UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL J. FROMMERT, et al., Plaintiffs, v. SALLY L. CONKRIGHT, et al. Defendants.	C.A. No. 6:00-CV-6311-DGL-JWF

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR ADOPTION OF THE PLAN ADMINISTRATOR'S INTERPRETATION

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TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 2

I. THE PLAN ADMINISTRATOR'S APPROACH IS GROUNDED IN THE TERMS OF THE PLAN. 3

II. THE PLAN ADMINISTRATOR'S APPROACH IS THE MOST REASONABLE AND EQUITABLE APPROACH 6

A. The Actuarial Equivalence Approach Is Reasonable And Equitable. 7

B. Plaintiffs' Nominal Offset Approach Is Unreasonable And Inequitable. 8

C. Plaintiffs' Assertion That The Actuarial Equivalence Approach Treats Plaintiffs Worse Than New Hires Is Irrelevant And Incorrect. 9

III. THE ACTUARIAL EQUIVALENCE APPROACH DOES NOT VIOLATE THE IRRELEVANT TAX CODE PROVISION RELIED ON BY PLAINTIFFS. 11

IV. THE ACTUARIAL EQUIVALENCE APPROACH IS CONSISTENT WITH ERISA'S NOTICE REQUIREMENTS. 12

V. PLAINTIFFS ARE NOT ENTITLED TO ADDITIONAL DISCOVERY 14

CONCLUSION 15

INTRODUCTION

Plaintiffs are Xerox employees who left the company, received lump sum distributions of retirement benefits they had earned up to that point, and were later rehired. In calculating the final benefit due to these rehired employees under the Plan's Highest Average Pay ("HAP") formula, the Plan takes account of *all* of their service to Xerox – including their first period of employment. If the Plan provided these employees with a HAP benefit based on all of their service to the company, but failed to take account of the retirement benefits provided after their initial period of employment, these employees would receive double credit for their initial service to Xerox. The Plan's non-duplication of benefits provision therefore requires that Plaintiffs' final benefits be reduced by the "accrued benefit attributable to" the prior distributions they received. The issue before this Court is how to interpret the non-duplication of benefits provision.

Plaintiffs argue that a rehired employee's benefit should be offset only by the nominal value of their prior distribution, without any adjustment to account for the time value of money. Plaintiffs' "Nominal Offset" approach lacks support in the terms of the Plan. Moreover, as the Supreme Court has recognized, such an interpretation would be "heresy" and "highly unforeseeable," because it fails to account for the time value of money. *Conkright v. Frommert*, 130 S. Ct. 1640, 1650 (2010). The Supreme Court also recognized that Plaintiffs' approach unfairly puts them "in a better position than employees who never left" Xerox. *See id.* By ignoring the time value of money, the Nominal Offset approach gives Plaintiffs a large measure of double credit for their initial periods of service, thereby frustrating the purpose of the Plan's non-duplication of benefits provision.

The Plan Administrator has offered a different interpretation of the non-duplication of benefits provision. Under this "Actuarial Equivalence" interpretation, the prior distribution

received by a rehired employee is converted into an age-65 annuity that is the actuarial equivalent of the prior lump sum distribution. The resulting age-65 annuity is subtracted from the age-65 annuity provided by the Plan's HAP formula.

Under the Supreme Court's decision in *Conkright*, the Plan Administrator's Actuarial Equivalence interpretation is reviewed under a deferential abuse-of-discretion standard. *Id.* at 1646. That interpretation is not an abuse of discretion. It is grounded in the terms of the Plan, properly takes into account the time value of money, and calculates the offset for prior distributions in the "typical" way, *see* Brief for the United States as *Amicus Curiae* at 26 n.7, *Conkright*, 130 S. Ct. 1640 (No. 08-810) (hereinafter, "U.S. Br."). As another court has already concluded, the Actuarial Equivalence interpretation (i) is a "reasonable" interpretation of the Plan, (ii) uses "fair" actuarial assumptions, and (iii) offsets Plaintiffs' final pension benefits only by the real economic value – the "actual actuarial equivalent" – of the lump sum distributions they received. *Miller v. Xerox Corp. Ret. Income Guarantee Plan*, No. 98-10389 (C.D. Cal. Sept. 22, 2010), slip op. at 12-13. The Actuarial Equivalence approach does not treat Plaintiffs unfairly as compared to new hires, because the Plan takes account of *all* of Plaintiffs' service to Xerox, including their initial period of service, and makes a typical actuarial adjustment that reflects the economic value of the benefits Plaintiffs have already received.

