UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BRUCE D. KUNSMAN, et al., Plaintiffs, v. SALLY L. CONKRIGHT, et al., Defendants.	**08-CV-06080-DGL-JWF**

NON-MOVING PLAINTIFFS' STATEMENT RE: PLAINTIFF MCNEIL'S MOTIONS TO FILE AMENDED COMPLAINT AND CERTIFICATION

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Plaintiff Joseph McNeil ("McNeil") has moved for leave to file an amended complaint to add class action claims and for class certification in this action. The undersigned represent the non-moving plaintiffs in this action ("Plaintiffs"), and file the following brief statement (1) to make clear that Plaintiffs do not oppose Plaintiff McNeil's motion to amend, and (2) to respond briefly to some of the factual representations made by Defendants in their opposition to McNeil's motions.

Plaintiffs fully concur in McNeil's objective that the relief awarded by the Court in this Action also inure to the benefit of other similarly situated plan participants. Accordingly, they do not oppose McNeil's motions for leave to file an amended complaint to add class action claims for class certification in this Action.

The Court should nonetheless also be aware that the relief awarded by the Court to the named *Kunsman* plaintiffs may benefit the other similarly situated plan participants even if a class is not certified because the existing complaint already seeks injunctive relief on their behalf. *See, e.g.*, Amended Complaint at ¶¶ 13 ("The relief sought in Counts One, Two and Three of this complaint is essentially equitable in nature and should apply to all persons similarly situated to plaintiffs."), 15 (same), 74 (requesting injunctive relief for all employees), 82-83 (affirming this Court's statement

that relief herein extends to all similarly-situated employees), 92 (requesting injunctive relief), 104-106 (requesting relief for "all rehired plain participants"), 111 (expressly requesting relief for all Xerox employees), & 125(a)-(h) (indisputably requesting relief for all plan participants).

In addition, as McNeil's moving papers reflect, this Court has previously made similar findings that even under the existing complaint, all similarly situated plan participants should be treated the same by Defendants. *See Frommert v. Conkright*, 472 F. Supp. 2d 452, at 456-57 (W.D.N.Y. 2007) ("Xerox may not lawfully use the phantom account mechanism, as to either the named plaintiffs in this lawsuit, **or anyone else who was rehired by Xerox prior to 1998**, after having previously received a distribution of pension benefits.") (emphasis added).

Defendants' repeated claim in their opposition to McNeil's motion that they "had no notice" and would be "surprised" and "prejudiced" by any request for relief for unnamed parties is thus belied by the contents of the existing complaint, this Court's prior Orders, and the conduct of this litigation by the parties over the past decade, each of which repeatedly emphasized Plaintiffs' demand for relief on behalf of all plan participants.

To the degree there is any uncertainty as to whether such remedies would be available to similarly-situated participants, or were Defendants to

challenge (as they apparently do) the procedural availability of such relief for those similarly-situated plan participants, Plaintiffs have no objection to McNeil's motion to amend his complaint to include class claims.

Finally, although Defendants forthrightly concede (Opposition at 16) that "the Plan Administrator is bound by law, and his fiduciary duty, to apply the court-ordered benefits calculation in *Frommert* to all similarly-situated plaintiffs, including those in this action as to which other defenses do not apply," this Court should be aware that:

(1) Defendants continue to apply the phantom account to current and former Xerox employees notwithstanding the almost the decade-old decision of the Second Circuit expressly declaring the application of the phantom account offset to be illegal, arbitrary and capricious, *Frommert v. Conkright*, 433 F.3d 254, 265-66 (2d Cir. 2006), and holding that "the phantom account may not be applied to employees rehired prior to the issuance of the 1998 SPD," *id.* at 263; and

(2) Defendants continue to apply the "Plan Administrator" approach to the plaintiffs in both *Kunsman* and *Frommert* notwithstanding the fact that the Second Circuit, six months ago, expressly declared that this approach too was illegal, arbitrary and capricious. *Frommert v. Conkright*, 738 F.3d 522, 530 (2d Cir. 2013).

The fact that Defendants refuse to comply with the Second Circuit's express holdings in *Frommert*, and continue to this day to refuse to pay plan participants the amounts that are expressly due under those decisions, should inform this Court's judgment regarding Defendants' claim that no relief is necessary, and McNeil's motions need not be allowed, because they intend to voluntarily satisfy their fiduciary obligations.

Dated: July 11, 2014

\/s/ Shaun P. Martin
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