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VIA ECF

The Honorable David G. Larimer
United States District Court, New York Western District
Kenneth B. Keating Federal Building
100 State Street
Rochester, New York 14614

Re: Frommert v. Conkright, 6:00-cv-06311-DGL
Kunsman v. Conkright, 6:08-cv-06080-DGL

Dear Judge Larimer:

We represent Joseph McNeil, who is one of the plaintiffs in *Kunsman v. Conkright*, 6:08-cv-06080-DGL (“*Kunsman*”) and who has moved to intervene in *Frommert v. Conkright*, 6:00-cv-06311-DGL (“*Frommert*”). We write in response to this Court’s March 21, 2011 Order, directing the parties in all the related actions concerning the Xerox Corporation Retirement Income Guarantee Plan (the “Plan”) (collectively, the “Actions”) to summarize their positions “as to what motions are currently pending that need to be decided by the Court, as well as motions that need to be briefed either for the first time or with supplemental briefing in light of the decisions from the Second Circuit Court of Appeals and the United States Supreme Court.”

The following motions filed by Mr. McNeil have been fully briefed and are currently pending before the Court: (1) Proposed Intervenor Joseph McNeil’s Motion to Intervene (*Frommert* Dkt. No. 167); and (2) Plaintiff Joseph McNeil’s Motion to Stay this Action Pending Resolution of his Motion to Intervene in the *Frommert* Action. (*Kunsman* Dkt. No. 16). Each is addressed below:

McNeil’s Motion to Intervene in *Frommert*: On February 20, 2009, Mr. McNeil moved to intervene in *Frommert* for the purpose of asserting class claims. In his proposed intervention complaint, Mr. McNeil sought to protect the interests of all similarly situated participants in the Plan who are not represented in the pending Actions¹ in order to insure that the Plan is

¹ The proposed class would include (a) former clients of attorney Robert Jaffe, now deceased, who are plaintiffs in either the *Frommert* or the *Kunsman* Action but have not retained substitute counsel, and (b) similarly situated persons who are not named as plaintiffs in any of the Actions.

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administered consistently for all similarly situated Plan participants.

This Court has previously endorsed this view when it held that the rulings in *Frommert* concerning the computation of the offset “do seem applicable to all Xerox employees who are similarly situated to the named plaintiffs.” *Frommert v. Conkright*, 472 F.Supp.2d 452, 466-67 (W.D.N.Y. 2007) (“*Frommert II*”), *aff’d in part, rev’d in part*, 535 F.3d 111 (2d Cir. 2008), *rev’d on other grounds*, *Conkright v. Frommert*, 130 S. Ct. 1640 (2010). The Plan Administrator held the same view prior to the commencement of the *Kunzman* action. Indeed, in an August 23, 2007 letter denying Mr. McNeil’s administrative appeal, the Plan Administrator wrote: “ERISA requires that the RIGP be administered ... consistently to all plan participants – without exception.” *Frommert* Dkt. No. 180, Ex. 3.

Mr. McNeil moved to intervene in *Frommert* to assert class claims because after the commencement of *Kunzman*, the Plan Administrator changed his position regarding the applicability of the *Frommert* rulings to similarly situated plan participants. He did so when he moved to dismiss *Kunzman* on statute of limitations grounds, *Kunzman* Dkt. No. 6, thus, effectively taking the position that he can apply the invalidated “phantom account offset” to the *Kunzman* plaintiffs notwithstanding this Court’s ruling that “the Second Circuit’s holding that ‘the phantom account may not be applied to employees rehired prior to the issuance of the 1998 SPD,’ would certainly seem to foreclose defendants from utilizing the phantom account in calculating ‘new’ retirees pension benefits.” *Frommert*, 472 F.Supp.2d at 467.

McNeil’s Motion to Stay in *Kunzman*: On February 3, 2009, Mr. McNeil moved to stay *Kunzman* until this Court ruled on his motion to intervene in *Frommert*. Should this Court deny Mr. McNeil’s motion to intervene in *Frommert*, Mr. McNeil requested leave to file an amended complaint in *Kunzman* that seeks to assert class claims. Mr. McNeil also requested that this Court defer ruling on the pending motion to dismiss in *Kunzman* until after an Amended Complaint is filed.

Additional Briefing on the Motion to Dismiss in *Kunzman*: Mr. Jaffe opposed the motion to dismiss in *Kunzman* before the undersigned counsel appeared for Mr. McNeil. The motion to dismiss (*Kunzman* Dkt. No. 6) is still pending. Mr. McNeil believes it is advisable to defer ruling on the motion to dismiss until after this Court decides the cross motions for entry of judgment in *Frommert*. *Frommert* Dkt. Nos. 205, 211. If the court does not defer decision on the motion to dismiss, we would request leave to file a further opposition on behalf of Mr. McNeil.

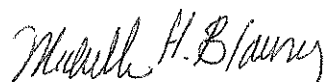
Amended Pleadings: The proposed Intervention Complaint in *Frommert* or the proposed Amended Complaint in *Kunzman* will need to be updated in light of the decision of the Supreme Court in *Conkright v. Frommert*, 130 S. Ct. 1640 (2010).

However, the proposed class would not include any plaintiffs currently represented in *Frommert*, *Kunzman*, or any of the other related actions, including those represented by Stris & Maher LLP and the Law Offices of John A. Strain.

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Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Michelle E. Blauner".

Michelle E. Blauner

cc: All Counsel, *via ECF and email*