Under the Supreme Court's decision in *Conkright*, this Court should defer to the Plan Administrator's reasonable interpretation of the Plan.

ARGUMENT

The Plan Administrator's interpretation is firmly grounded in the terms of the Plan, is reasonable and equitable, and is consistent with governing law, including ERISA's notice requirements. Plaintiffs' arguments to the contrary lack merit.

I. THE PLAN ADMINISTRATOR'S APPROACH IS GROUNDED IN THE TERMS OF THE PLAN.

The Second Circuit framed "the basic question presented" in this case as how to calculate Plaintiffs' "benefits in light of the ambiguous non-duplication of benefits provision." *Frommert*, 535 F.3d at 117. In *Conkright*, the Supreme Court made clear that this Court must defer to the Plan Administrator's interpretation of that provision, so long as it is reasonable. 130 S. Ct. at 1651. Plaintiffs assert that the Actuarial Equivalence approach is unreasonable because it is contrary to the terms of the pre-amendment Plan. That is incorrect. As another district court has already found, the Plan Administrator's interpretation "is reasonable" and entitled to deference. *Miller*, No. 98-10389, slip op. at 12-13 (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989)).

The Plan's non-duplication of benefits provision (Section 9.6) states:

> In the event any part of or all of a Member's accrued benefit is distributed to him prior to his Normal Retirement Date . . . and 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.*

Ex. B (Plan), § 9.6 (emphasis added). Section 9.6 thus requires that Plaintiffs' final pension benefits "be offset by the accrued benefit attributable to" the prior distributions they received.

Because Plaintiffs' prior distributions took the form of lump sums, and their final HAP benefits are annuities, Plaintiffs' prior distributions *must* be converted into annuity form before the offset can be calculated. As Plaintiffs themselves acknowledge (at 4), "[a]nnuitizing a lump sum requires multiple assumptions, including use of an interest rate." Consistent with Plan terms, the Plan Administrator looked to the portion of the Plan that specifies the actuarial assumptions to be used in converting lump sums to annuities, and interpreted the Plan to require use of those rates in performing the calculation called for by Section 9.6.

Plaintiffs argue (at 8) that, under Section 9.6, their benefits may be offset only by the nominal account balances that they were paid after their initial departures from Xerox. In support of that argument, Plaintiffs depart from the terms of the Plan and invoke ERISA's definition of the term "accrued benefit" for purposes of a *defined contribution* plan, which states that a participant's accrued benefit is the balance in the participant's account. *See* 29 U.S.C. § 1002(23)(B). Here, however, Plaintiffs are seeking additional benefits under a *defined benefit* plan – specifically, under the Plan's HAP defined benefit formula. For purposes of a defined benefit plan, ERISA defines a participant's "accrued benefit" as an age-65 annuity, not an account balance. *See* 29 U.S.C. § 1002(23)(A).

The Plan likewise defines a participant's "accrued benefit" as "[t]he normal retirement benefit which a [participant] has earned up to any date, and which is payable at Normal Retirement Date" Ex. B (Plan), § 1.1. With certain exceptions not relevant here, the Plan defines the term "Normal Retirement Date" as the first day of the month following an employee's 65th birthday. *Id.* § 1.27. Thus, Section 9.6, in conjunction with the Plan's definition of "accrued benefit," requires that a Plaintiff's final annuity benefit be offset by the age-65 annuity attributable to the prior distribution he received.

Plaintiffs also complain (at 6) that the Plan does not "specify the 'assumptions'" that will be used to convert their past distributions into equivalent age-65 annuities for purposes of applying Section 9.6. This argument is mistaken as well.

Plaintiffs' prior distributions consisted of the balances in their defined contribution Profit Sharing Retirement Accounts ("Retirement Accounts"), which were renamed Transitional Retirement Accounts, or "TRAs," in 1990. *See* Ex. B (Plan), Art. 17. Through its use of the defined term "accrued benefit," Section 9.6 requires that Plaintiffs' prior distributions be

converted to annuities "computed in accordance with . . . Section 4.3." *Id.* § 1.1. Subsection 4.3(e) is the portion of Section 4.3 that specifies how to convert defined contribution account balances into annuities, and provides that such conversions should be made "*using annuity rates established by the PBGC*." *Id.* § 4.3(e) (emphasis added). Accordingly, the Plan Administrator relied on the annuity rates established by the PBGC to determine the age-65 annuity that is the actuarial equivalent of Plaintiffs' prior lump sum distributions. *See* Ex. A (Becker Aff.), ¶ 15.

