UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BRUCE D. KUNSMAN, et al., Plaintiffs, v. SALLY L. CONKRIGHT, et al. Defendants.	C. A. No. 08-CV-6080(DGL)

PLAINTIFF JOSEPH MCNEIL'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT AND FOR EQUITABLE RELIEF

PLEASE TAKE NOTICE that Plaintiff Joseph McNeil hereby moves pursuant to Fed. R. Civ. P. 56 and L.R. 56 for the entry of summary judgment against the Defendant Plan Administrators on his claim that Defendants breached their fiduciary duties under the Employee Retirement Income Securities Act ("ERISA"), ERISA Section 502(a)(3), 29 U.S.C. §1132(a)(3), by failing to follow the directives of the Second Circuit in *Frommert, et al. v. Conkright, et al.*, C.A. No. 00-CV-06311(DGL) (W.D.N.Y.) (the "*Frommert* Action") regarding the proper method for calculating benefits under in the Xerox Corporation ("Xerox") Retirement Income Guarantee Plan (the "Plan").

PLEASE TAKE FURTHER NOTICE, that by his motion, Mr. McNeil moves this Court to enter the Proposed Order attached hereto as Exhibit A, which:

(a) Declares that the Defendant Plan Administrators and Xerox, and their successors, have and continue to violate ERISA, §502(a)(3) by applying the phantom account offset to Plaintiff McNeil, the other plaintiffs in this Action ("the *Kunsman* Plaintiffs"), and other participants in the Plan who worked for Xerox; left Xerox and took a lump sum distribution; came back to work for Xerox prior to the issuance of the Plan's Summary Plan Description on September 1, 1998, and did not sign a valid release of their claims (the "Similarly Situated Plan Participants");

(b) Declares that the Defendant Plan Administrators and Xerox, and their successors, have and continue to violate ERISA §502(a)(3) by calculating and paying benefits to Plaintiff

McNeil, the other Kunsman Plaintiffs and the Similarly Situated Plan Participants using a formula that is worse than the "new hire" formula;

(c) Enjoins the Defendant Plan Administrators and Xerox, and their successors, from using the "phantom account offset" in calculating the plan benefits for Plaintiff McNeil, the other Kunsman Plaintiffs and the Similarly Situated Plan Participants;

(d) Enjoins the Defendant Plan Administrators and Xerox, and their successors, from using any formula to calculate benefits for Plaintiff McNeil, the other Kunsman Plaintiffs and the Similarly Situated Plan Participants that treats them worse that "new hires"; and

(e) Orders the Defendant Plan Administrators and Xerox, and their successors, to recalculate the benefits for Plaintiff McNeil, the other Kunsman Plaintiffs and all Similarly Situated Plan Participants who have retired by using at least the "new hire" formula, together with pre-judgment interest thereon pursuant to this Court's November 3, 2016 and May 4, 2017 Orders in the *Frommert* case;

(f) Orders the Defendant Plan Administrators and Xerox, and their successors, to calculate the benefits of Similarly Situated Plan Participants, who like Kathy McElawaney, have not yet retired by using at least the "new hire" formula, when they retire.

(g) Orders the Defendant Plan Administrators and Xerox, and their successors, to provide to Plaintiffs' counsel the following detailed information regarding the Similarly Situated Plan Participants: i) name: ii) last known address; iii) social security number; iv) date of initial employment by Xerox; v) date first left Xerox's employ; vi) lump sum distribution taken at that time; vii) date of second employment by Xerox, viii) date left Xerox employment the second time, ix) all data regarding the amount of pension benefits provided and how calculated, and x) the amount of pension benefits to which they would be entitled under the "new hire" remedy.

(h) Orders the parties to confer and, if possible, agree as to a deadline by which the Defendants Plan Administrators and Xerox will provide Plaintiffs' Counsel with the information about each Similarly Situated Plan Participant, as set forth above, and advise the Court of that agreed upon deadline within 14 days of this Order. If the parties cannot agree on a deadline, they will submit their respective positions on what the deadline should be for the Court's decision.

(i) Within 14 days of this Order, the Plaintiffs shall file a proposed notice to be sent to each of the Similarly Situated Plan Participants, informing them, *inter alia* of the pendency of this Action and the entry by this Court of this Order. Defendants and Xerox shall file any response to the proposed notice within 14 days of Plaintiffs' submission.

