No. 6:00-cv-6311

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

PAUL J. FROMMERT, *ET AL.*

Plaintiffs,

v.

SALLY L. CONKRIGHT, *ET AL.*

Defendants.

ON REMAND FROM THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PLAINTIFFS' MOTION TO REENTER JUDGMENT

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INTRODUCTION

This is the third time this action, filed in 1999, has been before this Court. The lawsuit concerns whether the pensions of rehired Xerox employees should be reduced by prior pension distributions beyond the amount actually paid. The "appreciated" offset Xerox urges would result in a $16 million reduction in plaintiffs' pensions.

As Your Honor well knows, a divided Supreme Court recently ruled on the issue of when and in what circumstances judicial deference is due to plan administrators regarding plan terms.[1] Yet, whatever the Plan's terms say regarding the appropriate offset—and whatever deference Xerox is entitled to on that front—there is the entirely separate question of whether plaintiffs were properly *noticed*. The Supreme Court itself took pains to dispel any confusion on this point. It explicitly distinguished, and declined to rule on, the matter of whether Xerox's proposed offsets "violated ERISA's notice requirements."[2]

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[1] *Conkright et al. v. Frommert et al.*, 130 S.Ct 1640 (2010).

[2] *Conkright*, 130 S.Ct. at 1652 n.2. The United States, as amicus curiae, filed a brief and participated in oral argument before the Supreme Court. The Government argued that this Court's order could not only be affirmed as a matter of plan interpretation but *alternatively* on notice grounds. *Id.* at 1652 n.2 (citing Brief for United States as Amicus Curiae 25-26). *See also* Respondents Br. in *Conkright et al. v. Frommert et al.*, 130 S.Ct 1640 (2010) at 65-66 (urging notice as an alternative ground for affirming the lower courts). The Supreme Court held that the notice issue was to be resolved on remand. *Conkright*, 130 S.Ct. at 1652 n.2. *See* Section II, *infra*.

Put another way: whatever a plan's terms are, beneficiaries are entitled to notice of them.[3] Accordingly, if plaintiffs were not adequately noticed of Xerox's proposed pension offset(s), this is an alternate ground to enter judgment in plaintiffs' favor.

Crucially, Your Honor—after extensive briefing and hearings—has *already* determined that notice to plaintiffs here was inadequate. As explained in more detail below, in 2007 this Court, following the Second Circuit's decision in *Frommert et al. v. Conkright et al.*, 433 F.3d 254 (2006) ("*Frommert I"*), found for plaintiffs on two grounds, holding (1) that the terms of the 1989 Xerox retirement plan (the "Plan") entitled plaintiffs to the pension they sought, with no deference given to Xerox's alternative interpretation of the Plan,[4] and, alternately, (2) that plaintiffs were entitled to the pension they sought because Xerox had not given notice of its asserted offsets.[5] The extensive appellate litigation since has not disturbed this Court's notice holding.

In this motion, plaintiffs request that this Court reenter judgment based on its previous notice holding and, mercifully, end this interminable dispute.

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[3] *See, e.g.*, 29 U.S.C. § 1022(a). ERISA requires that all participants in a pension plan be provided with a summary plan description ("SPD"), that, in plain English, informs them of the plan's terms. Legally insufficient notice renders otherwise valid plan terms unenforceable. *See* Section I, *infra*.

[4] *Frommert et al. v. Conkright et al.*, 472 F.Supp.2d 452, 467-68 (2007).

[5] *Id*. at 457.

During the pendency of this litigation, several plaintiffs (and plaintiffs' original lawyer, Mr. Robert Jaffe) have died; other plaintiffs have lost their homes, their spouses, and their health; and each has already waited for over a decade to receive the pensions they were promised long ago. There is no just reason for continued delay. What this Court held in 2007 remains true today. Plaintiffs were not properly notified of them of *any* "appreciated offset" to their pensions, and this lack of notice is an independent basis for judgment.

STATEMENT OF FACTS

Plaintiffs are longtime employees of Xerox who were rehired in or around the early 1990s.[6] Each received a lump-sum pension upon first leaving the company.[7] Each was promised a new pension upon rehire.[8] This new pension was based on a formula in Xerox's Plan that gave credit for all years worked, including those prior to being rehired.[9] Then, the new pension would be reduced (i.e., "offset") by the old pension received.

