UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL J. FROMMERT, et al., Plaintiffs, v. SALLY L. CONKRIGHT, et al., Defendants.	**DECLARATION OF SHAUN P. MARTIN IN SUPPORT OF PLAINTIFFS' MOTION FOR CLARIFICATION AND/OR RECONSIDERATION RE: PREJUDGMENT INTEREST ORDER** **00-CV-6311(L)**

I, Shaun P. Martin, declare under penalty of perjury under the laws of the United States of America as follows:

1. I am an attorney admitted to this Court, and am counsel for plaintiffs in this action. I make the following declaration based upon my personal and firsthand knowledge, and if called and sworn as a witness, I could and would testify competently as to each fact set forth herein.

2. This Court entered a Decision and Order regarding prejudgment interest (Dkt. No. 319) on November 3, 2016 (the "Order"). Because ERISA requires an award of prejudgment interest to compensate for this delay, *see* Order at 2-3, this Court awarded interest "calculated using the prime interest rate, as published by the Federal Reserve, as to each plaintiff, calculated from the date of the plaintiff's distribution up to January 5, 2016." Order at 10. The Court instructed the parties to attempt to arrive at a mutually-agreeable award for each plaintiff, recognizing the unique retirement dates and interest rates applicable to each plaintiff. Order at 9-10. The parties have attempted to do so, but

have not been able to reach agreement with respect to three issues. These three issues are substantial, and result in a difference of millions of dollars in total prejudgment interest amongst the various plaintiffs. In particular, I had a lengthy conversation with Ms. Clemens over the telephone with respect to each of these issues, and further had numerous e-mail exchanges with Ms. Clemens and Ms. Reynolds regarding them. Although Ms. Clemens initially stated on the telephone that my interpretations of the Order "made sense" and was receptive to them, Xerox ultimately refused to adopt any of them, and the parties are now at an impasse.

3. I am very aware of the situation of plaintiff Tom Dalton, and have been personally and substantially involved in his particular circumstances. The following data comes from Xerox's own records (which Ms. Clemens provided to me), and has been confirmed by me personally as well as by Mr. Dalton. Mr. Dalton stopped working for Xerox on February 12, 2002. Mr. Dalton was entitled to "new hire" benefits on this date – and a similarly-situated new hire would have received them -- but Xerox neither offered nor paid Mr. Dalton this amount in 2002. Rather, Xerox paid Mr. Dalton nothing in 2002, since the (illegal) phantom account reduced Mr. Dalton's benefits to $0. As a result, Mr. Dalton received his full "new hire" benefits not in 2002, but rather only in 2016, after this Court compelled Xerox to pay him these benefits. Mr. Dalton eventually received $160,296.35 in new hire benefits. Since he was entitled to, but did not, receive these benefits in 2002, plaintiffs believe that Mr. Dalton is entitled to prejudgment interest at the Federal Reserve prime rate that existed when he left Xerox on February 12, 2002, which was 4.75%. Xerox, by contrast, contends that instead of using one interest rate (4.75%), the proper rate under this Court's Order for Mr. Dalton is thirty-one

different interest rates, rates that change each time the Federal Reserve changed the federal prime rate.

4. Xerox paid Mr. Dalton $56,263.61 on May 1, 2012 ("Plan Adminstrator") and was obligated to pay him an additional $104,432.74 on the date of this Court's "new hire" Order on January 5, 2016. At 4.75 percent, the interest on these amounts from 2002 totals $128,451.15. But by instead employing thirty-one different interest rates, Xerox contends that Mr. Dalton is entitled to only $13,010.82 in interest for the 14 years Xerox failed to pay his new hire benefits of $160,296.35.

5. Xerox's use of "variable" interest rates favors Xerox every single time, and for every single plaintiff. For example, for Mr. Dalton, Xerox's interest rate methodology deprives him of $115,440.33 in prejudgment interest that has accumulated on his behalf over the past 14 years. For the other plaintiffs, Xerox's methodology similarly collectively deprives them of over $4 million in prejudgment interest. I attach as Exhibit A individualized calculations for the 44 plaintiffs for which Xerox has provided prejudgment interest calculations. (I requested from Ms. Clemens that she provide me with Xerox's calculations for the other plaintiffs, including the interest to which these plaintiffs would be entitled under the competing methodologies as well as the underlying data, but Ms. Clemens refused to provide it.) As the spreadsheet reflects, every single plaintiff loses money as a result of Xerox's decision to use variable interest rates as opposed to a single fixed interest rate when calculating prejudgment interest.