According to Plaintiffs, it was unreasonable for the Plan Administrator to look to the PBGC rates identified in Section 4.3(e) of the Plan because their prior distributions came from Retirement Accounts, and Section 4.3(e) addresses Transitional Retirement Accounts. But as this Court has already recognized, the Retirement Account was the "direct predecessor" of the TRA, and "a participant's Retirement Account balance formed the basis for his initial . . . TRA balance[]." *Frommert v. Conkright*, 328 F. Supp. 2d 420, 434 (W.D.N.Y. 2004). Xerox simply changed the name of the defined contribution "Retirement Accounts" to "Transitional Retirement Accounts" as part of a plan redesign. Accordingly, the Plan Administrator's decision to use the actuarial assumptions specified by the Plan for converting TRA account balances to age-65 annuities in converting Plaintiffs' prior lump sum distributions to age-65 annuities was reasonable and grounded in the terms of the Plan. *See id.*; *Hammond v. Xerox Corp. Ret. Income Guarantee Plan*, No. CV 2:97-8349, 1999 WL 33915859, at *11 (C.D. Cal. Apr. 8, 1999) ("[I]t was not unreasonable for the plan administrator to construe distributions from the Retirement Account . . . as distributions from the TRA."), *aff'd* 225 F.3d 662 (9th Cir. 2000).

Plaintiffs also argue (at 9) that the Plan Administrator's interpretation is unreasonable because Section 4.3(e) provides only that a participant's final HAP benefit shall be offset by the current, annuitized value of the participant's existing TRA account, and Plaintiffs (who had

previously cashed out their defined contribution accounts) did not have current, defined contribution account balances. This argument attacks a straw man, because it is Section 9.6 – not Section 4.3(e) – that requires an offset for *previously-distributed* benefits. Section 9.6 mandates an offset for amounts "distributed to [a rehired employee] prior to his Normal Retirement Date." Ex. B (Plan), § 9.6. Section 9.6 further provides – by way of the Plan's definition of "accrued benefit" – that the amount of the offset should be calculated "in accordance with" Section 4.3, and so the Plan Administrator reasonably looked to Section 4.3(e) to determine which actuarial assumptions to use in calculating the offset, but Section 4.3(e) itself is not the Plan provision that addresses offsets for prior distributions. Because Section 9.6 expressly requires an offset for prior distributions, the absence of such a requirement in Section 4.3(e) is immaterial.

II. THE PLAN ADMINISTRATOR'S APPROACH IS THE MOST REASONABLE AND EQUITABLE APPROACH.

Plaintiffs also argue (at 3) that the Actuarial Equivalence approach should be rejected because it is "inequitable." Under *Conkright*, the Court must defer to the Plan Administrator's construction of the Plan so long as it is reasonable, even if Plaintiffs believe that another interpretation would be more equitable. *See id.* Here, the reasonableness of the Plan Administrator's approach is confirmed by the facts that this approach (i) is consistent with IRS guidance governing how floor-offset plans should take into account prior benefit distributions, *see* Defs. Br., at 12, and (ii) employs what the United States has acknowledged is the "typical" way of offsetting prior benefit distributions, *see* U.S. Br. at 26 n.7.[1]

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[1] Plaintiffs – using characteristically strident rhetoric – assert (at 18) that this is a "near-sanctionable misrepresentation" of the Government's position. Plaintiffs are incorrect. As the Solicitor General informed the Supreme Court in its *amicus* brief: "ERISA permits floor-offset (continued...)

The Actuarial Equivalence approach is also equitable. It is based on "fair assumptions that broadly seek to achieve equity" in accounting for the prior distributions of rehired Xerox employees. *Miller*, No. 98-10389, slip op. at 13. Indeed, the Supreme Court's decision makes clear that it is *Plaintiffs* who are seeking an inequitable result that ignores the time value of money and treats them better than similarly-situated employees who never left Xerox. *See Conkright*, 130 S. Ct. at 1650.

