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**

STATEMENT OF KUNSMAN PLAINTIFFS RE: IMPACT OF *FROMMERT*

(Filed pursuant to Court Order of January 11, 2016)

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The *Kunsman* plaintiffs submit the following in response to this Court's Order of January 11, 2016.

The *Kunsman* plaintiffs substantially agree with the submission of proposed class representative Joseph McNeil ("McNeil") and his counsel. This Court's resolution of *Frommert* establishes what should be done in *Kunsman* (and, for that matter, in *Testa*).

The former Xerox rehired employees in *Frommert* are entitled to immediately receive retirement benefits that are no less than those received by similarly-situated new hires. To do otherwise would – as both this Court and the Second Circuit have held – breach Xerox's fiduciary duties and constitute equitable fraud.

So too are the other former Xerox rehired employees entitled to promptly receive retirement benefits that are no less than those received by similarly-situated new hires. Including, but not limited, to the former Xerox rehired employees in *Kunsman* and *Testa*. To do otherwise would breach Xerox's fiduciary duties and constitute fraud for the identical reasons expressed by this Court and the Second Circuit in *Frommert*.

This Court should promptly do in *Kunsman* what it did in *Frommert* and ensure that Xerox does not continue its decades-long breach of its fiduciary duties to its former employees.

Argument

The *Kunsman* plaintiffs agree with what Mr. McNeil and his able counsel have identified at length as regards the central implications of *Frommert* on the present matter.

Xerox's refusal to treat its rehired employees at least as well as similarly-situated new hires violates its fiduciary duties to its former employees.[1] It constitutes equitable fraud.[2]

Xerox will continue to breach its fiduciary duties to its employees if not stopped by this Court. Xerox continues to apply the illegal phantom account to every one of its employees unless directly ordered to do otherwise by a federal court.[3] Xerox does so despite the direct, dispositive, and repeated holdings of the Second Circuit that this method of calculation violates ERISA and is arbitrary and capricious.[4]

This is not isolated conduct. Xerox did the same thing in *Frommert* when it refused to pay new hire benefits even after the Second Circuit

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1 *Frommert v. Becker*, 2016 U.S. Dist. LEXIS 439 (W.D.N.Y. Jan 5, 2016) ("*Frommert 2016").*

2 *Id.*

3 *Plaintiff Joseph McNeil's Supplemental Memorandum of Law* dated February 6, 2016 (Docket No. 77) ("*McNeil Memo*.") at 10-17.

4 *See, e.g., Layaou v. Xerox Corp.,* 238 F.3d 205, 209-13 (2nd Cir. 2001); *Frommert v. Conkright,* 738 F.3d 522, 531 (2nd Cir. 2013).

declared such benefits to be an absolute minimum.[5] This is also consistent with Xerox's conduct during the past sixteen years of litigation, in which it has yielded ground "generally only when compelled to do so by court decisions – [and] has done so grudgingly, block by metaphorical block." [6] Xerox will, unfortunately, not cease its fraud and breaches of fiduciary duty unless and until this Court affirmatively orders it to do so.[7]

No one can reasonably dispute that Xerox's fiduciary obligations require it to apply to the same remedy in *Frommert* to the other beneficiaries of the Plan. The Second Circuit has expressly said so.[8] ERISA indisputably requires it.[9] And this Court has repeatedly so held.[10]

Defendants themselves have told this Court that whatever remedy is imposed in *Frommert* will, as a matter of law, be applied to the *Kunsman*

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[5] *See* Plaintiff's Motion for Summary Judgment on Bad Faith (Docket No. 278) at 1-5.

[6] *Frommert 2016* at 17.

[7] *McNeil Memo* at 10-17.

[8] "The phantom account may not be applied to employees rehired prior to the issuance of the 1998 SPD." *Frommert v. Conkright*, 433 F.3d 254, 263 (2nd Cir. 2006).

[9] *See, e.g.*, Docket No. 50-12 (ERISA requires the Plan be "administered consistently to all plan participants – without exception").