(j) Places the Defendant Plan Administrators and Xerox on notice that if they fail to fully comply with the Court's Orders as set for herein, the Court will remove them as fiduciaries, and replace them with an independent fiduciary to be selected by the Court.

This Notice of Motion and Motion is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities in support thereof; the Statement of Undisputed Material

Facts; the affidavits and exhibits contained in the Appendix to the Statement of Undisputed Facts; the reply brief to be submitted in support of the Motion; all testimony or evidence submitted at or before the hearing on this Motion; and all matters of which this Court may take judicial notice.

Plaintiff intends to file and serve reply papers, and the opposing parties are accordingly required to file and serve opposing papers within the time period established by Local Rule 7.

Dated: September 20, 2017

Respectfully submitted,

/s/ Edward F. Haber
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CERTIFICATE OF SERVICE

I, Edward F. Haber, hereby certify that on September 20, 2017, I caused a copy of the foregoing to be served by email via the ECF system on all counsel of record in the above-captioned action.

/s/ Edward F. Haber

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BRUCE D. KUNSMAN, et al., Plaintiffs, v. SALLY L. CONKRIGHT, et al. Defendants.	C. A. No. 08-CV-6080(DGL)

MEMORANDUM OF PLAINTIFF JOSEPH MCNEIL IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT AND FOR EQUITABLE RELIEF

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Plaintiff Joseph McNeil respectfully submits this memorandum of law in support of his motion for summary judgment and for equitable relief. Mr. McNeil also supports the motion for summary judgment of the other Plaintiffs in this *Kunsman* Action (the "*Kunsman* Plaintiffs") that is being filed contemporaneously herewith.

I. PRELIMINARY STATEMENT

Plaintiff Joseph McNeil is a former employee of Xerox Corporation ("Xerox"), and a participant in the Xerox Corporation Retirement Income Guarantee Plan (the "Plan" or "RIGP"). He was first employed by Xerox in November 1972. In December 1980, McNeil left Xerox's employ. At the time he departed, he received a modest distribution from the Plan. In March 1998, Mr. McNeil rejoined Xerox. He worked there for another ten years, retiring in March 2008. When Mr. McNeil retired, the Defendant Plan Administrators ("Defendants" or "Plan Administrators"), who are Plan fiduciaries, determined that he had no accrued benefits under the Plan because of the impact of the so-called phantom account offset which Defendants used to calculate his benefits. Defendants' use of the phantom account offset for Plan participants like Mr. McNeil, who had been re-hired prior to the issuance of the Summary Plan Description ("SPD") on September 1, 1998, had been invalidated by the Second Circuit two years earlier in the related action, *Frommert, et al. v. Conkright, et al.*, C.A. No. 00-CV-06311(DGL) (W.D.N.Y.) (the "*Frommert* Action"). *See Frommert v. Conkright*, 433 F.3d 254, 263 (2d Cir. 2006) ("*Frommert 2006*").

In 2008, Mr. McNeil and the *Kunsman* Plaintiffs sued, alleging, among other things, that Defendants breached their fiduciary duties under the Employment Retirement Income Security Act ("ERISA") by calculating benefits using a methodology that the Second Circuit had prohibited in the *Frommert* Action. ECF Doc. Nos. 1, 4. In the Amended Complaint, Mr. McNeil and the *Kunsman* Plaintiffs sought relief for themselves and for "all persons similarly situated to the plaintiffs" because the claims are "equitable in nature" and "based on ERISA statutes found by the Second Circuit Court of Appeals to have been violated by the Xerox defendants." ECF Doc. No. 4, ¶13. On October 16, 2013, this Court denied Defendants' motion to dismiss Plaintiffs' breach of fiduciary

duty claim holding that "…plaintiffs have stated a facially valid claim for breach of fiduciary duty [because] defendants have ignored and refused to follow the Second Circuit's directives in its 2006 Frommert decision." *Kunsman v. Conkright*, 977 F. Supp. 2d 250, 263 (W.D.N.Y. 2013) ("*Kunsman 2013*").