A. **The Actuarial Equivalence Approach Is Reasonable And Equitable.**

The Plan specifies that Plaintiffs' final benefits under the HAP formula must be computed taking into account all of their years of service, including their first period of service. Ex. B (Plan), §§ 4.3, 9.6; *see Frommert v. Conkright*, 433 F.3d 254, 257 (2d Cir. 2006). As a result, unless the distributions Plaintiffs received from their defined contribution accounts are properly taken into account in calculating Plaintiffs' final HAP benefits, Plaintiffs will receive an unearned windfall.

Under the Actuarial Equivalence approach, the prior distributions are taken into account by (i) determining the amount of the age-65 annuity that Plaintiffs could have purchased with the prior distributions they received (at the time of the prior distribution), and (ii) offsetting their final benefit under the HAP formula by that amount. As another court has already concluded, this methodology "reaches as nearly as possible the actuarial equivalent value of the prior lump sum distribution." *Miller*, No. 98-10389, slip op. at 13. In other words, this approach fairly reflects the true financial value of the prior distributions Plaintiffs received.

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arrangements to make actuarial adjustments when calculating the offset for prior distributions. Indeed, the Internal Revenue Service and Treasury Department inform us that *plans typically calculate the offset in that way*." U.S. Br. at 26 n.7 (emphasis added).

Contrary to Plaintiffs' suggestion (at 18), the PBGC interest rates relied on by the Plan Administrator are not artificial. To the contrary, the PBGC rates are "derived from data on market interest rates." *Berger v. Xerox Corp. Ret. Income Guarantee Plan*, 338 F.3d 755, 760 (7th Cir. 2003) (citing 58 Fed. Reg. 5128-01 (Jan. 19, 1993)). Specifically, the PBGC rates are based on an annual survey of the commercial market undertaken by the PBGC to determine the "price the private sector annuity market would charge to annuitize [future] benefit payment obligations."[2] In other words, the PBGC rates reflect the actual annuity purchase rates in existence at a given time, and are not "skewed" in any direction. Thus, as another court has already concluded, it is reasonable for the Plan Administrator to use these rates in converting Plaintiffs' prior distributions into annuity form. *See Miller*, No. 98-10389, slip op. at 11-12.[3]

B. Plaintiffs' Nominal Offset Approach Is Unreasonable And Inequitable.

Unlike the Actuarial Equivalence approach, Plaintiffs' Nominal Offset approach has no basis in Plan terms, ignores the time value of money, and inequitably treats rehired employees better than Xerox employees who remain with the company through retirement.

The Plan's HAP formula benefit consists of a monthly retirement annuity. Plaintiffs' prior distributions, by contrast, consisted of lump sums. To offset a lump sum against a monthly annuity, an actuarial conversion of some kind is required. *See* Ex. A (Becker Aff.), at ¶ 11. And, as Plaintiffs acknowledge (at 4), this conversion – *i.e.*, "[a]nnuitizing a lump sum" – "requires

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2 *See* "PBGC Procedure for Setting Interest Factors Used to Value Liabilities For PBGC Financial Statements," *available at* http://www.pbgc.gov/news/other/res/pbgc-procedure-interest-factors.html#_ftnref2.

3 PBGC regulations expressly stated that it would be reasonable to use PBGC rates in converting annuities to lump sums, which is "the mirror image of the calculation required here." *Miller*, No. 98-10389, slip op. at 11 (citing *Cooke v. Lynn Sand & Stone Co.*, 673 F. Supp. 14, 20 (D. Mass. 1986)); *see* 29 C.F.R.§ 2619.26 (1983).

multiple assumptions, including use of an interest rate."

Plaintiffs effectively argue that this conversion should be done using two different interest rates. Specifically, under Plaintiffs' approach, a *zero* interest rate applies between the date of their original distributions and their retirement date. At retirement age, however, Plaintiffs apply a different, standard interest rate to convert their prior distributions into equivalent annuities.

This schizophrenic approach has no basis in the terms of the Plan. It is also inequitable, because it ignores the fact that Plaintiffs have had the use of their prior distributions for twenty or more years. As the Supreme Court recognized, the Nominal Offset approach would unfairly provide Plaintiffs with "windfalls" by putting them "in a better position than employees who never left the company." *Conkright*, 130 S. Ct. at 1650. Indeed, Plaintiffs' own expert agreed that the Nominal Offset approach would not be "equitable" because "there is some intrinsic time value of money" that a nominal offset ignores. Ex. D (July 11, 2006 Hearing Tr.), at 82.