[6] *Frommert I*, 433 F.3d at 257.
[7] *Id.*
[8] *Id.*
[9] A-222 – A-225 (section 4.3 of the 1989 Plan). References to the *Frommert II* Appendix are "A-[page number]."

Each rehired plaintiff was given a written summary describing the Plan.[10] This summary plan description (the "SPD") noted that the pension to be earned for new (i.e., post-rehire) work "may . . . be reduced if you had previously left the company and received a distribution at that time."[11] For years, however, this SPD said absolutely nothing about *how* such reduction would be calculated, nor did it reflect any offset other than the actual amount previously received by the participant.

Xerox also sent each plaintiff a *personalized* annual statement. The statement received in 1990 by Paul Frommert is representative. It stated:

> If you left the company as of February 28, 1990, with a vested benefit based on your current salary level and years of service, you would be entitled at age 65 to a monthly benefit of $1,281. This benefit will grow as your length of service (up to 30 years) and your earnings increases. You are 100% vested in this accrued benefit.[12]

Like the SPD, the statements noted that the recipient's "guarantee may be reduced . . . by distributions you have already received."[13]

After years of such representations, Xerox did an about-face. It told plaintiffs that their pensions would be dramatically reduced (often to $0). This reduction was the result of an exotic actuarial adjustment that Xerox decided to impose. It was called a phantom account offset. Put simply,

[10] A-628 – A-665 (excerpts from the summary plan description). *See also infra*, Argument Section I.A. (discussing applicable federal law).

[11] A-646.

[12] A-702.

[13] *Id*.

Xerox attempted to offset not only the old pension actually received but also $17+ million of hypothetical appreciation to those payments.[14]

The dramatic effect of this offset came as a shock to plaintiffs – many of whom faced losing their entire pensions. As Mr. Frommert wrote to Xerox:

> I have recently become aware that [the] numbers in my value added statement do not represent my true retirement benefits. *In fact, in my case, the benefits would be $5.31 per month vs. $2,482.00 as stated in my 1996 value added report*. . . . The news came as a shock since I believed the number in the value added statements year over year.[15]

Sadly, many plaintiffs fared even worse than Mr. Frommert.[16] Application of the phantom account offset would have resulted in roughly one-third receiving *no pension at all* for their entire post-rehire employment which, in some cases, now entails more than a decade of additional work.[17]

Plaintiffs filed this lawsuit in 1999 challenging the phantom account offset on several grounds, including that the offset was an illegal forfeiture under ERISA.[18] Plaintiffs also argued that the offset (even if legal) was

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[14] A-311 – A-312 (chart prepared by Xerox illustrating the outcome of applying various offset methods).

[15] A-331 (emphasis added).

[16] A-311 – A-312 (chart prepared by Xerox).

[17] *Id.*

[18] *Frommert*, 328 F.Supp.2d at 429 (discussing the various causes of action in the 1999 complaint filed by plaintiffs). Although this legal theory has never been decided in this case, it is worth noting that the United States agrees with the position asserted by plaintiffs. *See, e.g.*, United States Br. *Amicus Curiae* in *Conkright et al. v. Frommert et al*., 130 S.Ct 1640 (2010) at 26 ("As the Ninth Circuit correctly held in *Miller v. Xerox Corp. Ret. Income Guarantee Plan*, 464 F.3d 871, 875-76 (2006), cert. denied, 549 U.S. 1280 (2007), the phantom-account method violates 29 U.S.C. § 1054(c)(3) because it

unenforceable because its inadequate disclosure violated ERISA's notice requirements.[19] Plaintiffs finally argued that it was irrelevant whether the offset was legal and enforceable because it was not included in the Plan itself.[20]

In 2004, this Court granted summary judgment to Xerox.[21] In 2006, the Second Circuit reversed.[22] It held that the phantom account offset was not included in the Plan and that, in any event, the offset was inadequately disclosed.[23] The case was remanded to determine precisely how plaintiffs' new pensions should be recalculated under the Plan.[24]

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offsets employees' defined benefits by more than an actuarial equivalent of their prior distributions.").

