable refusal to try to interpret the Plan (or resolve Plaintiffs' bad faith motion) *at all* indisputably requires at least a remand. Because Plaintiffs are entitled to the benefits that the Plan provides, and to this day, they indisputably have not received such relief.

STATEMENT OF THE FACTS

This matter has previously been before this Court numerous times. As a result, most of the relevant underlying facts may already be known to the panel, or are already readily obtainable from this Court's prior opinions. *See Frommert v. Conkright*, 433 F.3d 254 (2d Cir. 2006) (*Frommert I*); *Frommert v. Conkright*, 535 F.3d 111 (2d Cir. 2008) (*Frommert II*); *Frommert III*, 738 F.3d 522. Plaintiffs nonetheless provide the following brief description of the relevant factual and procedural history of this long-running litigation.

A. Xerox Plan Basics

Before 1989, Xerox Corporation provided its employees with two ERISA plans: (1) a defined benefit pension plan called the Retirement Income Guarantee Plan, and (2) a defined contribution plan called the Profit Sharing Plan ("PSP").

Miller v. Xerox Corp. Ret. Income Guarantee Plan, 434 F.3d 871, 872 (9th Cir. 2006). The Retirement Plan provided a fixed "formula" benefit based on compensation and total years of service—the RIGP highest-average-pay formula ("RIGP/HAP benefit"). The RIGP/HAP benefit is like a traditional pension, where the recipient gets a fixed monthly amount based on tenure and pay. A95 (Section 1.1, 1989 Plan); A523 (description of RIGP/HAP annuity in SPD). By contrast, the PSP provided each participant with an individual account that consisted of annual contributions plus investment performance appreciation. *Miller*, 464 F.3d at 873. When the plaintiffs originally left Xerox, the distribution they received was a cash-out of their PSP accounts. Brief for the United States as *Amicus Curiae* Supporting Respondents 4, *Conkright v. Frommert*, 559 U.S. 506 (2010) (No. 08-810), 2009 WL 4030393, at *4; Brief for the Petitioners 9, *Conkright v. Frommert*, 559 U.S. 506 (2010) (No. 08-810), 2009 WL 2954165, at *9.

In 1989, Xerox combined the two plans, eliminating the PSP and transferring existing individual accounts into the Plan. A95-A175. Xerox created two new accounts—a Cash Balance Retirement Account ("CBRA") and a Transitional Retirement Account ("TRA"). A168-A175. The CBRA was not an actual account, but merely provided a benefit based on the balance of an employee's PSP account, plus annual contributions by Xerox equal to 5% of the employee's salary, plus interest at a specified rate. *Frommert I*, 433 F.3d at 258. The TRA, by contrast, was an actual, transitional account used to port employees' remaining PSP funds out of the abolished PSP plan and into the restructured Plan. A168 (Section 17.1, 1989 Plan); A683 (SPD describing TRA). No employee could contribute to or create a TRA after 1989. A168. Thus, the TRA did not apply to employees (including Plaintiffs) who had cashed out their PSP accounts prior to 1989, because they had no money in the PSP to transfer into the TRA.

When the two plans merged in 1989, the new plan distinguished between the offset applicable to retired employees as opposed to employees like Plaintiffs. A115-A120; *Frommert I*, 433 F.3d at 258. For those who had already retired from Xerox and were thus receiving monthly retirement checks, the 1989 Plan provided that their monthly checks would remain the same: any offset that had previously applied to amounts received in the past by these retirees (specifically the original "phantom account" offset) would persist. A115-A117 (Section 4.2, 1989 Plan). The phantom account offset used an interest rate equal to equity growth rates that the monies "would have experienced if the mon[ies] had remained in Xerox's investment funds, and reduced respondents' present benefits accordingly." *Conkright v. Frommert*, 559 U.S. 506, 510 (2010). By contrast, for those not yet retired, like Plaintiffs, the "phantom account offset" was eliminated. A117-A120 (Section 4.3, 1989 Plan).

Xerox nonetheless attempted to apply the phantom account offset to Plaintiffs. In 1999, Plaintiffs sued and claimed that the Plan did not by its terms provide for the use of the phantom account methodology to inflate and offset Plaintiffs' prior PSP distributions. *Frommert v. Conkright*, 328 F. Supp. 2d 420, 432-33 (W.D.N.Y 2004). Plaintiffs additionally contended that "the SPD did not disclose that the phantom account would be used" and that "defendants breached their fiduciary duties * * * by not adequately disclosing the offset to plaintiffs." *Id.* at 429-32.

The district court entered judgment for Xerox, but this Court reversed, holding "that the Plan administrator's conclusion that the Plan always included the phantom account is unreasonable," even under "an arbitrary or capricious standard" of review. *Frommert I*, 433 F.3d at 254. The panel further observed that it had already held in *Layaou*, 238 F.3d at 209-12, that the Plan had violated ERISA's SPD requirement by failing to "provide notice" that rehired employees' "future benefits would be offset by an appreciated value of their prior lump-sum benefits distributions." *Frommert I*, 433 F.3d at 265. The case was remanded to the district court to provide Plaintiffs with the benefits they were due. *Id.* at 268. Thus, long ago, as now, the issue was (1) what benefits the plan terms entitled Plaintiffs to obtain ("plan interpretation"), and (2) what benefits Plaintiffs should alternatively receive for Xerox's notice violations ("notice").

B. *Frommert II*: 2006-2010

On remand, the parties proposed four different "methodologies" to calculate Plaintiffs' benefits. Xerox proposed two methods, and Plaintiffs proposed two.

Xerox's Plan Administrator Approach (PAA). Xerox's PAA was a slightly less aggressive appreciated offset than Xerox's prior phantom account that this Court had invalidated. Whereas the phantom account offset inflated the past distributions using equity growth rates, the PAA inflated the past distributions using a compounding 8.5% rate. Brief for the United States as *Amicus Curiae* Supporting Respondents 6-7, *Conkright v. Frommert*, 559 U.S. 506 (2010) (No. 08-810), 2009 WL 4030393, at *6-7.

New Hire. Xerox's other proposed methodology was the "new hire" method, where Plaintiffs would be treated as if they were "new hires," i.e., their pension entitlement would be based exclusively on their second stint of service. *Id.*

Layaou Offset. Plaintiffs proposed adoption of the Layaou Offset, under which current benefits would be offset by only the nominal amount of each Plaintiff's prior distribution.

Actual-Annuity Offset. Under Plaintiffs' second proposed method—explained by expert actuary Phillip Cofield—the offset would have been equal to the actual RIGP/HAP annuity to which Plaintiffs were contractually entitled at their original date of departure. A66-A69. If, for example, at the original date of departure, Plaintiff A was entitled to an annuity worth $1,200 per month, then that annuity would be subtracted from Plaintiff A's annuity entitlement today. So if Plaintiff A was entitled now (under all years of service and at her Highest Average Pay) to

$4,000 per month, but when she first left was entitled under the RIGP/HAP to $1,200 per month, the $1,200 per month would be offset from her current entitlement and she would receive $2,800 per month ($4,000 minus $1,200).

From these four proposed methods, the district court chose the Layaou Offset, on two grounds. The first was "plan interpretation." The district judge concluded that the 1989 Plan did not include any language authorizing *any* type of appreciated offset. The second was "notice." The district judge concluded that Xerox was prohibited from using an appreciated offset, because no interest rate was ever disclosed. As the district court wrote in 2007:

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

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

This Court affirmed, rejecting the argument that Xerox's PAA "interpretation" of the 1989 Plan was entitled to deference and then affirming the Layaou Offset as the best interpretation of the 1989 Plan. *Frommert II*, 535 F.3d at 119-23. Because this Court resolved the case in Plaintiffs' favor—and granted them the full relief they requested—on plan interpretation grounds, it did not find it necessary to address the "notice" issue.

Xerox sought review by the Supreme Court solely on the plan interpretation question, arguing that the lower courts' judgment as to the meaning of the Plan should be reversed because no deference was extended to the Plan Administrator's interpretation of the Plan. *See Conkright v. Frommert*, 559 U.S. 506, 511 (2010). On that question, five justices agreed with Xerox. *Id.* at 522.