6. Under the Plan Administrator approach, Xerox appreciated an employee's prior distribution by a fixed – not variable -- interest rate, and the fixed PBGC interest rate that Xerox has selected was the single interest rate (generally 8%) that existed on the

date of the prior distribution. Even when interest rates progressively diminished over time (as they have), Xerox continued to appreciate all prior distributions by the fixed interest rate that existed at the time of the distribution, rather than the lower interest rates subsequently available. Similarly, even now, to calculate plaintiffs' "new hire" benefits, Xerox uses a fixed – not variable – interest rate to determine the lump sum due by discounting the present value of the monthly annuity created by the formula benefit.. Not only does Xerox's current use of low, variable interest rates conflict with its own continuing interpretation and application of the Plan, but it also is inequitable. This Court has already selected a low interest rate: the prime rate, which is the rate that banks charge their best, most creditworthy customers. Plaintiffs could not in fact obtain loans at such a low rate, particularly when (as here) they faced a speculative, 17-year ordeal with no certainty of ultimately recovering such benefits at the conclusion of this litigation. Rather than borrow at the prime rate, plaintiffs were instead forced to borrow at higher interest rates, max out their credit cards, or simply do without.

7. As a result of the phantom account, some plaintiffs were told that they had absolutely no retirement benefit due; *i.e.*, that the value of their retirement benefit was $0. Plaintiff Tom Dalton is an example of this group of plaintiffs. Mr. Dalton tried to withdraw his pension as a lump sum upon finally leaving Xerox in 2002, but was told by Xerox that even though his annual benefits statements showed a lump-sum entitlement to hundreds of thousands of dollars, he was in fact entitled to nothing as a result of the phantom account. So even though Mr. Dalton left Xerox on February 12, 2002, he got paid nothing until this Court's subsequent Orders in 2012 and 2016. Mr. Dalton asked for but received no retirement benefits at all in 2002, even though he was eventually paid

$160,296.35 in new hire benefits as a result of the present lawsuit. Xerox insists that for the decade between 2002 and 2012 – a period in which Mr. Dalton was entitled to $160,296.35 but received nothing – Mr. Dalton is entitled to exactly $0 in prejudgment interest. Xerox maintains that the same is true for every other plaintiff who (like Mr. Dalton) similarly did not take a distribution from Xerox when he or she finally left Xerox when the phantom account made the balance due to these plaintiffs $0. On Xerox's theory, these plaintiffs are only entitled to interest after 2012, since that is the date on which Xerox deigned to pay these plaintiffs the "Plan Administrator" recovery. At that point, Xerox says, plaintiffs had then "settled" with the plan (e.g., taken a distribution), so only after that date does Xerox maintain that this group of plaintiffs is entitled to prejudgment interest.

8. By contrast, plaintiffs contend that Mr. Dalton, and the other plaintiffs like him, are entitled to prejudgment interest from the date they finally left Xerox until the date they were finally paid those amounts (e.g., January 5, 2016). Plaintiffs adopt the common sense approach that the fact that these plaintiffs did not "settle" with the Plan until 2012, and could not take a distribution before that date (because the phantom account reflected that $0 was due), is irrelevant. Plaintiffs insist that this group remains entitled to prejudgment interest under the Order as compensation for the decade-long delay between the date they were in fact entitled to a pension (i.e., the day they left Xerox) and the date they finally received these long-overdue amounts in 2016.

9. The difference between the competing methodologies referred to above for the plaintiffs like Mr. Dalton totals several million dollars in differential prejudgment interest. The figures for the 44 plaintiffs alone that are reflected on Exhibit A reveal that

Xerox has attempted even for this subset of plaintiffs to deprive them of over $4 million in prejudgment interest.

10. Xerox's phantom account treated some plaintiffs slightly more favorably, and entitled them to at least a pittance in lump-sum retirement benefits. After they finally left Xerox, a minority of the plaintiffs – 12 of them – requested and received these "phantom account" benefits as a distribution.

11. These 12 plaintiffs are the only ones that Xerox maintains are entitled to any prejudgment interest prior to 2012. Moreover, even as to these 12 plaintiffs, Xerox insists that they not entitled to prejudgment interest on the date they finally left Xerox, but instead claim that they may only recover prejudgment interest from the date they eventually "settled" with the Plan (i.e., took a distribution).