[19] *Frommert*, 328 F.Supp.2d at 429 ("The complaint asserts four separate causes of action. The first seeks relief under 29 U.S.C. §1132(a)(1)(B), based on plaintiffs' allegation that Xerox's SPDs inadequately disclosed the phantom account offset, in violation of 29 U.S.C. § 1022. The second alleges that defendants breached their fiduciary duties by applying the phantom account offset and by not adequately disclosing the offset to plaintiffs.").

[20] *Id.* ("The fourth cause of action alleges that defendants amended the Plan to provide for the phantom account offset, in violation of 29 U.S.C. § 1054(g)"). *See also Frommert I,* 433 F.3d at 264-265 ("Despite its absence from the 1989 Restatement. . . defendants argue that the Plan contained the phantom account. . . . Specifically, the defendants. . . argue that this oversight was quickly rectified by changes to the Plan. . . . Implicit in this approach is an assumption that material terms of a plan may be omitted from a plan for significant periods only to surface later and be given binding effect for the period prior to their absence.").

[21] *Frommert*, 328 F.Supp.2d at 439.

[22] *Frommert I,* 433 F.3d at 273.

[23] *Id.* at 256-257 ("For the reasons set forth below, we find that the Plan has not always contained a phantom account, that it was not properly added to the Plan through amendment until 1998 . . . and that its adoption in 1998 was made without proper notice to Plan participants.").

[24] *Id.* at 257 ("remand[ing] for further proceedings consistent with this opinion").

After losing in the Second Circuit, Xerox asked this Court to recalculate plaintiffs' new pensions using a different actuarial adjustment called the "plan administrator" offset.[25] Whereas the phantom account offset had reduced plaintiffs' retirement benefits by $17 million in imaginary appreciation, the "new" plan administrator offset reduced plaintiff's benefits by $16 million in imaginary appreciation.[26] As a fallback, Xerox also asked this Court to recalculate plaintiffs' pension using only post-rehire years of service; *i.e.,* treating plaintiffs like newly hired employees.[27]

In 2007, this Court rejected both of Xerox's proposals. Instead, declining to use a hypothetical offset, it ordered Xerox to recalculate plaintiffs' pensions based upon all years of work with an offset only for payments actually received.[28] This Court articulated two bases for that decision.[29] The first was per the terms of the Plan itself – *i.e.,* the Court held that the Plan

[25] A-149 – A-176 (Defendants' Pre-Hearing Brief Addressed to Remedies); A-177 – A-185 (affidavit of the Xerox Plan's Administrator); A-186 – A-187 (affidavit of Xerox's lead counsel); A-188 – A-199 (report of Xerox's "actuarial" expert).

[26] A-311 – A-312 (chart prepared by Xerox). The vast majority of plaintiffs get not one penny more under the plan administrator approach than they would have received under the invalidated phantom account approach.

[27] A-297 – A-299 (Defendants' Pre-Hearing Reply Brief Addressing Remedies).

[28] *Frommert*, 472 F.Supp.2d at 467-68.

[29] *See id.* ("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 mechanism suggested by witnesses at the remand hearing before me.") (emphasis added).

did not include any language authorizing an appreciated offset.[30] The second was notice – *i.e.*, this Court held that Xerox could not enforce any appreciated offset that might be read into the Plan because no such adjustment was disclosed to participants.[31]

Xerox appealed to the Second Circuit. It made two distinct arguments:

- In response to the plan interpretation holding, Xerox argued that this Court legally erred in failing to defer to Xerox's new interpretation of the Plan.[32]
- In response to the notice holding, Xerox argued that the proper remedy was to treat plaintiffs like "new hires."[33] According to Xerox, this was required because two (of the 100+) plaintiffs allegedly conceded that they expected to be treated as "new hires."[34] Thus, Xerox argued, the proper remedy for its notice failure was to honor such "expectations."[35]

In 2008, the Second Circuit decided the appeal ("*Frommert II*").[36] It rejected the argument that Xerox's new interpretation of the Plan was entitled to deference. It then affirmed this Court's method of pension

[30] *Id.*
[31] *Id.*
[32] *See, e.g.,* Xerox Opening Brief in *Frommert II*, 535 F.3d 111 (2008) at 45.
[33] *See, e.g.,* Xerox Reply Brief in *Frommert II*, 535 F.3d 111 (2008) at 14-17.
[34] *Id.* at 17.
[35] *Id.*
[36] *Frommert v. Conkright*, 535 F.3d 111, 118 (2008).

recalculation as consistent with the language of the Plan. As such, the Second Circuit did not find it necessary to address the notice issue.