Because the *Frommert II* panel did not rule on the merits of the notice question, the Supreme Court expressly left that issue "to be decided, if necessary, on remand." *Id.* at 522 n.2. The Supreme Court also took specific pains to point out that, even on the plan interpretation question, Xerox still had a duty to offer a reasonable interpretation of the plan; arbitrary constructions were unacceptable. *Id.* at 521.

C. *Frommert III*: 2010-2013

On remand, Plaintiffs again sought the Layaou or Actual-Annuity Offsets, and Xerox asked that the PAA be applied. *Id.* The District Court agreed with Xerox, but this Court reversed, holding that "the [PAA] offset is an unreasonable interpretation of the retirement plan and it violates ERISA's notice provisions." *Frommert III*, 738 F.3d at 525. In short, in its latest opinion, this Court held that Xerox (1) lost on the plan interpretation claim and (2) lost on the notice claim.

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

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

Id. Frommert III thus held that Xerox failed to intelligibly explain that there would be an offset of *any* kind. This Court accordingly directed the district court, on remand, to determine the equitable relief to which Plaintiffs were entitled under *Amara*. *Frommert III*, 738 F.3d at 534.

Plan interpretation. Apart from the issue of notice, *Frommert III* also held that Xerox's then-interpretation of the Plan, the PAA, was arbitrary and capricious. This Court's conclusion was based on the finding that the PAA led to the necessarily unreasonable result of putting Plaintiffs in a worse position than new hires. In the words of this Court:

> We hold this [interpretation] is unreasonable because it makes the rehired employees worse off under the Plan in terms of actual benefits received. * * * To be clear, ERISA plans may be constructed to change the risk borne by rehired employees or reduce such employees' benefits in a manner that treats them worse than newly hired employees, provided that such terms exist in the plan. They do not exist here.

Id. at 529-31.

Because this Court concluded that Plaintiffs had prevailed on both their plan interpretation and notice claims, it remanded to the district court, alongside instructions regarding available relief. Since this Court had conclusively found a notice violation, it took that cause of action first, and instructed the district court to fashion an appropriate remedy for these notice violations. *Id*. at 534 ("Because we hold that in the circumstances of this case *any* offset of the RIGP benefit violated ERISA's notice provisions, the district court should first consider equitable remedies.")

The Court then instructed the district court that if the remedies it granted for the now-conclusively resolved notice violation "provide the relief that Plaintiffs seek," *id.*, the case would be over. By contrast, if those remedies did not grant the relief that the Plaintiffs sought, the district court was to then resolve Plaintiffs' alternative "plan interpretation" claim. *Id*.

D. *Frommert IV*: 2013-Present

On remand, the district court initially did what this Court instructed, and determined which equitable remedy it believed Plaintiffs were entitled to for Xerox's violations of ERISA's notice requirements. SA23-SA27. However, the only equitable theory that the district court elected to resolve was the claim for reformation, SA24, and, on that theory, the district court decided only to award New Hire relief. SA30-SA31 (reforming plan and directing Xerox "to recalculate and pay plaintiffs' retirement benefits, treating plaintiffs' second periods of employment with Xerox as if plaintiffs had been newly hired and without regard for their prior periods of employment."). And even though it had not awarded Plaintiffs the relief they sought (the Layaou or the Actual-Annuity Offset), the district court inexplicably decided that its decision to award the New Hire relief that *Xerox* had requested made it "unnecessary to reach plaintiffs' arguments concerning the alternative theories of surcharge and estoppel." SA24.

Since the equitable relief it awarded adopted Xerox's approach, and did not "provide the relief that Plaintiffs seek," *Frommert III*, 738 F.3d at 534, Plaintiffs promptly filed a motion reasserting their plan interpretation cause of action, yet again seeking either the Layaou or the Actual-Annuity Offset, the only reasonable interpretations of *the terms of the plan* (wholly apart from the equitable remedies for the notice violation). D.Ct. Dkt. 302. Plaintiffs also reasserted that such relief was the only one available given the undisputed evidence of Xerox's bad faith in prior interpretations of the plan. D.Ct. Dkt. 302 (reasserting bad faith); D.Ct. Dkt. 278 (additionally requesting such relief).

But the district court refused to resolve *either* plan interpretation motion, holding that since the court had granted *some* remedy for the notice violations—albeit not awarding (as this Court presumed it would) "the relief that Plaintiffs seek"—Plaintiffs' request for benefits under the contractual, promised terms of the plan itself was allegedly "moot." SA22.

Plaintiffs finally filed motions for prejudgment interest and attorney's fees, which the district court granted in part and denied in part. D.Ct. Dkt. 308; SA51. Plaintiffs timely appealed.

SUMMARY OF ARGUMENT

The decision below contains multiple reversible errors.

First, New Hire is not an appropriate equitable remedy. It is unfair to Plaintiffs, treats them worse than actual new hires, judicially sanctions *another* notice violation by Xerox, and wrongly applies the equitable theory of reformation.

Second, the district court erroneously refused to consider or resolve the equitable theories of surcharge and estoppel, both of which were advanced by Plaintiffs and either of which would independently justify the imposition of the Layaou or the Actual-Annuity Offset, not New Hire.

Third, the district court erroneously refused to construe the Plan or rule on Xerox's bad faith. Because ERISA's most foundational rule is that beneficiaries are always entitled to—and can never be made worse off than—what the plan promises, the district court was required to construe the Plan. It did not, and the district court's belief that this Court was somehow commanding it to ignore the plan is simply wrong. No court can rewrite ERISA that way, and this Court did not require the district court to do so in *Frommert III*.

Finally, the district court also erroneously awarded an inadequate amount of prejudgment interest that failed to make the Plaintiffs whole.

Ultimately, equity matches the remedy to the wrong. If, as here, a fiduciary fails to disclose a material term (whether it be an interest rate or a service reduction), the pension should be paid without that term. That is what ERISA presumes. That is what reformation, surcharge, and estoppel all justify. And that is precisely what New Hire does *not* do.

STANDARD OF REVIEW

An award of equitable relief under ERISA is reviewed for abuse of discretion and legal error. *Amara v. CIGNA Corp.*, 775 F.3d 510, 519 (2d Cir. 2014). Where the district court's determinations regarding equitable remedies rely on conclusions of law, these legal conclusions are reviewed *de novo*; where they rely on findings of fact, such findings are reviewed for clear error. *Id.* A mistaken application of the law or an abdication of the responsibility to adjudicate is an abuse of discretion. *Milanese v. Rust-Oleum Corp*., 244 F.3d 104, 110 (2d Cir. 2001).

ARGUMENT

I. *NEW HIRE IS AN INSUFFICIENT NOTICE REMEDY*

The district court's award of New Hire was an error. New Hire is neither a sufficient nor equitable remedy for the notice violations performed by Xerox, and Layaou, rather than New Hire, is the appropriate reformation remedy.

A. New Hire Is Not Equitable

New Hire is an insufficient remedy for multiple reasons. It remedies one notice violation by approving another, fails to remedy the wrong for which equitable relief is sought, does not actually treat Plaintiffs as well as real new hires, and makes Plaintiffs worse off than the Plan itself. Contrary to the holding below, reformation justifies use of the Layaou Offset, not New Hire.

New Hire is unfair. First, it is law of the case that Xerox violated ERISA by not telling Plaintiffs their pensions would be subject to the appreciated offsets Xerox has been trying to impose for 15 years. This Court has held that because Xerox did not disclose an interest rate, it cannot impose an interest-rate-driven offset. That was a straightforward application of a basic ERISA principle: a fiduciary must tell a beneficiary if, when, and how it will reduce her pension.

New Hire fails under the same reasoning. Instead of using an undisclosed interest rate to reduce Plaintiffs' pensions, the district court has now permitted Xerox to use an undisclosed service reduction. But not only did Xerox never say that previous service would not count, it also said the opposite repeatedly. *See infra* pp. 44-46. It is inequitable to remedy one notice violation (involving an undisclosed interest rate) by adopting another one (involving an undisclosed service reduction). Two wrongs don't make a remedy.