12. These 12 plaintiffs typically requested their belated phantom account distribution only years later. Because the present lawsuit was pending, and because these plaintiffs knew that Xerox had calculated their entitlement in an illegal fashion, Xerox's own records (produced by Ms. Clemens) reveal that these plaintiffs only "settled" with the Plan in 2009-12, even though they left Xerox as early as 2002.

13. Finally, several plaintiffs were entitled to a pittance from Xerox under the phantom account, but refused to "settle" with the Plan by taking a distribution that they knew was illegally calculated. For example, plaintiff Joyce Pruett retired from Xerox in January of 1998. Ms. Pruett was told that she could "settle" with the Plan by taking a distribution pursuant to the phantom account, but she refused to do so. As a result, even though Xerox eventually paid Ms. Pruett a total of $41,277.58 in additional "new hire" benefits -- $21,734.98 in 2012 and $19,542.60 in 2016 – Xerox insists that Ms. Pruett,

and every other plaintiff like her, is not entitled to *any* prejudgment interest from 1998 until 2012, since 2012 was the first date on which Ms. Pruett "settled" with the Plan after finally leaving Xerox (*i.e*, the date on which Xerox made its "plan administrator" payments).

14. The 23 plaintiffs in the *Layaou* Group each requested and received a lump-sum distribution of their retirement benefits when they first left Xerox, and then did the same thing after they were subsequently rehired and then left Xerox again. These 23 plaintiffs accordingly each received a distribution of their "phantom account" benefits shortly after they left Xerox for the final time. Thereafter, in 2009, before the Supreme Court granted certiorari, Xerox paid each of these plaintiffs another distribution consistent with the *Layaou* methodology pursuant to the then-existing mandate of the Second Circuit.

15. The principal amount of the *Layaou* benefits paid to these plaintiffs in 2009 was generally greater than the "new hire" benefits to which they would ultimately be entitled under this Court's January 5, 2016 Order. But "principal" is the key caveat. Some of the *Layaou* Group plaintiffs are in fact entitled to greater benefits under new hire, plus interest, than the amount they received as *Layaou* benefits in 2009. To take but one representative example, by Xerox's own records (which Ms. Clemens has provided to me), Plaintiff Richard Glickin left Xerox on January 1, 1997 and requested and received his "phantom account" distribution later that year. At that time, in 1997, the federal prime interest rate was 8.25%. Under this Court's Order, Xerox calculates that Mr. Glickin should have received – but did not – an additional $16,716.96 in "new hire" benefits in 1997. Mr. Glickin was ultimately paid slightly more than this *principal*

amount in 2009. In 2009, as part of the *Layaou* Group, Xerox paid Mr. Glickin $17,920.00. This is why Xerox asserts that Mr. Glickin, like the other *Layaou* Group plaintiffs, was "overpaid" in 2009, by (in his case) $1,203.04. That is also why Xerox asserts that Mr. Glickin, and others like him, are not entitled to prejudgment interest; because they allegedly received more in 2009 than they were due under "new hire" in 2016.

16. But Xerox is wrong. Mr. Glickin was, by Xerox's own calculations, due an additional $16,716.96 in "new hire" benefits in 1997. He asked for these benefits in 1997 but Xerox wrongfully did not pay them. He is accordingly entitled to interest, at 8.25% (since this was the prime rate in 1997), to compensate him for the delay in the benefits he was due in 1997 but were not then paid. Mr. Glickin did eventually receive $17,920, in 2009. But by 2009, including interest on new hire, Mr. Glickin was owed far more than what he was then paid. As of early 2009, he was owed a total of $43,280.49 -- $16,716.96 in principal, plus interest at the prime rate of 8.25% for the twelve years from when he left Xerox in 1997 to when he was paid in 2009 (total interest of $26,563.53). So under "new hire," Mr. Glickin was due $43,280.49 in 2009 but was only paid $17,920 in that same year. He was thus not "overpaid" in 2009, but was instead underpaid, by over $25,000. This prejudgment interest accordingly remains due, as well as additional prejudgment interest (at the same 8.25% rate) after 2009 on this unpaid amount. Most, if not all, of the *Layaou* Group are entitled to greater benefits under new hire plus interest than they received in 2009 under *Layaou*. Again, I requested that Ms. Clemens provide me with Xerox's underlying data to show these interest calculations for each of the

Layaou Group in connection with the present motion, but Ms. Clemens refused to provide it to me.

Dated: November 28, 2016

/s/ Shaun P. Martin
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