Xerox sought review with the United States Supreme Court on the plan interpretation question. Before the Supreme Court, Xerox argued that the Second Circuit's judgment must be reversed because this Court used the wrong standard of review. On that question, five justices agreed with Xerox.[37] Because the notice question is a separate one and was unquestionably *not* a basis for the Second Circuit's order, the Supreme Court expressly left that issue "to be decided, if necessary, on remand."[38]

Plaintiffs asked the Second Circuit to reaffirm this Court's 2007 judgment on notice grounds,[39] but Xerox urged the Second Circuit to remand the case because, according to Xerox, "it is far from clear that the district court actually decided the notice question. . ."[40] The Second Circuit denied plaintiffs' motion and remanded the case to this Court. The mandate recently issued on this judgment, and this matter is now before this Court for the third time.

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[37] *Conkright*, 130 S.Ct. at 1651 (concluding that the *Frommert II* panel "erred in holding that the District Court could refuse to defer to the Plan Administrator's interpretation of the Plan on remand, simply because the Court of Appeals had found a previous related interpretation by the Administrator to be invalid.").

[38] *Id.* at 1652 n.2.

[39] *See* Plaintiffs' Motion for Decision Upon Remand From U.S. Supreme Court.

[40] Xerox Remand Request at 1. Xerox also claimed that "the Supreme Court's opinion bears on the notice issue in several ways, and that [this Court] has not had an opportunity to consider the relevance of that opinion." Xerox Remand Request at 1.

ARGUMENT

As explained below in Section I, this Court properly concluded in 2007 that Xerox failed to disclose any "appreciated" offset and that plaintiffs were likely prejudiced thereby. As explained below in Section II, the recent decision by the Supreme Court to reverse the court of appeals has absolutely no bearing on this notice issue. Put simply, this Court need only reinstate its prior notice holding and reenter the same judgment that it entered in 2007; *i.e.,* that Xerox recalculate plaintiffs' pensions without any appreciated offset.

I.
IN 2007, THIS COURT PROPERLY CONCLUDED THAT ERISA DOES NOT PERMIT XEROX TO USE ANY APPRECIATED OFFSET IN CALCULATING POST-REHIRE PENSIONS.

In 2007, this Court ordered that Xerox recalculate plaintiffs' new pensions under the Plan by offsetting only the actual amount that the plaintiffs previously received. In prohibiting Xerox from offsetting anything in excess of the actual monies previously received, this Court noted that the relevant SPDs provided by Xerox did not give adequate notice to plaintiffs that the offset would be subject to any appreciated offset.[41] Moreover, there was likely prejudice as a result of this ERISA violation because, in the words of the Second Circuit, plaintiffs "likely believed that their past

[41] *Frommert*, 472 F.Supp.2d at 467-68.

distributions would only be factored into their [retirement] benefit calculations by taking into account the amounts they actually received."[42] As explained below, this Court's conclusions regarding notice were correct.

A. No Provision in an ERISA-Governed Pension Plan Is Enforceable Unless Adequate Notice Is Given to Those Affected.

ERISA requires that all participants in a pension plan be provided with a SPD that must be "written in a manner calculated to be understood by the average plan participant" and "sufficiently accurate and comprehensive to apprise such participants and beneficiaries of their rights and obligations under the plan."[43] An SPD will only be deemed "sufficiently accurate and comprehensive" if it provides notice of certain items. For example, every SPD must describe the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits."[44]

Federal regulations further specifically reiterate the statutory requirement that notice of any potential reduction in benefits must be given in an SPD:

[42] *Frommert I,* 433 F.3d at 267.
[43] 29 U.S.C. § 1022(a)(1).
[44] 29 U.S.C. § 1022(b).