Second, New Hire also does not address the actual wrong of which Plaintiffs complain. Plaintiffs received tiny sums long ago from a defunct plan, returned to work at Xerox, received personalized benefit statements setting forth their pensions, and were never told those old sums would *in any way* damage their pensions. Plaintiffs thus worked at Xerox on the reasonable belief that all years of service would be counted and no appreciated offset would be imposed, and they did so because that is what Xerox promised them

To allow Xerox to now impose a never-mentioned service reduction because Xerox breached its interest rate disclosure obligations is neither fair nor responsive to the wrong. To use an instructive example: if a restaurant promises a free twelve-ounce steak to attract customers but uses horsemeat, the equitable remedy is not to make the restaurant use beef but cut the steaks in half. Plaintiffs should not suffer because Xerox cannot follow the law.

Finally, the New Hire remedy is inequitable because it in fact treats employees worse than actual new hires. The district court believed that the New Hire remedy it imposed was "neither a penalty nor a windfall," SA21, because such a remedy would serve to treat Plaintiffs no worse than actual new hires—which was the absolute minimum this Court had said was possibly allowed. *Frommert III*, 738 F.3d at 529-31 (holding that treating rehired employees worse than new hires would be "arbitrary and capricious"). But Plaintiffs are in fact treated worse:

1. Actual new hires at Xerox get the full benefit of the highest-average-pay formula the RIGP plan promises. By contrast, under New Hire, Plaintiffs do not.

Like many defined benefit plans, Xerox's RIGP plan calculates an employee's pension entitlement by multiplying (1) years of service, (2) highest average pay (using the employee's best five years), and (3) a fixed percentage. *See infra* pp. 43-44. Employees almost always earn significantly higher salaries in their later career, which drives up their highest average pay. Much of the value in a defined benefit pension formula derives not just from having a higher average pay, but from having that higher average pay multiplied across *every year of service* (even the early, low-salary ones) to determine the pension.

But when service is broken into two parts, the first period is "isolated" from the highest pay of one's career.[1] Thus, under New Hire, a Plaintiff's highest average pay number is only being applied to *part* of their career to determine their pension. By contrast, real new hires have their highest average pay apply to their whole

[1] Nor does the average in the later period change by dint of the lower salary years not being included, as highest average pay is based on one's five best years, which all come in the later period anyway.

careers. As a result, "New Hire" in fact treats Plaintiffs worse than actual new hires, an inequitable result.

2. Real new hires were never misled, and thus had the opportunity to plan. They were promised a pension of some specific dollar amount, had the opportunity to plan accordingly, and then received what was promised. Plaintiffs, by contrast, were promised a pension of a specific size but are being given something less, and had no opportunity to alter their choices in any way.

To use an example Plaintiffs invoked before the district court: A real new hire who was promised a pension of $1500 per month by Xerox and who in fact received this amount when he retired could plan. When he retired, he could pay his mortgage—a mortgage he undertook knowing that he was promised $1500 per month in retirement. He could afford to visit his grandchildren. He could plan for and do all those things that $1500 per month permitted him to pay for. And if $1500 per month was insufficient, he could save more money or do the other things that routine planning for retirement entails.

By contrast, Plaintiffs were given annual individual benefits statements and SPDs that, as this Court has held, a reasonable observer would believe entitled them to a pension in a specific dollar amount without an appreciated offset of their prior distribution. *Frommert III*, 738 F.3d at 531-34. That's the amount they were told they would receive, and that's the amount they planned for retirement.

But, unlike new hires, Xerox didn't pay this amount. Nor does the New Hire remedy pay this amount. So while actual new hires were paid what they were told they would receive, even under "New Hire," Plaintiffs are treated differently. They do not get paid the amount they were told and upon which they planned. They instead get less.

Take lead plaintiff Paul Frommert, for example. Mr. Frommert was promised and thus planned on a pension of $2,000 per month. But Xerox paid him only $5 per month. Unlike a new hire, he did not receive—nor under New Hire does he receive—the amount for which he planned his retirement. A190-A208.

To be clear: This is not just a doctrinal or academic difference. It matters. To real people. An actual new hire did not lose his house; Paul Frommert did. A new hire could visit his grandchildren; Paul Frommert could not. *Id.* That's because an actual new hire got the precise amount he was told by Xerox he'd receive when he retired. But Paul Frommert, and the other plaintiffs, did not, even under New Hire.

The district court correctly noted that because "it was Xerox that failed to meet its notice obligations under ERISA[,] [t]o the extent that one side or the other should suffer the consequences for that violation, it should be Xerox." SA21. But as the foregoing makes clear, the lower court failed to correctly apply that proposition to the facts.

New Hire treats Plaintiffs worse than actual new hires. It fails to apply their highest pay to all their years of service. It fails to provide to them the amount of benefits they were promised and for which they planned. Actual new hires got both. Plaintiffs under New Hire obtain neither. Such a result is inequitable and insufficient.

Reformation does not justify New Hire. The court made a related error with respect to reformation: while it correctly stated its elements, it misapplied them to these facts. The court accurately noted that reformation requires (1) "inequitable conduct" by Xerox, and (2) a resulting misunderstanding on the part of Plaintiffs. SA13. It also correctly explained that the inequitable conduct necessary for reformation need not be actual fraud. SA14-SA15.

But then the district court erred. While it correctly held that violating one's ERISA disclosure requirements is sufficiently inequitable to justify reformation, SA15-17, it nonetheless concluded that inequitably misleading plaintiffs about an appreciated offset justified inequitably misleading plaintiffs about a service discount.

And there *is* a service discount. Yes, plaintiffs received a distribution long ago for their early years of service. But salaries grow, significantly, over a long career, and a central attraction of a highest-average-pay entitlement is that later salary increases are applied to every year of service when calculating one's pension check. As noted above, breaking up service into stint one (with a low pay multiplier) and stint two (with a higher pay multiplier) robs plaintiffs of the full retirement value of their highest earning years. It is a pension truism that a major financial benefit of a career-long pension is that one gets to use one's highest pay average *over the course of a career* to calculate the entitlement. It is inequitable (and itself a notice violation) to not tell plaintiffs they would not get that "full career" benefit. Xerox, indisputably, never did.

As importantly, reformation turns on what Plaintiffs' misunderstanding was. ERISA presumes that participants will understand their pension entitlements based on plain-English SPDs written for the average plan participant. 29 U.S.C. § 1022; *Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 114 (2d Cir. 2003). The SPDs at issue here convey no more than a nominal offset, and they promise (like the Plan) that all years of service will count. In addition, Xerox for years promulgated individualized benefit statements enumerating a Plaintiff's monthly pension entitlement that was based on all years of service and without any offset reduction. Floyd Swaim's "Your 1993 Value Added Statement" is representative. That document explained that "Under the RIGP formula, the monthly benefit you have earned to date, payable at age 65 is $2,183 per month. This benefit will grow as your length of service and earnings increase." A891. There is no mention of an offset or service reduction. Instead, Swaim was promised all service would count, and the statement reflected that all 239 months of service were being counted. *Id.* ("Your

RIGP months of credited service as of 2/28/93 is 239. This represents the total service time at Xerox less leaves of absence, periods of terminated service and an adjustment for part-time.”).

Given those facts, it is no mystery why in 2001 then-Judge Sotomayor adopted the Layaou Offset, *Layaou*, 238 F.3d at 209, and why in 2007 the district court originally imposed it, *Frommert*, 472 F. Supp. 2d at 457. These courts did so because the Layaou Offset “most clearly reflects what a reasonable employee would have anticipated.” *Id.*

Thus reformation, correctly applied, justifies Layaou, not New Hire. Indeed, that is what the district court held ten years ago, just as then-Judge Sotomayor concluded when she was on this Court.