C. **Plaintiffs' Assertion That The Actuarial Equivalence Approach Treats Plaintiffs Worse Than New Hires Is Irrelevant And Incorrect.**

Plaintiffs assert (at 19) that no interpretation of the Plan that treats them "worse than new hires can possibly be equitable or reasonable under the [P]lan." This assertion is wrong as a matter of law: Plaintiffs do not and could not cite any authority for the proposition that it would violate ERISA for an employer to design a plan that sometimes happened to treat rehired employees worse than new hires. Plaintiffs' assertion is also factually mistaken, because the Actuarial Equivalence approach does not treat Plaintiffs worse than new hires.[4]

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[4] Comparing employees with the same number of years of service, and taking account of all their benefit distributions, the Actuarial Equivalence interpretation *cannot* leave re-hired (continued...)

Plaintiffs' argument overlooks the fact that the Xerox Plan is a floor-offset plan. "The purpose of [a floor-offset arrangement] is to provide, in the [defined benefit] component, insurance against the vagaries of securities investments [in the defined contribution] component." *Lunn v. Montgomery Ward & Co.*, 166 F.3d 880, 883 (7th Cir. 1999). Under the Xerox Plan, the "floor" benefit is provided by the HAP defined benefit formula. Participants receive a benefit under the defined benefit component of the Plan only if the value of their defined contribution accounts falls below the benefit provided under the HAP formula.

Plaintiffs complain that their accrued benefit under the HAP formula for their second period of service is reduced as a result of distributions they received at the end of their first period of service. But there is nothing arbitrary or unfair about reducing Plaintiffs' "floor" benefits by the value of the defined contribution account balances they received – that is how floor-offset plans work. Such plans use defined benefit formulas as a kind of insurance policy, to ensure a minimum level of benefits in case the defined contribution component of the plan performs poorly. When the defined contribution component performs well – as it did for Plaintiffs here – the "insurance" component of the plan is not triggered, and "many [employees] will have little or no benefit from the defined benefit plan."[5] In this respect, Plaintiffs are in the same position as similarly-situated employees who never left Xerox. Just like Plaintiffs, many such employees worked for Xerox for many years without ever becoming entitled to *any* benefit under the Plan's HAP formula. The reason that these employees – like some of the Plaintiffs –

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employees worse off than newly-hired employees, because an actuarial equivalence offset merely reduces an employee's benefit by the actual value of the prior distribution.

5 Employee Benefit Research Institute, *Hybrid Retirement Plans: The Retirement Income System Continues to Evolve*, EBRI Special Report SR-32, at 18 (1996), *at* http://www.ebri.org/pdf/briefspdf/0396ib.pdf.

receive no benefit under the Plan's defined benefit component is because the Plan's defined contribution component already places them above the Plan's floor benefit.

In essence, Plaintiffs ask this Court to treat them *better* than similarly-situated employees who waited until retirement age to receive a distribution. Like employees who never left Xerox, Plaintiffs want the full value of their defined contribution accounts. But Plaintiffs also seek an additional payment, under the Plan's defined benefit formula, that a similarly-situated employee who never left Xerox would not receive. That is not a fair result. *See White v. Sundstrand Corp.*, 256 F.3d 580, 583-84 (7th Cir. 2001) (explaining that if early distributions are not properly taken into account, employees who leave before retirement age would "obtain a big advantage over those who stay," producing "a plan that treated workers staying through retirement age as suckers").

III. THE ACTUARIAL EQUIVALENCE APPROACH DOES NOT VIOLATE THE IRRELEVANT TAX CODE PROVISION RELIED ON BY PLAINTIFFS.

Plaintiffs argue (at 5) that the Actuarial Equivalence approach is arbitrary and capricious because it violates a provision of the Internal Revenue Code ("IRC") requiring that any actuarial assumptions be "specified in the plan in a way which precludes employer discretion" in order for the plan to receive favorable tax treatment. 26 U.S.C. § 401(a)(25). This assertion is both incorrect and irrelevant.