> [T]he summary plan description [shall include] a statement clearly identifying circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture, suspension, offset, reduction, or recovery . . . of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide. . .[45]

The regulations further clarify the manner and form in which such notice must be given. For example:

- "[T]he plan administrator shall . . . tak[e] into account such factors as the . . . the complexity of the terms of the plan [which] will usually require . . . the use of clarifying examples and illustrations. . ."[46]

- "The format of the summary plan description must not have the effect [of] misleading, misinforming or failing to inform. . ."[47]

- "Any description of exception, limitations, reductions, or restrictions of plan benefits shall not be minimized, rendered obscure or otherwise made to appear unimportant."[48]

- "Such exceptions, limitations, reductions, or restrictions of plan benefits shall be described or summarized in a manner not less prominent than the style, captions, printing type, and prominence used to describe or summarize plan benefits."[49]

- "The advantages and disadvantages of the plan shall be presented without either exaggerating the benefits or minimizing the limitations."[50]

In sum, an SPD will only comply with the statutory requirements of ERISA if it is written to explain the "full import" of material plan terms.[51]

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[45] 29 C.F.R. § 2520.102-3(l).
[46] 29 C.F.R. § 2520.102-2(a).
[47] 29 C.F.R. § 2520.102-2(b).
[48] *Id.*
[49] *Id.*
[50] *Id.*

B. Xerox Did Not Give Adequate Notice of Any Appreciated Offset

The relevant SPDs provided by Xerox failed to adequately disclose that anything more than the actual pension monies previously received would be deducted from plaintiffs' pension. In the words of this Court: "the only notice in the SPD concerning nonduplication of benefits was the proviso that 'the amount you receive may also be reduced if you had previously left the company and received a distribution at that time.'"[52]

In light of the extraordinary complexity of the Plan, the multi-million dollar reduction (via an "appreciated" offset of plaintiffs' old pension) would surely "require . . . the use of clarifying examples and illustrations. . ."[53] Yet the relevant SPDs provided to plaintiffs failed to provide a single example or illustration *of any kind*. As the Second Circuit noted in a different lawsuit (involving the same Xerox plan and disclosures): "[t]he SPD could have [easily] given sufficient notice, for example, by . . . providing an example calculating the benefits of an employee who had received a prior distribution."[54] But they indisputably did not do so.

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[51] *See e.g.*, *Chambless v. Masters, Mates & Pilots Pension Plan*, 772 F.2d 1032, 1040 (2d Cir. 1985) (requiring SPD to explain "full import" of provisions affecting employees).

[52] *Frommert et al. v. Conkright et al.*, 472 F.Supp.2d 452, 458 (quoting *Frommert I*, 433 F.3d at 258) (citing *Layaou v. Xerox Corp.*, 238 F.3d 205, 210 (2d Cir. 2001)).

[53] 29 C.F.R. § 2520.102-2(a).

[54] *Layaou v. Xerox Corp.*, 238 F.3d at 211.

The grossly misleading SPDs provided by Xerox are a paradigmatic example of precisely what ERISA was designed to prohibit. In its SPDs, Xerox aggressively proclaimed the generosity of the new 1989 Plan. At the same time, however, Xerox failed to identify -- let alone describe or illustrate -- the multi-million dollar reductions (first $17 million, now $16 million) that it later attempted to make to plaintiffs' pensions by means of a complex appreciated offset. Put simply, Xerox "exaggerated the benefits" of its plan.[55] And it did so by "minimiz[ing], render[ing] obscure[e and] otherwise ma[king] to appear unimportant" critical provisions that Xerox now alleges are part of the Plan.[56] This is precisely what ERISA prohibits.

C. Plaintiffs Were Likely Prejudiced By the Insufficient Notice.

As the Second Circuit and this Court have already found, plaintiffs were likely prejudiced by the SPDs provided to them. "[R]ehired employees likely believed that their past distributions would only be factored into their [retirement] benefit calculations by taking into account the amounts they actually received."[57] There is no reason to reverse this prior finding.

[55] 29 C.F.R. § 2520.102-2(a).
[56] *Id.*
[57] *Frommert I*, 433 F.3d at 267.

II.
BECAUSE THE SUPREME COURT EXPRESSLY DID NOT REACH THE NOTICE QUESTION, THIS COURT MAY – AND SHOULD – REENTER ITS 2007 JUDGMENT ON NOTICE GROUNDS.

