

May 3, 2011

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By US Mail and by email to Chambers

Chambers of Judge David Larimer
Kenneth Keating Federal Building
100 State Street
Rochester, New York 14614

Re: Frommert v. Conkright, 00-cv-6311; Kunsman v. Conkright, 08-cv-6080;
Holland v. Becker, 08-cv-6171T; Testa v. Becker, 10-cv-6229

Dear Judge Larimer:

The undersigned is submitting this letter in response to the Court's Order dated March 21, 2011, which requested comments about pending and prospective motions in the four cases named above (and mentioned *Anderson v. Xerox Corp.*, 06-cv-6202). These cases involve over 200 individual plaintiffs, each of whom has a unique history.

A. ***Frommert v. Conkright.***

1. *Motions that have been filed:*

a. Plaintiffs' Motion to Reenter Judgment (on disclosure grounds) and Defendants' Cross Motion for Adoption of the Plan Administrator's Interpretation are now scheduled to be heard on June 2. Our motion for permission to file an *amicus curiae* brief on behalf of Robert Testa may be considered in the Court's discretion.

b. Joseph McNeil filed a Motion to Intervene on February 20, 2009. The status of this motion is not clear to the undersigned.

c. The Law Offices of Robert A. Jaffe filed a Motion for Award of Interim Attorney's Fees and Litigation Costs on June 4, 2009. Mr. Jaffe died in August of 2009 and his Administrator would like to close his estate. The undersigned represents the Law Offices of Robert A. Jaffe and proposes to file a Supplemental Brief related to this Interim fee award, to be followed by an Opposition Brief from the Defendants (if they so wish) and potentially a Reply Brief.

2. *Other Remaining Issues:*

a. Additional proceedings regarding this case will depend on the outcome of the above-mentioned motions. For example, independent of disclosure issues, does

ERISA simply prohibit “phantom account” offsets of the size and type applied by Xerox (as determined in *Miller v. Xerox Ret. Inc. Guar. Plan*, 464 F.3d 871 (9th Cir. 2006))?

b. The Second Circuit’s decision regarding releases will need to be interpreted, particularly in light of the procedural history of this case. F.R.C.P. 8(c) provides that “release” must be pled as an affirmative defense, which then gives Plaintiffs normal opportunities to develop their response. Depending on what Defendants decide to file on this affirmative defense, discovery may be necessary. Additional briefing may then be called for to address how the standards enunciated by the Second Circuit apply when all relevant documents and facts pertaining to each Plaintiff are brought to light.

B. *Testa v. Becker.*

1. Defendants’ Motion to Dismiss (on statute of limitations grounds) was fully briefed after the Supreme Court decision. The Court should issue a decision. We note that similar issues were briefed in the *Anderson* case and in *Kunsman*.

2. The subsequent development in *Testa* will depend on the decisions reached by the Court regarding that initial motion, with due regard to the precedential value of other decisions.

C. *Kunsman v. Conkright.*

1. Defendants’ Motion to Dismiss in *Kunsman* (on statute of limitations grounds) was heard by the Court on February 2, 2009 following full briefing by the parties. Considering more recent developments, and the briefing of similar issues in *Testa* and *Anderson*, the Court may want additional briefing on this issue.

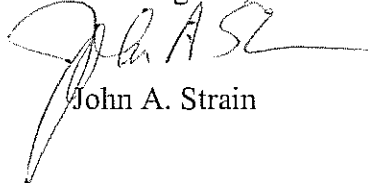
2. The subsequent development of *Kunsman* will depend on decisions reached by the Court regarding that initial motion. Plaintiffs may seek leave to amend their Complaint to clarify the substance of relevant causes of action.

3. Defendants will presumably seek leave to amend their Answer to include “release” as an affirmative defense (compare *Frommert* and *Anderson*). Plaintiffs will present additional evidence related to the individual circumstances and a complete set of documents pertaining to each individual Plaintiff.

D. *Holland v. Becker.*

A Motion to Dismiss in *Holland* (based on statute of limitations grounds) was filed September 17, 2008 but has not yet been decided. The undersigned does not currently represent anyone in *Holland* and is not aware of anyone who represents any plaintiff in that case.

Best Regards,



John A. Strain

Judge David Larimer
May 9, 2011
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