Mr. McNeil also separately sought to represent on a class action basis other Plan Participants, who worked for Xerox; left Xerox and took a lump sum distribution; came back to work for Xerox prior to the issuance of the SPD on September 1, 1998, and did not sign a release of their claims (the "Similarly Situated Plan Participants"). ECF Doc. Nos. 64, 66. On July 7, 2017, this Court denied Mr. McNeil's motion, finding that it was "unnecessary" to convert this action into a class action because "the Court can simply order appropriate declaratory relief." *Kunsman v. Conkright*, No. 09-cv-6080L, Decision and Order, at pp. 12-13 (W.D.N.Y. July 7, 2017) ("*Kunsman 2017*"). In the instant motion, Mr. McNeil seeks that "appropriate declaratory [and injunctive] relief" for himself and the Similarly Situated Plan Participants.

This Court recently granted summary judgment for a Similarly Situated Plan Participant in another related case, *Testa v. Becker*, No. 10-cv-6229L (W.D.N.Y.) (the "*Testa* Action"). *See Testa v. Becker,* 2017 U.S. Dist. LEXIS 70984 (W.D.N.Y. May 9, 2017). The Court held that Defendants violated their fiduciary duties under ERISA by refusing to follow the controlling court decisions in the *Frommert* Action in calculating the benefits owed to Testa. *Id.* at *11-15. The final judgment in *Testa* is determinative here. As in *Testa*, this Court should granted summary judgment in favor of Mr. McNeil, and order Defendants to re-calculate his benefits using the new hire methodology that was ordered by this Court in *Frommert v. Becker*, 2016 U.S. Dist. LEXIS 439, at *14 (W.D.N.Y. Jan. 5, 2016) ("*Frommert 2016*").

In addition, this Court should enter an injunction pursuant to the broad equitable power granted in Section 502(a)(3) of ERISA, 29 U.S.C. §1132(a)(3), precluding Defendants from using the phantom account offset to calculate the benefits of Mr. McNeil, the *Kunsman* Plaintiffs and Similarly Situated Plan Participants. The Court should also order Defendants to calculate or re-calculate the benefits of Mr. McNeil, the *Kunsman* Plaintiffs and Similarly Situated Plan Participants using at least

the new hire methodology. Furthermore, this Court should remove Defendants as fiduciaries if they continue to violate these directives. The Proposed Order which Mr. McNeil moves this Court to enter is attached to Plaintiff McNeil's Notice of Motion and Motion for Summary Judgment and for Equitable Relief as Ex. A.

II. STATEMENT OF UNDISPUTED FACTS

The undisputed facts in this case demonstrate that Defendants applied the phantom account offset to Mr. McNeil and Similarly Situated Plan Participants, and have treated them worse than new hires in calculating benefits. This course of conduct continues to this day.

A. Defendants Applied the Phantom Account Offset in Calculating Mr. McNeil's Retirement Benefits, Leaving Him With No Benefits from the Plan When He Retired.

Mr. McNeil is a former employee of Xerox and a participant in the Plan. He was first employed by Xerox in November, 1972. Affidavit of Joseph McNeil (ECF Doc. No. 50-1) ("McNeil Aff."), ¶2, attached to Plaintiff Joseph McNeil's Appendix to Local Rule 56 Statement of Undisputed Facts ("Appendix") as Ex. 1. In December, 1980, Mr. McNeil left Xerox's employ. *Id.* At that time, he received a modest lump sum distribution of the retirement benefits to which he was entitled under the Plan of approximately $16,000. *Id.*

On March 16, 1998, Mr. McNeil was re-hired by Xerox. *Id.*, ¶3. In each year from 1999 until 2007, he received a "You & Xerox" Value Added Account Statement (the "Value-Added Statements"). The Value-Added Statements disclosed that his retirement benefit would be the greatest of the following three components: the RIGP formula, the Cash Balance Retirement Account (CBRA), or the Transitional Retirement Account (TRA). *Id.*, ¶5 and Exs. A-G. In 2007, Xerox reported:

- Under the RIGP formula, the benefit you have earned to date, payable at age 65, is $2,241 per month.
- The current value as of 5/31/2007 of your CBRA is $43,198.
- The current value as of 5/31/2007 of your TRA is $0.

Id., ¶6 and Ex. G.