As Xerox was well aware, this Court had every right to prohibit Xerox from using any appreciated offset entirely on notice grounds. Accordingly, Xerox addressed this dispositive issue in the briefs that it filed with the Second Circuit during the *Frommert II* proceedings.

Notably, Xerox did *not* argue that this Court erred in finding that the disclosures provided to plaintiffs were inadequate. Nor did Xerox argue that plaintiffs failed to suffer "likely prejudice" as a result of the inadequate notice. Instead, Xerox argued that the order entered by this Court *overstated* the actual prejudice suffered by plaintiffs.[58] Xerox was, and is, mistaken. As the United States explained in its brief with the Supreme Court: "the district court's approach did not give rehired employees a windfall, because it reflected what the court reasonably found that they expected in light of the promises they had been given and the information they had received."[59]

[58] Xerox Reply Brief in *Frommert II*, 535 F.3d 111(2008) at 17.

[59] United States Br. *Amicus Curiae* in *Conkright et al. v. Frommert et al.*, 130 S.Ct. 1640 (2010), at 32. As the government also explained: Xerox "incorrectly assert[s] that [plaintiff Alan] Clair stated that he did not expect a benefit as large as the one provided by the district court's approach. Clair actually stated that he believed that offsetting only his prior distribution was appropriate because he had been promised a credit for all of his prior service." *Id*. (citation omitted).

Now, however, Xerox has adopted the convenient litigation position that "it is far from clear that the district court actually decided the notice question. . ."[60] As such, it is necessary for this Court to reenter its order and to confirm that it remains based on "notice" grounds. For the reasons described below, there is no procedural obstacle to such action by this Court.

A. The "Notice" Issue Was Raised and Briefed by the Parties But Not Reached By the Second Circuit in *Frommert II*

In *Frommert II*, Xerox argued that this Court's order to recalculate plaintiffs' pensions without any appreciated offset should be reversed because the court erred in failing to defer to Xerox's new interpretation of the Plan.[61] The Second Circuit disagreed.[62] It affirmed this Court's holding that Xerox was due no deference and that an offset of actual money received with no hypothetical appreciation was consistent with the language of the

[60] Xerox's Remand Request at 1.

[61] Xerox Opening Brief in *Frommert II*, 535 F.3d 111 (2008) at 45 ("In this case, the Plan Administrator considered the provisions of the 1989 Restatement that the Second Circuit found to be ambiguous as to how prior distributions were to be treated, and resolved this ambiguity by means of an interpretation that. . . harmonizes the provisions of the Plan. . . . Accordingly, the Plan Administrator's approach should have been given deference. . . .") (citation omitted).

[62] *Frommert II*, 535 F.3d at 119 ("Defendants-Appellants have identified no authority in support of the proposition that a district court must afford deference to the mere *opinion* of the plan administrator in a case, such as this, where the administrator had previously construed the same terms and we found such a construction to have violated ERISA.").

Plan.[63] Before the Second Circuit, plaintiffs confronted Xerox's arguments directly and, in so doing, defended this Court's order on plan term grounds.[64]

Most of plaintiffs' brief, however, was devoted to the notice issue.[65] Specifically, plaintiffs argued that any appreciated offset would be unenforceable -- regardless of the proper interpretation of the Plan -- because the use of an appreciated offset was *never* disclosed, as required by ERISA, in the relevant SPDs.[66] And plaintiffs explained that this Court, *itself*, had justified its holding on notice grounds.[67]

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[63] *Id.* ("As Defendants-Appellants wrote a pension plan that addresses the situation of a discharged-and-then-rehired employee with what can only be described as ambiguity, contradiction or silence, we see no problem with the District Court's selection of one reasonable approach among several reasonable alternatives.") (citation omitted).

[64] *See, e.g.*, Plaintiffs/Appellee's Brief in *Frommert II*, 535 F.3d 111(2008) at 19 (Argument Section I), available at 2008 WL 5869182 *15.

[65] *See, e.g., id.* at *26 (Argument Section IV).