The district court decided to depart from this sage remedy because it believed that Layaou is a windfall and/or does not account for the time value of money. But that is wrong. The only windfall here is to Xerox. Plaintiffs were never told about an appreciated offset or a service reduction. They came back to Xerox on that understanding of their compensation, and made career, personal, and savings decisions accordingly. Whether something is a windfall depends on the assumed baseline. And here, the baseline was in fact Layaou—because that’s precisely what Xerox told them, as well as what “a reasonable employee would have anticipated” under the circumstances. *Id.*

Moreover, as this Court has made clear, when construing remedies in the aftermath of "fiduciaries found to be in breach of their duty * * * . Any doubt or ambiguity should be resolved against them." *Donovan v. Bierwirth*, 754 F.2d 1049, 1050 (2d Cir. 1985); *see also Osberg v. Foot Locker, Inc.*, 862 F.3d 198, 215 (2d Cir. 2017) (holding that an equitable remedy tied to an express promise in an SPD was not a disqualifying windfall, even if some plaintiffs were made better off). Plaintiffs understandably relied on what Xerox told them in the SPDs and individualized benefit statements, the latter of which contained specific dollar amounts, no offset, and no service reduction. Similarly, there is literally not one shred of evidence that suggests (or has ever suggested) that Xerox objectively believed that they thought they would treat Plaintiffs as New Hires, which is not surprising, since Xerox has refused for over a decade to so treat them. Reforming the Plan into something that *neither* party thought it said simply makes a mockery of reformation.

As for time value of money, Plaintiffs note two things. First, this Court has already made clear that the Supreme Court's reference to the time value of money is "entirely inapposite" to the question of notice. *Frommert III*, 738 F.3d at 534. Second, to the extent time value of money should drive determination of what an equitable remedy is, Actual-Annuity takes precisely this principle into account, and is further consistent with the Plan. *See infra* pp. 46-50. That remedy, not New Hire, should thus be the alternative to Layaou in the unlikely event that the "heresy" of a nominal offset is inapplicably transported into the world of notice.

The district court only adjudicated the equitable remedy of reformation, and, on that basis, adopted a New Hire approach. But that remedy improperly and inequitably treats Plaintiffs worse than actual new hires, is unfair to them, and reforms the Plan to take away service that both parties thought counted. It is not a proper reformation remedy here.

B. Surcharge And Estoppel Entitle Plaintiffs To At Least The Layaou Offset

Plaintiffs get the best of their three sought remedies. Because the district court concluded that reformation entitled Plaintiffs to New Hire, it refused to consider relief due under surcharge and estoppel. SA24 (not reaching "alternative theories of surcharge and estoppel"). But that one form of equitable remedy provides some relief does not mean others are mooted or inapplicable. Just as Plaintiffs are entitled to the greatest remedy available for a particular complaint amongst several causes of action, so too does equity entitle the aggrieved party to the greatest available equitable relief.

The district court disregarded this basic principle. Because it granted *some* relief (albeit the relief requested by Xerox) under reformation, it refused to consider whether other (greater) relief was available under surcharge or estoppel. Yet adjudicating those alternative claims was required. That a plaintiff has obtained a remedy for assault does not mean there is no need to determine if he is entitled to a remedy for battery. So too here. A court must adjudicate all asserted remedies so long as (as here) those alternative grounds may conceivably entitle a Plaintiff to additional relief.[2] The district court here indisputably failed to do that, and the surcharge and estoppel remedies both authorize relief in excess of New Hire.

Surcharge. Surcharge includes monetary relief "for a loss resulting from a trustee's breach of duty, or to prevent the trustee's unjust enrichment." *Amara*, 563 U.S. at 441; Austin W. Scott et al., 2 *The Law of Trusts* § 170.25, 1419 (3d ed. 1967) (breaching trustee chargeable for "any profit he made, even if the transaction was fair and reasonable"). As *Amara* explained, surcharge is appropriate to remedy harm that "come[s] from the loss of a right protected by ERISA or its trust-law antecedents." 563 U.S. at 423.

Here, Plaintiffs were not told about an appreciated offset and were told that all years of service would count. Any pension reduction that uses an appreciated offset or a service reduction obviously hurts Plaintiffs—and benefits Xerox—by reducing pension payments. So the proper remedy is to surcharge Xerox with the

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[2] Nor would any contrary rule make sense. Under the district court's view, were it to have awarded Plaintiffs nothing (i.e., $0) under reformation, it would have been obligated to decide the alternative grounds of estoppel and surcharge. Yet under this same view, so long as even $1 is awarded under reformation, these alternative grounds are suddenly moot, even though Plaintiffs request (and may perhaps be entitled to) thousands of dollars thereunder. That is clearly not the law.

profits it made (that is, the pensions that it refused to pay) as a result of that breach. Only a nominal offset satisfies that goal, whereas a service reduction (e.g., New Hire) does not. Anything other than a nominal offset by definition ignores Plaintiffs' losses or Xerox's gain.

Moreover, the particular notice failure at issue in this case strikes at the heart of one of ERISA's central objectives: to guarantee that beneficiaries can know their pension entitlements and *plan* accordingly. *See Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995) (explaining that "one of ERISA's central goals is to enable plan beneficiaries to learn their rights and obligations at any time").[3] Xerox's non-disclosures were so bad that they *obliterated* the right of any Plaintiff to plan for or alter his retirement future, while simultaneously securing for Xerox the benefit of Plaintiffs' career labors. This is precisely the "loss of a right protected by ERISA" that *Amara* explained surcharge is available to remedy. Redressing that failure by robbing Plaintiffs of something *else* they believed and planned as if they were getting (credit for all their years of service) makes no sense. The equitable remedy of surcharge thus justifies a nominal offset, not New Hire. And at the very least, the district court should have assessed that requested remedy,

[3] *See also Burke*, 336 F.3d at 110 (holding that the SPD is "an employee's primary source of information regarding employment benefits, and employees are entitled to rely on the descriptions contained in the summary") (citations omitted).

not merely declared it "moot" given its inadequate provision of a different remedy on different equitable grounds.

Estoppel. The equitable remedy of estoppel should similarly have been adjudicated, and similarly justifies a nominal offset, not New Hire.

Equitable estoppel treats the victim as "had the representations been true." *Amara*, 563 U.S. at 441. The elements of estoppel are a misrepresentation, reliance, resulting injury, and injustice in permitting the defendant to escape its word. *Schonholz v. Long Island Jewish Med. Ctr.*, 87 F.3d 72, 79 (2d Cir. 1996).

SPDs must by law include all material terms, *Frommert III*, 738 F.3d at 532 (citing 29 C.F.R. § 2520.102-3(l)), and common sense entitles employees to rely on personal benefit statements. Here both the SPDs and personal benefits statements made clear that no appreciated offset or service reduction would apply to Plaintiffs' pension calculations. *See supra* pp. 26-27, 44-46; A542; A891. That is why Plaintiffs returned in the first place, and why they, like any reasonable employee, thereafter relied on Xerox's misrepresentations when making their career and personal choices: to stay at Xerox; to not bargain for higher pay and benefits; to not pursue or accept other jobs; and to not save more. *In re U.S. Foodservice*, 729 F.3d 108, 119 (2d Cir. 2013) (explaining that actions "may constitute circumstantial proof of reliance upon a financial representation") (citations omitted).

Plaintiffs offered further specifics through representative affidavits below. For example, Plaintiff Floyd Swaim's decision to rejoin Xerox turned virtually exclusively on Xerox's pension promise. He left a job with a salary that was 60% higher than the one Xerox offered, and he declined an offer from a third company that promised a salary twice as large. Instead, swayed by Xerox's attractive pension terms, Mr. Swaim returned to the company. A886.

Plaintiff Jim Farrell similarly forewent an opportunity of employment at a Xerox competitor, Copier Services Unlimited, to rejoin Xerox, again because of Xerox's attractive pension terms; he had no idea his pension would be reduced because of his prior service. A902-A903.