On August 10, 2007, Mr. McNeil's former counsel, attorney Robert H. Jaffe, sent a letter to the Plan Administrators on behalf of Mr. McNeil (and others), requesting that his pension benefits upon his retirement be calculated consistent with the formula set forth in this Court's January 24, 2007 Order in *Frommert v. Conkright*, 472 F. Supp. 2d 452 (W.D.N.Y. 2007) ("*Frommert 2007*"). *Id.*, ¶7 and Ex. H. The Plan Administrators responded by letter dated August 15, 2007. In its August 15, 2007 letter, the Plan Administrators wrote that the use of the phantom account offset was part of the Plan's design, and that Mr. McNeil's benefits had been "calculated correctly and according to the terms of the Plan." *Id.*, ¶8 and Ex. I. The Plan Administrators further stated that because the Court's decision in *Frommert 2007* was on appeal "until final resolution to the contrary, the plan provisions govern." The Plan Administrators further stated that that "ERISA requires that RIGP be administered strictly in accordance with its terms and further requires that RIGP be administered consistently to all plan participants – without exception." *Id.*

On August 20, 2007, Mr. Jaffe sent a second letter on Mr. McNeil's behalf appealing from the Plan Administrators' August 15, 2007 decision stating that the continued use of the phantom account offset for plan participants rehired prior to the issuance of September 1, 1998 SPD was in contravention of the Second Circuit's decision in *Frommert 2006*. *Id.*, ¶9 and Ex. J. The Plan Administrators responded by letter dated August 23, 2007. *Id.*, ¶10 and Ex. K. The Plan Administrators denied his administrative appeal. In the letter denying Mr. McNeil's appeal, the Plan Administrators wrote:

> [Y]ou refer to the *Frommert v. Conkright* decision rendered by the United States Court of Appeals for the Second Circuit. In view of the appeal of this case, until final resolution to the contrary, the plan provisions govern.
>
> Accordingly, I have concluded that your clients' RIGP benefits are being calculated correctly and according to the terms of the Plan document. ERISA requires that the RIGP be administered strictly in accordance with its terms and further requires that the RIGP be administered consistently to all plan participants – without exception.

Id.

The Plan Administrators concluded the letter by stating: "This represents a final and binding

decision under the Plan and you have no further appeal rights under ERISA…. Based on this adverse determination, you have the right under ERISA to bring civil action." *Id.*

Mr. McNeil brought this lawsuit, together with the *Kunsman* Plaintiffs, on February 21, 2008. ECF Doc. No. 1.

Mr. McNeil retired from Xerox on March 18, 2008. McNeil Aff., ¶13. Despite having worked an additional 10 years after being re-hired, and despite Defendants' repeatedly advising him over the years that he would receive a meaningful pension, Mr. McNeil did not receive any retirement benefits under the Plan because Defendants applied the prohibited phantom account offset. *Id.*

B. Defendants Continue to Apply the Phantom Account Offset to Similarly Situated Plan Participants Who Are Not Plaintiffs in this Action.

Kathy McElwaney is a current employee of Xerox and a participant the Plan. Affidavit of Kathy McElwaney (ECF Doc. No. 79), ¶1 (Appendix Ex. 2). She is not a named plaintiff in the *Kunsman* Action but is a Similarly Situated Plan Participant who would have been a member of the Putative Class that Mr. McNeil moved this Court to certify. Amended Complaint (ECF Doc. No. 4) (Appendix Ex. 3); Affidavit of Michelle Blauner ("Blauner Aff."), ¶6(b) (Appendix Ex. 4).

Ms. McElwaney first became employed by Xerox in 1979. She worked at Xerox, or a Xerox subsidiary, until September, 1985, when she was laid off for a period of seven weeks, and then re-hired. At the time she was laid off she received a modest lump-sum distribution from the Plan of approximately $6,500. Ms. McElwaney was re-hired by Xerox in late 1985 and has worked continuously for Xerox, or a Xerox subsidiary, for the past 32 years. McElwaney Aff., ¶¶2, 3.

In the summer of 2015, when she was 62 years old, Ms. McElwaney began to contemplate retirement. In July, 2015, she asked the benefits administrator to provide her with a projection of what her retirement benefits would be if she retired in February, 2016. *Id.*, ¶4. She received the projection on July 21, 2015, and was surprised to learn that her benefits would be much less than she anticipated. She wrote to Xerox, seeking an explanation and a re-evaluation. *Id.*, ¶5.