[10] "[The Second Circuit's] language was not ambiguous. It could not be any clearer: the phantom account may not be used. It is hard to imagine how anyone could read the Second Circuit's directive and still persist in using the phantom account. This is especially so for a fiduciary. It is difficult to see, then, how the plan administrator could read the Second Circuit's decision in *Frommert* and continue to apply the phantom account to employees hired before 1998, consistent with that decision and with the administrator's fiduciary duty to act in the interest of plan participants." *Kunsman v. Conkright*, 977 F. Supp. 2d 250, 263 (W.D.N.Y. 2013). "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 benefits." *Frommert v. Conkright*, 472 F. Supp. 2d 452, 456-57 (W.D.N.Y. 2007).

plaintiffs.[11] Defendants are correct, not only as a matter of fiduciary duty principles, but also pursuant to doctrines of law of the case and collateral estoppel.[12] Simply put, Xerox must – but does not yet – treat all of its employees equally under the Plan, and must provide the *Frommert* remedy to all of its employees, including but not limited to those in *Kunsman* and *Testa*.

Mr. McNeil correctly states that one way to force Xerox to do what it is compelled as a fiduciary to do – and yet refuses to do -- is to certify a class. The *Kunsman* plaintiffs agree with Mr. McNeil that class certification would be entirely appropriate and a proper way to order the long-overdue *Frommert* remedy for all of Xerox's rehired employees.

But it is not the only way. This Court can alternatively simply order such entirely appropriate injunctive and equitable relief in the present action.

There's no doubt that the operative *Kunsman* complaint requests such relief on behalf of all of Xerox's employees.[13] There's also no doubt that

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[11] "The outcome of the claims asserted by Plaintiff McNeil and the other Kunsman Plaintiffs in this case (whether or not part of a Class) is controlled by the outcome of the Frommert Action. The decision in *Frommert* regarding the method of calculated benefits will, as a matter of law, be applicable to those in the putative Kunsman class." Docket No. 68 at 16.

[12] *Parklane Hoisery v. Shore*, 439 U.S. 322 (1979); *Beck v. Levering*, 947 F.2d 639 (2nd Cir. 1991); *In re Ivan F. Boesky Securities Litigation*, 848 F. Supp. 1119 (S.D.N.Y. 1994).

[13] *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

such equitable and injunctive relief may properly be awarded under ERISA.[14] And, as noted *supra*, this Court has itself repeatedly held – consistent with the law of the case established by the Second Circuit (as well as ERISA) – that whatever remedy is applied in *Frommert* must be applied equally to all of the other non-releasor beneficiaries the Plan.[15]

That is what this Court should do. This Court in *Frommert* ordered Xerox to promptly pay new hire benefits to the plaintiffs in that action. This Court should do the same in *Kunsman* with respect to the *Kunsman* (and *Testa*) plaintiffs, as well as for the other plan participants.

That remedy is precisely what Xerox has said all along should happen: that, as a fiduciary, it would apply whatever remedy was applied in

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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).

[14] *See, e.g.*, 29 U.S.C. § 1132(a)(3) (authorizing plan participants to bring action "to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan" as well as "to obtain other appropriate equitable relief"); 29 U.S.C. § 1109 (cross-referenced in § 1132(a)(2)) (providing that a "fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter . . . shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary").

[15] *See supra* at 2. While non-releasors may – and should – receive immediate payment of their legally owed retirement benefits, just as was ordered in *Frommert*, all parties recognize that any *Kunsman* plaintiff who signed a release will be required to litigate the validity of that release, which is an affirmative defense asserted by Xerox, prior to such a releasor's receipt of benefits. Non-releasors nonetheless remain entitled to immediate payment of their benefits even though releasors might require additional individualized litigation, just as the non-releasors in *Frommert* were entitled to immediate payment even though active employees did not receive immediate payment.

Frommert to all participants, consistent with its duty to apply the Plan consistently and uniformly to all beneficiaries. Now that this Court has ordered a remedy in *Frommert*, however, Xerox has returned to its usual practice of paying benefits "only when compelled to do so by court decisions – grudgingly, block by metaphorical block."

Xerox's decades of intransigence have persisted, to its benefit, long enough. The elderly retirees in *Kunsman* – like the plaintiffs in *Frommert* – continue to die off, without receiving a penny, as this litigation ceaselessly persists. Injunctive and equitable relief has been expressly requested. It can, and should, be promptly ordered. Xerox's latest continuing efforts to delay, obfuscate, and defy the prior holdings of this Court and the Second Circuit should not be permitted to accomplish their objectives.

The remedy awarded in *Frommert* should be promptly awarded to all other non-releasor participants in the Plan, including but not limited to the *Kunsman* and *Testa* plaintiffs, as appropriate equitable and injunctive relief.

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