Plaintiff Paul Frommert also relied on Xerox and paid an enormous price. After leaving Xerox the first time, he started a successful business—a business he left behind to rejoin Xerox, in large part because of Xerox's promise of robust monthly pension. Thereafter, while at Xerox and under the belief that his promised monthly pension would afford him retirement stability, not only did he choose to stay at Xerox, but he made a variety of other life decisions, including adopting his grandson, purchasing a boat, and feeling comfortable taking family vacations. These choices, which Mr. Frommert cannot undo, were made based on his belief that his monthly RIGP benefit would not be subject to either an appreciated or service offset. Sadly, this litigation crippled Mr. Frommert financially, leaving him with a $5 per month pension that was insufficient to allow him to make his house payments or satisfy creditors. Instead of a modest retirement, Mr. Frommert was forced to sell assets and earn money doing manual labor. A904-A906. And Plaintiffs like Michael McCoy, Thomas Vasta, and Kenneth Parnett died without ever receiving what they were told they had earned.

All of these facts more than amply justify the equitable remedy of estoppel and the binding of Xerox to the representations that it made. Yet the district court adjudicated *none* of these facts, instead holding that considering such relief was "unnecessary" since it had now reformed the Plan to provide a *lesser* remedy. This was manifestly error.

One final doctrinal point bears mention. Beyond the traditional elements of estoppel, some older cases have concluded that estoppel in ERISA cases also requires "extraordinary circumstances." *Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 85-86 (2d Cir. 2001). The meaning of "extraordinary circumstances" was not strictly defined pre-*Amara*, and this additional requirement, candidly, may no longer be good law under *Amara*.[4] That said, even under pre-*Amara* precedent,

[4] The "extraordinary circumstances" element was not historically an element of estoppel in equity courts, and the Supreme Court has long defined equitable relief as that which was "typically available" in equity. *Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 657 (2016). Moreover, the observation that "equity suffers not a right to be without a remedy," *Amara*, 563 U.S. at 440 (citations omitted), suggests that the Supreme Court may disfavor lower

the following were held to qualify as extraordinary circumstances: (1) cases involving "a promise that the defendant reasonably should have expected to induce action or forbearance on the plaintiff's part," *Devlin*, 274 F.3d at 86; (2) cases involving "misrepresentations over an extended course of dealing," *Pell v. E.I. DuPont de Nemours & Co.*, 539 F.3d 292, 304 (3d Cir. 2008); and (3) cases in which "th[e] plaintiffs are particularly vulnerable." *Id.* All three exist here.

Pensions are a well-known example of where the promise thereof will induce the forbearance, reliance, and vulnerability that justifies estoppel. And pensioners are uniquely exposed: they cannot go back in time to save more money on their own, negotiate for higher lifetime wages, or take advantage of job opportunities long filled by others. That is why, over eighty years ago, the Restatement used a pension-annuity promise as an illustration of when estoppel is necessary:

> A promises B to pay him an annuity during B's life. B thereupon resigns a profitable employment, as A expected that he might. B receives the annuity for some years, in the meantime becoming disqualified from again obtaining good employment. A's promise is binding.

Restatement of the Law, Second, Contracts § 90, ill. 2 (1932).

Xerox made a series of misrepresentations during the primes of the careers of thousands of employees that left those employees out of options, money, and hope. Xerox should be held to its word: that all years would count, and that there would

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courts adding extra conditions to equitable relief. Here the question is moot, however, because extraordinary circumstances exist.

be no appreciated offset. New Hire, in contrast, holds Xerox to its "no appreciated offset" representation by freeing it from its "all years count" representation. That is precisely what estoppel is designed to avoid.

The district court accordingly erred (1) by adopting New Hire as a reformation remedy and (2) by not adjudicating Plaintiffs' alternative equitable estoppel and surcharge claims and by imposing a nominal Layaou offset as a result. This Court should accordingly reverse.

C. The Actual-Annuity Offset Is An Alternative Equitable Remedy

As Plaintiffs have explained throughout this litigation, there is another remedy that is both equitable and permissible under the Plan: the Actual-Annuity Offset. It was originally proposed by expert actuary Philip Cofield.[5]

Here is how it works: it simply subtracts a Plaintiff's "first period" annuity from a Plaintiff's "career" annuity. Imagine that when an employee first left Xerox, he was entitled to a RIGP annuity that would pay him $800 per month upon retirement at age 65. If he rejoined Xerox and then (upon ultimate retirement) was entitled under the RIGP to an annuity that (counting all years of service) would pay him $2,800 per month at age 65, the Actual-Annuity approach would entitle him to $2,000 per month ($2,800 per month minus $800 per month).

[5] *See* A66-A71 (explaining Actual-Annuity Offset); A302-A366 (direct examination and cross-examination of Phillip Cofield).

The appeal of this approach is manifold. It credits all years of service. It incorporates an implicit time value of money, because both the "first period" annuity and "career" annuity are funded promises payable at a future date, i.e., age 65—which means both of them incorporate an internal interest rate. It requires no complex calculations or assumptions. And it puts Plaintiffs in a reasonable financial position and comports with the Plan. *See infra* pp. 46-50.

Such a remedy would be fully justified under any of the alternative equitable remedies of reformation, estoppel, and surcharge. Instead, the district court refused to resolve either of these latter two alternative theories, and, with respect to the former, adopted an inadequate and unfair New Hire remedy that compounds (rather than corrects) the notice failure by ignoring the express promises of both Xerox and the Plan that all years of service (and rates of pay) will be counted in assessing an employee's final pension benefit upon retirement. Should this Court elect a remedy other than the Layaou Offset, it should find the Actual Annuity Offset an equitable alternative sensitive to the circumstances of this case and consonant with the Supreme Court's decision in *Amara*.

In short, on the notice issue, the district court erred. New Hire is not a proper reformation remedy, and the district court erroneously failed to adjudicate the alternative remedies of surcharge and estoppel. This Court should accordingly reverse.

II. *THE DISTRICT COURT FAILED TO PROPERLY INTERPRET THE PLAN*

Even were the district court correct with respect to Plaintiffs' notice claims, reversal would still be required, because the district court failed to interpret the Plan and to provide Plaintiffs with the pension benefits they were promised therein.

ERISA's foundational rule is that beneficiaries can never be made worse off than what the plan itself provides. Thus, with respect to any equitable remedy, a court must check whether the plan itself requires more. The district court here failed to do that, and it also failed to rule on whether Xerox acted in bad faith.

Both of these errors were seemingly motivated by the district court's miscontrual of a passage in *Frommert III* regarding what should happen if the remedy for the notice violations "provide[s] the relief that Plaintiffs seek." *See infra* pp. 41-42. Because the district court improperly failed to interpret the Plan or adjudicate Xerox's alleged bad faith, at a minimum, absent this Court's imposition of the Layaou or the Actual-Annuity Offset, a remand would thus be required with respect to those unadjudicated questions.

Fortunately, however, a ruling in Plaintiffs' favor is warranted as a matter of law, and this matter can thus finally, after 18 years, be brought to a conclusive end, and the elderly (and dying) Plaintiffs at long last paid the pensions that are their due. This Court has already held that there is no reasonable interpretation of the Plan that treats Plaintiffs worse than actual new hires. The plan interpretation question is accordingly now limited to what reasonable interpretations of the Plan treat Plaintiffs as well or better than new hires.

As explained below, there are *only* two plan interpretations that are not arbitrary and capricious: Layaou and Actual-Annuity Offset. Given the New Hire floor that is the law of the case, and the Plan's stark requirement that *any* offset be tied to an accrued benefit, no offsets other than Layaou or Actual-Annuity are reasonable under the Plan.

By contrast, New Hire squarely contravenes both the express language and structure of the Plan. As a result, even when reading the Plan deferentially, the award of an equitable New Hire remedy would impermissibly make Plaintiffs worse off than what the Plan promises. This Court should thus find that, in the circumstances of this case, Layaou and Actual-Annuity are, as a matter of law, the only reasonable interpretations of the Plan.

In addition, independently, Xerox's bad faith is both indisputable and dispositive. In spite of this Court's December 2013 ruling that New Hire was the minimum that Plaintiffs should receive under the Plan, Xerox refused to pay Plaintiffs that sum, merely because Plaintiffs continued to claim they were entitled to more. That constitutes palpable bad faith.