First, Plaintiffs are wrong that the Plan fails to specify the actuarial assumptions underlying the Actuarial Equivalence approach. As explained in Part I, Plan terms support the Plan Administrator's use of PBGC interest rates in calculating the offset for prior distributions.

Second, even if the Plan failed to satisfy § 401(a)(25)'s tax-qualification requirement, that would have no relevance here. It is well-established that plan participants do not have standing to bring claims arising out of alleged failures by their pension plans to satisfy IRC tax-

qualification requirements. *See, e.g.*, *Reklau v. Merchants Nat. Corp.*, 808 F.2d 628, 631 (7th Cir. 1986). Unlike a number of other tax provisions relating to pension plans, Congress decided *not* to import the "employer discretion" rule codified in § 401(a)(25) into ERISA. *See, e.g.*, *id.*; *Stamper v. Total Petroleum, Inc. Ret. Plan*, 188 F.3d 1233, 1240 (10th Cir. 1999).

Third, § 401(a)(25) prohibits only *employer* discretion in setting actuarial assumptions. It is inapplicable to cases – like this one – where a *plan administrator* exercises discretion to resolve ambiguous plan terms in the course of resolving a claim for ERISA benefits. *See McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1117-18 (9th Cir. 2000) (holding that a plan administrator's interpretation of ambiguous plan terms is entitled to deference even where the plan terms at issue fail to satisfy § 401(a)(25)'s tax-qualification requirements).

IV. THE ACTUARIAL EQUIVALENCE APPROACH IS CONSISTENT WITH ERISA'S NOTICE REQUIREMENTS.

Defendants' cross-motion seeks an order authorizing implementation of the Plan Administrator's approach and dismissing Plaintiffs' claims, including their notice claims. Plaintiffs' opposition, however, ignores Defendants' notice arguments, and none of the assertions made elsewhere by Plaintiffs regarding the notice issue has merit. Accordingly, notice concerns do not foreclose adoption of the Plan Administrator's interpretation.

First, Plaintiffs are wrong to suggest that, because notice considerations preclude use of the phantom account methodology, the Actuarial Equivalence approach also runs afoul of ERISA's notice requirements. As the Supreme Court recognized, phantom accounting and the Actuarial Equivalence approach are different. *Conkright*, 130 S. Ct. at 1645. While the phantom account approach calculated the offset for prior distributions based on "hypothetical growth in a nonexistent account," *Frommert*, 433 F.3d at 268, the Plan Administrator's approach performs the offset calculation in the "typical" way, *see* U.S. Br. at 26 n.7. The only notice question now

before this Court is whether the *standard* offset methodology used by the Actuarial Equivalence interpretation needed to be disclosed in Xerox's SPD, and that question is not resolved by reference to the heightened disclosure requirements that the Second Circuit found applicable to the "exotic" phantom account methodology.

Second, Plaintiffs do not confront the authority holding that "typical" offset calculations need not be disclosed in SPDs. Here, as Plaintiffs implicitly concede, Xerox complied with the regulatory requirement that the "circumstances which may result in . . . offset . . . of any benefits" be disclosed. 29 C.F.R. § 2520.102-3(l). Moreover, the Second Circuit has held that ERISA does not "impose[] a blanket requirement under which a Summary Plan Description invariably must describe the method of calculating an actuarial reduction or must use a clarifying example." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 197 (2d Cir. 2007); *see Stamper*, 188 F.3d at 1243 (plan controls where SPD is "silent on the actuarial reduction assumptions" to be used). If even typical offset calculation methods were required to be disclosed in SPDs – and if that were so even where, as here, the offset in question affects only a small fraction of a plan's participants – then the Second Circuit's holding in *McCarthy* would be eviscerated. *See also Herrmann v. Cencom Cable Assocs.*, 978 F.2d 978, 983-984 (7th Cir. 1992). ("Larding the summary" with technical "minutiae" would "defeat that [summary] document's function.").

Third, Plaintiffs are unable to square their notice arguments with the Supreme Court's decision in this case. Language that is ambiguous in the more detailed plan document would rarely be explicitly clarified in the shorter summary document. Thus, under Plaintiffs' reading of the SPD notice requirements, there would typically be *no deference* to plan administrators in cases involving ambiguous plan language. That is precisely the result that the Supreme Court rejected in *Conkright*. 130 S. Ct. at 1646-47.