The Plan responded in an August 26, 2015 letter from Arlyn Kaster, Manager of Pension

and Life Insurance Benefits. *Id.*, ¶6. The letter expressly states that Ms. McElwaney's benefits would be calculated using an offset for her prior lump-sum distribution. As stated in the letter:

> As it relates to rehires, the RIGP plan document clearly provides that the benefit payable under the plan "shall be offset by such prior distribution as it would have increased (or decreased), had it remained invested under the plan." In your case your prior distribution of $6,468.83 is currently worth $102,760.76 had it remained invested in the plan. This is the amount that is required to be subtracted from your Formula Benefit.

Id., ¶6 and Ex. C.

Ms. Kaster also told Ms. McElwaney that "[t]he Summary Plan Descriptions ('SPD') have referred consistently to this offset." *Id.*, ¶7 and Ex. C. She further stated that ERISA "requires that RIGP be administered consistently to all plan participants – without exception" and that "[t]his offset has been applied consistently to all participants who left the Company and received a distribution who were later rehired by the Company." *Id.*

Ms. McElwaney appealed from that adverse determination on September 14, 2015. *Id.*, ¶8. On September 22, 2015, Defendant Becker denied her appeal, repeating the assertion that: "the RIGP plan document clearly provides that the benefit payable under the plan 'shall be offset by such prior distribution as it would have increased (or decreased), had it remained invested under the plan.'" *Id.*, ¶8 and Ex. D.

Neither letter nor any other communications she received from Xerox or the Plan notified Ms. McElwaney of the *Frommert* or *Kunsman* actions or any of the judicial decisions in those actions which held that the appreciated offset for the prior distributions that Defendants intended to apply violated ERISA. *Id.* ¶9, Exs. C and D.

Ms. McElwaney sued Defendants for breach of fiduciary duty on August 19, 2016. *McElwaney v. Becker et al.*, No. 16-cv-6578 (W.D.N.Y.) ("*McElwaney* Action"), Complaint (Appendix Ex. 5). By agreement of the parties in the *McElwaney* Action and Order dated November 21, 2016, this Court stayed the *McElwaney* Action case until thirty days after this Court decision on the then pending motion by Mr. McNeil for class certification in this Action. Blauner Aff., ¶6(d).

On September 11, 2017, Defendants' Counsel in this Action and the *McElwaney* Action

("Defendants' Counsel"), telephoned counsel for Ms. McElwaney and Mr. McNeil ("Plaintiffs' Counsel") to discuss the *McElwaney* proceedings. Defendants' Counsel informed Plaintiffs' Counsel that Defendants intended to make a motion to dismiss the *McElwaney* Action similar to the one it made in the *Testa* Action. Defendants' Counsel asked Plaintiffs' Counsel whether Ms. McElwaney would consider staying the *McElwaney* Action pending the outcome of an appeal of the judgment in favor of *Testa*, which is pending in the Second Circuit. Blauner Aff., ¶6(f).

In response, Plaintiffs' Counsel informed Defendants' Counsel that Ms. McElwaney would consider a stay if Defendants agreed to apply a decision affirming the *Testa* judgment to Ms. McElwaney, who like Mr. Testa had worked for Xerox; left Xerox and took a lump sum distribution; came back to work for Xerox prior to the issuance of the SPD on September 1, 1998, and did not sign a release. Blauner Aff., ¶6(g). Defendants' Counsel informed Plaintiffs' Counsel that Defendants would not agree, and would be filing a motion to dismiss Ms. McElwaney's claim. Blauner Aff., ¶6(h).

III. RELEVANT PROCEDURAL HISTORY

A. The *Frommert* Rulings Invalidated the Phantom Account Offset and Approved the New Hire Methodology for Plan Participants Re-Hired Prior to the Issuance of the September 1998 SPD.

After years of litigation, it has now been finally decided in the *Frommert* Action how prior distributions to Plan Participants rehired prior to September 1998 may and may not be treated when calculating benefits under the Plan. The Second Circuit in *Frommert* has ruled:

(1) "[T]he phantom account may not be applied to employees rehired prior to the issuance of the 1998 SPD." *Frommert 2006*, 433 F.3d at 263.