Moreover, Xerox's present position—that New Hire is both equitable and consistent with the Plan—amounts to its *third* effort to read an offset into the Plan (after the illegal Phantom Account and Plan Administrator approaches), and the Supreme Court has expressly held that multiple prior arbitrary interpretations of a plan may constitute bad faith. The undisputed facts of Xerox's bad faith means that any court, here or below, will no longer apply deference to the Plan—and this Court has already decided that absent deference, the Plan provides for the Layaou Offset. Plan interpretation thus warrants entry of judgment in Plaintiffs' favor or, at an absolute minimum, requires a remand to require the district court to satisfy its duty to adjudicate the independent cause of action for plan interpretation.

A. The District Court Was Required To Interpret The Plan

ERISA's most important requirement is that plan beneficiaries can never receive less than what the plan promises. As the Supreme Court explained: "'[a] written plan is to be required in order that every employee may, on examining the plan documents, *determine exactly what his rights and obligations are under the plan*.'" *Curtiss-Wright*, 514 U.S. at 83 (citations omitted) (emphasis in original and added); *see also Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996).

There is no exception to this rule, and its application here is clear. The award below is New Hire. Either that award makes Plaintiffs worse off than the Plan provides, or it does not. In the former case, the ultimate award must be at least as generous as the Plan; otherwise, in the guise of awarding a "remedy," the court has impermissibly derogated the Plan. In the latter case, the Plan serves as no obstacle to the award. The district court's refusal to below construe the Plan—which in fact entitles Plaintiffs to pensions greater than New Hire, *see infra* pp. 46-50—was an error.

The district court's error was motivated by a misreading of this Court's opinion in *Frommert III*. The district court believed that—if any equitable relief was available, even one dollar's worth—it need go no further, and no interpretation of the Plan was necessary. SA7-SA11. But that approach gainsays ERISA and misunderstands this Court's instructions.

Context matters. At issue in *Frommert III* was the specific relief Plaintiffs sought for Xerox's notice failures; namely, imposition of the Layaou or the Actual-Annuity Offset. While this Court agreed there was a notice failure, it remanded so the district court could determine whether the equitable remedies newly sanctioned by *Amara* would "provide the relief that Plaintiffs seek" for the notice violations—namely, Layaou or Actual-Annuity. *Frommert III*, 738 F.3d at 534. If not, the plan would need to be interpreted. *Id.*

Those instructions made sense. Equitable relief that awarded Layaou or Actual-Annuity would make plan interpretation moot, because both offsets are obviously reasonable interpretations of the Plan (and are, in any event, what

Plaintiffs seek).[6] By contrast, if equity under *Amara* only authorizes New Hire relief on notice, then plan interpretation is necessary to ensure that the Plan is not being derogated and that Plaintiffs receive the benefits they were promised under it. After all, a notice remedy that makes one worse off than what the Plan provides is not a *remedy*.

Neither ERISA nor common sense supports the idea that *Frommert III* instructed the lower court to use equity to make participants worse off than under the plan. And, as explained below, New Hire does indeed make Plaintiffs worse off than the reasonable interpretation of the plan.

B. New Hire Is An Unreasonable Interpretation Of The Plan

The governing plan document for this dispute is the 1989 Restatement. A1497-A1578. The Plan is not a model of clarity—it led, after all, to this 18-year litigation—but about one thing it has always been clear: all years of employment count. As this Court has already put it: "[f]or employees rehired by Xerox, the number of years of service includes the total time the employee worked for Xerox, not just the period of employment following rehire." *Frommert I*, 433 F.3d at 257. Not only does the Plan specifically say that, but all of Xerox's representations *about*

[6] Indeed, it is the law of the case that Layaou is a reasonable interpretation of the plan. *Frommert II*, 535 F.3d at 117-20. *Frommert II* was reversed because of a failure to extend deference, not because Layaou was an unreasonable interpretation.

the Plan also said that. In short, there is no doubt that, under the Plan, all years of service count.

Plan mechanics. The starting point is Section 1.1 of the Plan. This section is entitled "Accrued Benefit" and specifically spells out what that term means. To wit, it defines the accrued benefit of an employee as equal to the product of (1) the employee's average monthly compensation, (2) the "Years of Participation rendered by a Member," and (3) the fractional percentage set forth in Section 4.3. A95; A117.

The term "Years of Participation" is thereafter defined in Section 1.44. Not only does that section unambiguously provide that an employee's "Years of Participation" include "[a]ll years of employment," but section 1.44(j) also goes on to specifically provide that when determining a given employee's Years of Participation, "[n]on-successive periods of employment shall be aggregated." A110.

Xerox has long relied on Section 9.6—a section of the plan that prohibits non-duplication of benefits—as the textual basis for its series of pension-slashing offsets. But when it comes to justifying New Hire's discounting of prior years of service, Section 9.6 not only provides no help to Xerox, it dispels any ambiguity whatsoever about whether all years need be counted. They must.

Section 9.6—which specifically contemplates rehires like Plaintiffs who "recommence[] active participation in the plan"—provides:

> Section 9.6. *Nonduplication of Benefits*. In the event any part of or all of a Member's accrued benefit is distributed to him prior to his Normal

> Retirement Date, if * * * such Member at any time thereafter recommences active participation in the Plan, the accrued benefit of such Member based on all Years of Participation shall be offset by the accrued benefit attributable to such distribution.

A141. According to Section 9.6, *all* years of employment *always* count. One cannot reduce a participant's pension by throwing out years; one can only reduce the pension entitlement by calculating an *all-years* pension and then deducting "the accrued benefit attributable to [an earlier] distribution." *Id.* Put simply, one is not permitted to subtract *years*; one is only permitted to subtract *accrued benefits*, and there is no reasonable way to interpret the term "accrued benefit" as "the first employment period." In short, under the express terms of the Plan, all years count, and New Hire is accordingly not a reasonable interpretation of the Plan.

Xerox representations. Xerox's repeated express representations about the Plan confirm this point. No SPD has ever suggested the Plan discounts prior service; rather, they promise the exact opposite. For example, the December 1989 "Planning for a Secure Retirement" SPD explains that one's benefit entitlement "basically includes all your years of employment with Xerox, up to maximum of 30 years." A524. Although the SPD did spell out some circumstances in which past service would not count (such as employment with a subsidiary of Xerox), none of those include a first period of service.

Moreover, the SPD also included a section entitled "Reemployment" that stressed that if a participant was reemployed by Xerox, *only* "the time you did not work at Xerox" would fail to be counted toward the employee's pension. A542. Similarly, the personalized benefit statements that Plaintiffs received included pension calculations that included all years of service. A886-A887 (all service promised); A891 (calculation included all 239 months of service). Given the foregoing, no "average plan participant" reading Xerox's disclosures would have concluded that a previous stint of employment would not count toward the calculation of their career pension.

Like the Plan, SPDs, and personalized benefit statements, Xerox's lawyers similarly repeatedly admitted that all years must count under the terms of the Plan. Indeed, that is why Xerox previously tried to use interest-rate offsets—because the Plan was clear that Xerox could not reduce a rehired employee's pension through the simpler expedient of disregarding years of service.

In its petition for certiorari, for example, Xerox insisted that "the Plan takes account of *all* of their service to Xerox—including service rendered during their first period of employment." Petition for a Writ of Certiorari 5, *Conkright v. Frommert*, 559 U.S. 506 (2010) (No. 08-810), 2008 WL 5394017, at *5 (emphasis in original). In its merits briefing before the high court, Xerox similarly said 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." Brief for the Petitioners 59, *Conkright v. Frommert*, 559 U.S. 506 (2010) (No. 08-810), 2009 WL 2954165, at *59. And on appeal to this Court, Xerox again said that the Plan squarely foreclosed treating Plaintiffs as "new hires." *See* Brief for Respondents 38, *Conkright v. Frommert*, 559 U.S. 506 (No. 08-810), 2009 WL 5240210, at *38 (plan expressly requires that all years be counted).

In short, Xerox has consistently said—both to its own employees and to the courts—that all years counted. And it did so not because of a charitable impulse, but because that is unquestionably what the Plan says—under any standard of review. It is thus clear that New Hire is inconsistent with the Plan.