Fourth, Plaintiffs have no answer to Defendants' argument that, even if the Xerox SPD violates ERISA's notice requirements (which it does not), Plaintiffs would not be entitled to their proposed remedy. Instead, they assert only that the Nominal Offset approach would be the "law of the case" if a notice violation were found. Pls. Reply at 8. This assertion, however, ignores the Supreme Court's holding that the Nominal Offset approach's failure to take the time value of money into account would be "heresy" and "highly unforeseeable," and would result in "windfalls" to Plaintiffs. *Conkright*, 130 S. Ct. at 1650. This is fatal to Plaintiffs' proposed remedy, because ERISA "abhor[s]" windfalls. *Harms* v. *Cavenham Forest Indus., Inc.*, 984 F.2d 686, 693 (5th Cir. 1993); *accord Benefits Comm. of Saint-Gobain Corp*, 313 F.3d at 932 (purpose of ERISA is "not to obtain windfalls"). Accordingly, in light of *Conkright*, any equitable remedy in this case would need to account for the time value of the monies that Plaintiffs received in calculating the offset for prior distributions. *See id.*

V. PLAINTIFFS ARE NOT ENTITLED TO ADDITIONAL DISCOVERY.

Finally, Plaintiffs assert (at 21) that this Court should not enter judgment in favor of Defendants without first permitting them to engage in discovery regarding a purported "conflict of interest" on the part of the Xerox Plan Administrator. This assertion fails for three reasons.

First, Plaintiffs already had the opportunity to conduct any necessary discovery. This case was remanded to this Court for the first time in 2006. Thereafter, the Plan Administrator submitted his interpretation of the pre-amendment Plan terms to the Court, the parties engaged in extensive discovery, the Court held a two-day trial, and the Court entered a final judgment on the remedies issue. Plaintiffs *never* requested discovery regarding the Plan Administrator's purported conflict of interest during this process. Accordingly, Plaintiffs may not now be heard – nearly five years later – to seek such discovery. *Trebor Sportswear Co., Inc. v. The Limited*

Stores, Inc., 865 F.2d 506, 511 (2d Cir. 1989) ("[C]ourt may properly deny further discovery if the [requesting] party has had a fully adequate opportunity for discovery.").[6]

Second, even if summary judgment standards apply (which they do not, since this case has already been tried), Plaintiffs would have failed to demonstrate that there are any material issues of fact that preclude entry of judgment. *See* Fed. R. Civ. P. 56(d). In the Second Circuit, a party resisting summary judgment on the ground that additional discovery is needed must submit an affidavit supporting the request. *Carpenter v. Churchville Greene Homeowner's Ass'n, Inc.*, No. 09-CV-6552, 2011 WL 710204, at *4 (W.D.N.Y. Feb. 22, 2011). "[T]the failure to file such an affidavit under [former] Rule 56(f) is by itself enough to reject a claim that the opportunity for discovery was inadequate." *Burlington Coat Factory Warehouse Corp. v. Esprit De Corp.*, 769 F.2d 919, 926 (2d Cir. 1985). Here, Plaintiffs failed to satisfy these requirements, and so their request for discovery should be denied.

Third, there are no material facts that are genuinely in dispute. As Plaintiffs' memorandum makes clear, the parties agree that the Plan Administrator is a Xerox employee and that Xerox is responsible for funding the Plan. Accordingly, no discovery is needed.

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in Defendants' opening memorandum, Defendants' cross-motion should be granted.

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[6] Nor is it relevant that the Supreme Court decided *Metropolitan Life Insurance Co. v. Glenn*, 554 U.S. 105 (2008), after the 2006 remedies trial. Prior to the 2006 remand, it was established in the Second Circuit that (i) a conflict of interest is relevant to the amount of deference owed a plan administrator, and (ii) discovery regarding such a conflict may be available in appropriate cases. *See Wagner v. First Unum Life Ins. Co.*, 100 Fed. Appx. 862, 864 n.1 (2d Cir. 2004); *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 174 (2d Cir. 2001). Accordingly, *Glenn* does not warrant the reopening of discovery here. *See Letvinuck v. Aetna Life Ins. Co.*, No. CV 06-2831, 2009 WL 2355709, at **2-3 (C.D. Cal. July 28, 2009) (denying request for conflict of interest discovery on remand in ERISA benefits claim).

Respectfully submitted,

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