[66] *Id.* at *28 ("There is absolutely nothing in the pre-amendment SPD that gave a rehired plan participant notice that actuarial concepts would or could be used to determine his retirement benefits nor is there any explanation of what is meant by the term 'actuarial equivalent.'").

[67] *Id.* at *27 ("Judge Larimer determined that the language of the pre-amendment SPD controlled and that it required the plan administrators 'to consider all prior years of Service' and only deduct from the lump sum value of pension benefits accrued the actual amount which the plaintiffs previously received."). *See also id.* n. 17 (observing that "every Circuit Court of Appeals that has considered the issue has found that, where there is a conflict between the SPD and the plan document, the SPD controls") (citing *Mathews v. Sears Pension Plan*, 144 F.3d 461, 466 (7th Cir. 1998); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1518-19 (10th Cir. 1996); *Jensen v .SIPCO, Inc.*, 38 F.3d 945, 952 (8th Cir. 1994); *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 981-83 (5th Cir. 1991); *Edwards v. State Farm Mutual Automobile Ins. Co.*, 851 F.2d 134, 136 (6th Cir. 1988); *Bergt v. Ret. Plan for Pilots Employed by Mark Air*, 293 F.3d 1139 (9th Cir. 2003); *McNight v. Southern Life & Heath Co.*, 758 F.2d 1566 (11th Cir. 1985)).

Xerox responded to this notice argument at length in its reply.[68] Nowhere did Xerox dispute the fact that it had violated the notice provisions of ERISA.[69] Instead, Xerox argued that:

> if the touchstone for determining an approach remedy is to provide appellees with recalculated benefits based upon their expectations at the time of rehire, as appellees contend it is, then [t]he matter should be remanded to the Court for an Order directing the Plan Administrator to recalculate appellees' pension benefits in accordance with a "new hire" approach.[70]

Because the Second Circuit affirmed this Court on interpretation grounds, it never addressed whether the confessed notice violations warranted affirmance or merely, as Xerox argued, a "new-hire" recalculation.

B. The Supreme Court Expressly Left the Notice Issue To Be Resolved on Remand

Before the Supreme Court, Xerox argued that reversal was warranted because the Second Circuit affirmed this Court's interpretation of the Plan without considering Xerox's position under a deferential standard of review. The Supreme Court agreed with Xerox. Specifically, a five justice majority decided that the Second Circuit "erred in holding that the District Court could refuse to defer to the Plan Administrator's interpretation of the Plan on

[68] *See, e.g.,* Xerox Reply Brief in *Frommert II,* 535 F.3d 111(2008) at 14-17.

[69] This, of course, is not surprising. *See, e.g., supra,* Argument Section I.B. (reviewing the egregious notice violations committed).

[70] Xerox Reply Brief in *Frommert II,* 535 F.3d 111(2008) at 17.

remand, simply because the Court of Appeals had found a previous related interpretation by the Administrator to be invalid."[71]

Although the Supreme Court reversed, it expressly left open the notice question to be addressed on remand. *Conkright et al. v. Frommert et al*., 130 S.Ct. at 1652 n.2 ("The Government raises an additional argument—that the District Court should not have deferred to the Plan Administrator's second interpretation of the Plan because that interpretation would have violated ERISA's notice requirements. That is an argument about the merits, not the proper standard of review, and we leave it to be decided, if necessary, on remand.") (citation omitted).[72]

The notice issue remanded to this Court remains the same one upon which this Court's 2007 judgment was alternatively based. Accordingly, this Court should reenter this judgment and preclude Xerox from reducing plaintiffs' pensions based upon hypothetical appreciation that was indisputably never disclosed in its SPDs.

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[71] *Conkright et al. v. Frommert et al*., 130 S.Ct at 1651.

[72] The United States explained the argument as follows:

> As the district court recognized, interpreting the Plan to provide for the administrators' appreciated-offset method would have posed the same notice problem that the court of appeals had already identified because, like the phantom account, that method provided for an offset of an "appreciated value" of the prior distributions.

United States Brief in *Conkright et al. v. Frommert et al*., 130 S.Ct 1640 (2010) at 25; *id.* at 34 ("[R]egardless of the standard of review that applies to the district court's decision, the court was correct to reject the administrators' appreciated-offset approach.").