C. There Are Only Two Reasonable Interpretations Of The Plan: The Layaou Offset Or The Actual-Annuity Offset

While New Hire is clearly not a reasonable interpretation of the plan, Layaou and Actual-Annuity are. They count all years of service, as required by the Plan, and—as this Court has itself previously determined—accurately reflect the language contained in that document as well as the reasonable expectations of the employees governed by it.

The relevant history of the Xerox plans prior to 1989 is set forth in detail in the prior briefs and opinions in this case. The key fact is that, prior to 1989, there were two plans: the now-defunct Xerox Profit Sharing Plan ("PSP") and the Xerox RIGP plan. The PSP was a defined contribution plan, i.e.., a collection of individual savings accounts. The pre-1989 Xerox RIGP plan was a defined benefit plan, i.e., a traditional pension plan.

Plaintiffs earned benefits under both plans. When Plaintiffs left Xerox for the first time, however, every Plaintiff received a lump sum *only* from the PSP; no Plaintiff received anything from the RIGP. In 1989, Xerox combined the two plans into the current plan, eliminating the PSP and amending the RIGP Plan.

There is only one provision in the restated 1989 Plan that permits the imposition of an offset. That provision is the familiar Section 9.6. *See supra* pp. 43-44.

Section 9.6 is strict about how any offset must work. First, one must begin with the accrued benefit that one has earned through all years of participation, which is the career-long, highest-average-pay calculation set forth in Section 1.1. There has never been any dispute about this part of the meaning of 9.6.

The dispute has instead been about what the Plan permits Xerox to *subtract* from a participant's gross Section 1.1 and 4.3 pension. But Section 9.6 answers that question: one may only deduct "the *accrued benefit* attributable to such [earlier] distribution."[7]

The Plan's choice to tie any offset to "the accrued benefit attributable to" an earlier distribution significantly limits what the offset can be. As Plaintiffs have pointed out before, an "accrued benefit" cannot be something that was at no point

[7] Another way to think of Section 9.6 is that it is a lawyer's version of the following formula: *gross accrued benefit* − *prior accrued benefit* = *net accrued benefit.*

collectable; an accrued benefit can only refer to something one was entitled to receive.[8] By operation of language and logic, Section 9.6 accordingly commands that any offset be equal to some accrued benefit that the participant was entitled to receive when she first left Xerox.

Given this constraint, the Plan admits of only two offset possibilities—Layaou and Actual-Annuity—for a simple reason. The *only* things Plaintiffs were entitled to receive when they first left Xerox were (1) the *cash balance* in their PSP plan (which corresponds to Layaou), or (2) the *annuity* the RIGP plan promised them (which corresponds to the Actual-Annuity). Given how the plan was written, there is no other reasonable way to define an accrued-benefit-driven offset. Thus, under any standard of review, Xerox loses.

Why Layaou is a reasonable plan interpretation. As explained above, the now-defunct PSP was a separate defined contribution plan in which Plaintiffs were members. ERISA itself explains what the "accrued benefit" in a defined contribution account is: the amount of cash in the account. 29 U.S.C. § 1002(23)(B). So the departing Plaintiffs both *possessed* an accrued benefit equal to the nominal amount in their PSP accounts, and actually received that benefit upon departure. A1619. Thus, the most obvious way to read Section 9.6's "accrued benefit" offset is to

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[8] Presumably a plan *could* be written to set an offset equal to virtually anything. But *this* plan specifically ties the offset to some sort of "accrued benefit." The language deliberately selected by Xerox thus constrains the offset.

subtract the cash that Plaintiffs received when they cashed-out their PSP accounts. That, of course, is the Layaou Offset.

Why the Actual-Annuity Offset is a reasonable plan interpretation. Because there were two plans, Plaintiffs could have also chosen to take the highest-average-pay retirement annuity the RIGP plan promised. Had a Plaintiff elected that option, he would have received a traditional annuity payable at age 65, with the specific amount based on his then years of service and highest average pay. Importantly, that highest-average-pay RIGP benefit (1) is a benefit whose calculation methodology is unambiguously set forth in Section 4.3 of the Plan, (2) is something a plaintiff could have received, and (3) *is defined by Section 1.1 as an accrued benefit*.

As a result, beyond Layaou, the other way to satisfy Section 9.6's offset requirements is to set the offset equal to the "old" highest-average-pay annuity a Plaintiff could have received when she first left Xerox. So if, for example, a Plaintiff's "old" annuity was $500 per month, then her current retirement annuity (based on all her years of service) would be offset by $500 per month.

Using the original highest-average-pay annuity a Plaintiff could have received as the offset is, of course, the Actual-Annuity Offset. It is so labeled because it subtracts from today's entitlement the actual annuity Plaintiffs could have taken when they first left. That too would be a reasonable interpretation of the Plan. As noted above, the original highest-average-pay annuity to which a Plaintiff was entitled is explicitly defined as an "accrued benefit" under Sections 4.3 and 1.1, and thus satisfies Section 9.6's requirement that an offset be an "accrued benefit." In addition, the Actual-Annuity Offset has the additional equitable appeal of taking into account the time value of money. An ERISA annuity is no more than a funded promise to pay a fixed monthly amount in the future. It therefore necessarily relies on an implicit interest projection, and thus has the time value of money built in.

Because the PSP balance or the RIGP highest-average-pay annuity were the only things a departing Plaintiff was entitled to have actually received, they are the only things that can be said to have been accrued benefits of the Plaintiffs, and they are therefore the only two things that Section 9.6 permits to be subtracted from today's pension entitlement. No other potential offset—whether New Hire or something else—can reasonably satisfy Section 9.6's "accrued benefit" constraint and thus be consistent with the Plan.

D. The District Court Was Wrong Not To Find That Xerox Acted In Bad Faith And Incompetently

There is an additional basis for entry of judgment in favor of Plaintiffs on plan interpretation grounds, and the district court abused its discretion by failing to adjudicate it.

It is well-settled that deference to an administrator's plan interpretation is no longer warranted upon a showing of bad faith or serial incompetence. As the Supreme Court held in this very case, an administrator is stripped of deference when either he (1) "does not exercise his discretion honestly and fairly," or (2) makes "[m]ultiple erroneous interpretation of the same plan provision" and thereby demonstrates "that a plan administrator is too incompetent to exercise his discretion" faithfully. *Conkright*, 559 U.S. at 521.

Xerox indisputably demonstrated its bad faith in both of the ways the Supreme Court identified, either one of which would independently strip the administrator of deference and entitle Plaintiffs to judgment in their favor.

Xerox exercised bad faith by not paying benefits. Xerox first engaged in bad faith conduct by not paying indisputably due benefits.

In 2013, this Court decisively ruled that Xerox's latest offset approach— the PAA—was one that "produce[s] an absurd and contradictory result and is therefore unreasonable" under ERISA. *Frommert III*, 738 F.3d at 531. In the aftermath of that ruling, Xerox did two things.

First, it adopted its third interpretation of the Plan, i.e., "New Hire." Specifically, in 2014, plan administrator Laurence Becker offered sworn testimony that Plaintiffs were now entitled to New Hire under the Plan, and stated that the "Plan's actuaries [] will be instructed to calculate the Plaintiffs' benefits in such a manner so as to ensure each individual receives the same actual benefits relative to the treatment of a newly hired Xerox employee." D.Ct. Dkt. 266-1, ¶ 6(b). In short, this Court said that New Hire benefits were the minimum the Plan required, and the plan administrator agreed and promised to pay them.

Plaintiffs thereafter promptly (1) asked for benefits statements setting forth how much they were entitled to under the New Hire reading of the plan, as federal law entitles them to do, *see* 29 U.S.C. § 1025, and (2) asked to be paid those benefits. A1445-A1449. Xerox nonetheless both refused to issue the required benefit statements and likewise refused to pay Plaintiffs these amounts. *Id.*

To be clear: this Court held that no pension worse than New Hire was reasonable under the Plan. The Xerox plan administrator then adopted New Hire as his latest interpretation and promised to pay these benefits. But when Plaintiffs then asked for benefit statements reflecting that additional entitlement, Xerox refused to issue them, and also refused to make the New Hire payment. The obvious motivation was to put pressure on Plaintiffs to abandon the litigation by withholding funds they needed desperately.