(2) The "Plan Administrator's offset approach" may not be applied because it "is inconsistent with the Plan's plain terms" and "makes the rehired employee worse off under the Plan in terms of actual benefits received" than "newly hired Xerox employees." *Frommert v. Conkright*, 738 F.3d 522, 529-530 (2d Cir. 2013) ("*Frommert 2013*").

This Court concurred in *Frommert 2007,* holding that "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 [September] 1998, after having previously received a distribution of pension benefits."** 472 F. Supp. 2d at 456-57 (emphasis added).

In its most recent ruling in *Frommert 2016,* this Court held that "the appropriate equitable remedy is to recalculate plaintiffs' benefits, treating plaintiffs upon their re-employment with Xerox as if they had been newly hired, with no offset [for the prior lump-sum distributions] whatsoever." 2016 U.S. Dist. LEXIS 439, at *14.

B. In *Kunsman 2013*, this Court Held that Defendants' Failure to Adhere to the *Frommert* Directives Would Constitute a Breach of Fiduciary Duty Under ERISA.

Mr. McNeil and the *Kunsman* Plaintiffs allege that Defendants have breached, and continue to breach, their fiduciary duties by failing to apply the final rulings in *Frommert* to Mr. McNeil, the *Kunsman* Plaintiffs and the Similarly Situated Plan Participants. Mr. McNeil and the *Kunsman* Plaintiffs maintain that Defendants violated ERISA, and continue to violate ERISA, by failing to follow the binding directives of the Second Circuit and this Court in *Frommert* which prohibited the application of the phantom account offset in calculating benefits for Plan Participants rehired prior to September 1998, and required that Plan Participants rehired prior to September 1998 to be treated no worse than newly hired employees in calculating their benefits.

As this Court held in its Decision and Order on Defendants' Motion to Dismiss in this Action:

> **[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 language in *Frommert*, and continue to apply the phantom account to employees rehired 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) ("*Kunsman 2013*") (emphasis added). Thus, the Court held that "…plaintiffs have stated a facially valid claim for breach of fiduciary duty [because] defendants have ignored and refused to follow the Second Circuit's

directives in its 2006 *Frommert* decision." *Id.*

This Court further found that the claim, which could not have arisen prior to January 6, 2006 at the earliest, "is not time-barred." *Id. See also id.* at 264 ("plaintiffs could not have foreseen ... that defendants would ignore the directives of the Second Circuit, and continue to apply the phantom account to Xerox retirees, after the issuance of the *Frommert* decision in 2006.").

C. As In *Testa*, this Court Should Rule that Defendants Breached their Fiduciary Duties to Mr. McNeil by Applying the Phantom Account Offset and Failing to Apply the New Hire Methodology.

Mr. McNeil moves this court to grant his motion for summary judgment on his breach of fiduciary duty claim as it did in *Testa.* In the *Testa* Action, this Court granted summary judgment for the plaintiff on his claim that Defendants violated ERISA by failing to follow the controlling directives of the Second Circuit in the *Frommert* case in calculating Testa's benefits under the Plan. This Court held:

> **Based on the Court's prior statements, one might reasonably have thought that this issue was dead and buried. But defendants persist in attempting to resuscitate it…. If further clarification is needed, the Court will spell it out again. In 2006, the Second Circuit held that the phantom account may not be applied to an employee rehired prior to 1998.** That same year, the Ninth Circuit in Miller did so as well. Plaintiff Testa was rehired prior to 1998, and he finally retired and sought benefits in 2008. In 2009, the Plan administrator issued a decision, as to Testa, that essentially ignored the Second and Ninth Circuit's 2006 proscription of the application of the phantom account to employees rehired prior to 1998. That refusal, by the plan fiduciary, to follow controlling court decisions is what forms the basis of this claim.

Testa, 2017 U.S. Dist. LEXIS 70984, at *11-13 (emphasis added).

The Court further rejected Defendants' recast statute of limitations defense, finding that "[u]ntimeliness is not a valid defense here…." *Id.* at *11. The court continued: "lest there be any doubt on this score, I find that plaintiff's third cause of action is timely" and "arose no earlier than 2006." *Id.* at *13-14.