III.
ALTERNATIVELY, THIS COURT SHOULD ORDER RECALCULATION USING A "NEW HIRE" METHODOLOGY.

This lawsuit has dragged on for more than a decade. It has already resulted in three published decisions by the United States Supreme Court and Second Circuit. Several plaintiffs have died. Others are losing homes and facing bankruptcy as they try to survive with little or no pension.

Many plaintiffs are receiving absolutely no pension because Xerox continues to apply the illegal phantom account offset, which Xerox asserts that it has a right to do so until a final judgment is entered in this case. At the same time, additional plaintiffs are being laid off by Xerox every year -- and these employees are denied any severance pay unless they give up this lawsuit (and, thus, their pensions).

In response to this Court's notice holding in 2007, the *only* argument that Xerox made on appeal was that the proper remedy for this violation should be a "new hire" remedy – treating rehired employees as new hires – rather than the offset method this Court adopted (and which mirrored the Second Circuit's *Layaou* holding).[73] Accordingly, even if this Court is for some reason reluctant to reenter the prior judgment in response to Xerox's claim that "it is far from clear that the district court actually decided the notice

[73] *See, e.g.*, Xerox Reply Brief in *Frommert II*, 535 F.3d 111 (2008) at 14-17.

question,"[74] this Court should, at a minimum, enter a judgment that orders Xerox to pay rehired employees *no less* than the pension that identically-situated new employees would receive.

This is the remedy that Xerox itself advocated in the Second Circuit and that would be vastly fairer than the grossly inequitable "plan administrator" approach. Plaintiff Paul Delfina, for example, is a 68 year old retiree who depends upon his pension. He originally worked for Xerox for twenty years, and then another seven-and-a-half years as a rehire. A new employee who worked for Xerox for seven-and-a-half years as Mr. Delfina did would obtain a pension of almost $1,000 a month. But under Xerox's "plan administrator approach" (and the undisclosed hypothetical appreciation that accompanies it), Mr. Delfina is forced to survive on a pension of *less than $25 a month* for this same seven-a-half years of work.[75]

Consider also plaintiff Tom Vasta. Mr. Vasta, 65 years old when this litigation began, is now over 76 years old and in poor health. Mr. Vasta originally worked for Xerox for 22 and then *over 15* years as a rehire. A newly hired employee with 15 years of service in Mr. Vasta's position would receive a pension of around $1,300 a month. But Xerox's "plan administrator" approach would pay Mr. Vasta only $525 a month, which is

[74] Xerox Remand Request at 1.
[75] A-311 – A-312 (chart prepared by Xerox).

only 40 percent of what a new hire would receive.[76] Moreover, as with all of the plaintiffs, every day and every year the litigation continues, Mr. Vasta cannot obtain access to the pension to which he is rightfully entitled.

This Court should, at a minimum, at least do what Xerox argued before the Second Circuit: enter a judgment that orders Xerox to pay rehired employees no less than the pension that identically-situated new employees would receive.

CONCLUSION

For the reasons described above, this Court should reenter an order requiring that plaintiffs' pensions be recalculated without any appreciated offset. In the alternative, this Court should do what *Xerox* requested in its previous merits briefing before the Second Circuit: enter "an Order directing the Plan Administrator to recalculate appellees' pension benefits in accordance with a 'new hire' approach."[77]

[76] A-311 – A-312.

[77] Xerox Reply Brief in *Frommert II*, 535 F.3d 111 (2008) at 17.

PROOF OF SERVICE

I, Shaun P. Martin, hereby certify under penalty of perjury that on October 7, 2010, I served a copy of PLAINTIFFS' MOTION TO REENTER JUDGMENT via e-mail and U.S. mail to:

Robert Wick, Esq., Covington & Burling LLP, 1201 Pennsylvania Avenue NW, Washington, DC 20004 (counsel for defendants) at rwick@cov.com.

Margaret Clemens, Esq., Littler Mendelson PC, 400 Linden Oaks #110, Rochester, NY 14625 (counsel for defendants) as mclemens@littler.com.

I further certify that on October 7, 2010, I electronically filed the foregoing with the Clerk of the District Court using its CM/ECF system, which would then notify the above-mentioned participants in the case.

DATED: October 7, 2010 _____/s/_____
Shaun P. Martin