It is difficult to think of a clearer example of bad faith. The plan administrator admitted *in sworn testimony* that Plaintiffs were owed the "new hire" amount this Court explicitly said (at a minimum) must be paid, yet refused to acknowledge, calculate, or pay those amounts to individual Plaintiffs. *See Conkright*, 559 U.S. at 514 (bad faith occurs when "a trustee's failure to pay a reasonable amount to the beneficiary of the trust is due to a failure to exercise the trustee's discretion honestly and fairly"). On these grounds alone, no more deference is due Xerox. *Id.* at 514-15.

Xerox also demonstrated its serial incompetence. But there is more. Xerox's bad faith also comes with serial incompetence. This is Xerox's *third* attempt to read an offset into the Plan. The first, the phantom account offset, was unreasonable and undisclosed. The second, the PAA offset, was unreasonable and undisclosed. The third, New Hire, is also unreasonable and undisclosed. In the words of Chief Justice Roberts:

> Multiple erroneous interpretations of the same plan provision, even issued in good faith, might well support a finding that a plan administrator is too incompetent to exercise his discretion fully, [thereby] cutting short the rounds of costly litigation [necessary to resolve the meaning of the Plan].

Id. at 521.

This holding is dispositive here. It is undisputed that Xerox has adopted "multiple erroneous interpretations" of the Plan, as its first two interpretations (phantom account and PAA) have been expressly held to be arbitrary and capricious by this Court. These multiple erroneous interpretations—even ignoring Xerox's latest version—strip Xerox of deference. And absent deference, this Court has *already* held that the Plan authorizes only the Layaou Offset. *Frommert II*, 535 F.3d at 117-21.

The district court erred by inexplicably failing to even adjudicate Xerox's bad faith. SA32 (denying motion as moot). That would alone require a remand. But because Xerox's conduct constitutes bad faith as a matter of law, it is stripped of its discretion, and this Court should award Layaou relief for the precise reasons expressed in its prior opinion.

III. The District Court Awarded Inadequate Prejudgment Interest

The district court finally erred by awarding an inadequate amount of prejudgment interest.

The district court correctly held that it would constitute an abuse of discretion to fail to award prejudgment interest. SA43-SA44. As this Court has held, in ERISA cases, a prejudgment interest award is required to fully compensate the employee and to make him whole. *Slupinski v. First Unum Life Ins. Co.*, 554 F.3d 38, 54 (2d Cir. 2009). Such an award is also required to ensure that "defendants do not profit" by violating ERISA. *Id.*

Plaintiffs sought the New York statutory rate of prejudgment interest, which is 9%. SA47-SA49. This is consistent with the typical practice in ERISA cases. *Weber v. GE Grp. Life. Ins. Co.*, 541 F.3d 1002, 1016 (10th Cir. 2008) (noting that in ERISA cases, courts "commonly look to state statutory prejudgment interest provisions as guidelines for a reasonable rate"); *Rood v. N.Y. State Teamsters*

Conference Pension, 39 F. Supp. 3d 241, 254 (N.D.N.Y. 2014) (awarding prejudgment interest in ERISA case at New York statutory rate) (citing cases).

The district court, however, felt the New York statutory rate too high, and instead awarded prejudgment interest at the federal prime rate, which it noted was currently 3.5%. *Id*. at 8. But the district court's selection of the federal prime rate was, in the circumstances here, an abuse of discretion for three reasons.

First, this rate does not make Plaintiffs whole. The district court correctly noted that Xerox's failure to grant Plaintiffs the pensions it promised required these individuals to borrow money to make up for the resulting shortfall. *Id*. Yet the district court selected the federal *prime* interest rate, which is the *base* rate charged to the most credit-worthy consumers and *lower* than the actual rates charged by most banks and credit card companies.[9] Plaintiffs were obviously not uniformly the most credit-worthy customers known to banks, and instead had to fund their livelihoods the way most people do—at the base prime rate plus the additional points applied by their bank or credit card company to this base rate. The district court irrationally selected a prime rate with no evidence that Plaintiffs were in fact prime customers able to borrow at this rate.

[9] *See* FAQs, Board of Governors of the Federal Reserve System, https://www.federalreserve.gov/faqs/credit_12846.htm

Second, this rate abusively grants Xerox a windfall. This Court has noted that an interest award must ensure that defendants do not profit from their violations of ERISA. *Slupinski*, 554 F.3d at 54. Yet Xerox profits *mightily* from the rate selected below. Plaintiffs established—and Xerox did not dispute— that Xerox's cost of capital during the relevant period was 8.88% per year. SA49-SA50. As a result, under the district court's ruling, Xerox *nets* over 5% per annum on the money it wrongfully withheld from Plaintiffs, since it pays interest at the low federal funds rate (typically 3.5%) but itself earns nearly 9%. This is inequitable, unjustified, and conflicts with the core purpose of prejudgment interest awards in ERISA cases.

Third, this rate treats Plaintiffs worse than actual new hires. Citing statistics from the Federal Reserve, Plaintiffs established—and again Xerox did not dispute— that AAA corporate bonds paid an average annual interest rate of 12.8% during the 1980s and 8.5% during the 1990s, and if instead invested in the stock market on January 1, 1990, funds would have earned an annual compound return of 9.3%. *Id*. at 9-10. So actual new hires who were paid New Hire and invested those funds would have received annual returns on their pension of over 9%—yet under the district court's award, Plaintiffs paid New Hire earn only around a third of that amount. That is a big difference, particularly when these differential returns are spread, as here, over the twenty or thirty years that passed between when Plaintiffs typically retired and when Xerox was finally forced to pay New Hire plus interest. A remedy that, once again, treats Plaintiffs less favorably than actual new hires is not supportable. Yet, the district court's choice of interest rate does precisely that.

Finally, the district court compounded its error by not compounding. Plaintiffs repeatedly and expressly requested that prejudgment interest be compounded yearly. *Id*. at 1-15. Yet the district court did not order, nor did Xerox pay, compound interest, and Plaintiffs thus received only simple interest on their wrongfully withheld funds. Simple interest is actuarial heresy, particularly when (as here) applied over a period of decades, as the choice of simple interest over such a period cuts the effective interest rate *in half* compared to compound interest.[10] It also, yet again, treats Plaintiffs worse than actual new hires, who not only received interest on their lump-sum pension investments, but interest on that interest as well.

The New York statutory rate not only reflects a considered legislative judgment about likely returns,[11] but, particularly in the present case, is also virtually spot on as to both (1) the actual returns that actual new hires would have achieved, and (2) the actual returns that Xerox itself achieved. By contrast, the district court's

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[10] *See, e.g.*, http://www.math-only-math.com/difference-of-compound-interest-and-simple-interest.html.

[11] *See Alfano v. CIGNA Life Ins. Co.*, 2009 WL 890626, at *7 (S.D.N.Y. Apr. 2, 2009) ("[N]umerous courts have awarded prejudgment interest at a rate of 9% * * * While 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.").

award of the federal prime rate treats Plaintiffs worse than actual new hires, rewards Xerox for its violations of ERISA, and fails to make plaintiffs whole. As applied to the present case, such an award constitutes an abuse of discretion, and should be reversed.

CONCLUSION

The judgment below should be reversed. The district court erred on the notice issue by awarding an inadequate remedy and by failing to resolve Plaintiffs' estoppel and surcharge claim. It erred on the plan interpretation issue by failing to resolve it at all, by ignoring Xerox's bad faith, and by not imposing a Layaou or Actual-Annuity Offset. And it erred by granting an inadequate rate of prejudgment interest.

Dated: August 15, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Local Rule 32.1, this petition contains 13,967 words, excluding the portions of the petition exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), and complies with the format, typeface, and type-style requirements of Federal Rules of Appellate Procedure 32(a)(4)-(6).

Dated: August 15, 2017

/s/ Brendan S. Maher
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