The Court then concluded: "[T]here is no reason here to deviate or depart from the remedy this Court imposed in *Frommert*. Plaintiff is therefore entitled to at least that same new hire remedy,

as set forth in the Conclusion to this Decision and Order."[1] *Id.* at *18.

D. Under the *Kunsman 2017* Decision, Equitable Relief Should Extend to Similarly Situated Plan Participants.

In this Court's July 7, 2017 Decision and Order in this case, this Court addressed the impact of the *Frommert* decisions on this case. This Court once again reiterated that the *Frommert* rulings apply to all Xerox employees who were re-hired prior to the issuance of the revised SPD in September 1998, and that Defendant's failure to follow the *Frommert* directives constitutes a breach of their fiduciary duties under ERISA.

The Court emphatically rejected Defendants' argument that "**the Second Circuit's statement in *Frommert* that 'the phantom account may not be applied to employees rehired prior to the issuance of the 1998 SPD,'** 433 F.3d at 263, **is not the 'unswerving mandate' that it seems to be**." *Kunsman 2017*, at p. 7 (emphasis added). The Court stated that **"in a remarkable combination of sophistry and chutzpah, defendants draw a distinction between 'may not' and 'must not.'**" *Id.* (emphasis added).

The Court then rejected Defendants' argument that the claims were "substantively meritless" or "time-barred" for the reasons stated in *Testa*. The Court concluded:

> I see no reason why plaintiffs in this action who have not validly released their claims should be barred from seeking relief under § 502(a)(3), based on defendants' continued refusal to abide by the Second Circuit's directive in *Frommert*-which, despite defendants' protestations to the contrary, does not contain any limitations on its general prohibition against applying the phantom account to employees rehired prior to the issuance of the 1998 SPD.

Kunsman 2017, at p. 9.

It then concluded that "absent some valid defense (such as a signed release) as to an

[1] In *Testa,* plaintiff contended that the Court should apply an "actual annuity" approach, if it would result in a monthly benefit more favorable to plaintiff than the new-hire remedy adopted in *Frommert*. Mr. McNeil recognizes that this Court rejected that approach in *Testa*. Mr. McNeil does not seek to re-litigate that issue but seeks to preserve his rights to appeal the question.

individual plaintiff, the plaintiffs in this action are entitled to relief in accordance with the new hire remedy set forth in the *Frommert* Remedy Order." *Id.* at p. 11.

With respect to Mr. McNeil's motion for class certification, the Court held that it was "unnecessary" to convert this action into a class action because "the Court can simply order appropriate declaratory relief." *Id.* at pp. 12-13. After taking "defendants at their word" that "the *Frommert* decision and remedy will apply to the entire putative class here," the Court denied class certification "largely on the ground that class certification is unnecessary here." *Id.* at p. 14. The Court found that it can "order relief in favor of all persons falling within the definition of the purported class, consistent with the Second Circuit's directives in *Frommert*, and subject to any valid, individualized defenses that defendants may have." *Id.* at p. 14.

IV. ARGUMENT

A. Defendants Are Precluded From Relitigating the Issues Decided Against Them in *Testa*.

Under the doctrine of collateral estoppel, Defendants are precluded from re-litigating the issues decided against them by the final judgment in *Testa*. *See Aerogroup Int'l v. Shoe Show,* 966 F. Supp. 175, 179-80 (W.D.N.Y. 1997) (Larimer, J.) (party is precluded from re-litigating issues decided against it under the doctrine of collateral estoppel where "(1) the party against whom collateral estoppel is asserted [was] … a party, or in privity with a party, to the prior action; (2) the issues to be collaterally estopped [were] … finally determined on the merits; (3) the estoppel issues [were] … essential, necessary, and material to the prior action; (4) the estopped issues [were] … actually litigated, and the party to be estopped must have had the opportunity to fully and fairly litigate the issues; and (5) the issues decided [were] …. identical to the issues sought to be estopped.")

Collateral estoppel applies to the final judgment in *Testa*[2] to preclude Defendants from relitigating the issues decided against them in *Testa*, namely that they breached their fiduciary duties

[2] The judgment in *Testa* remains final for collateral estoppel purposes notwithstanding the pendency of an appeal. *See Aerogroup,* 966 F. Supp. at 180 ("the pendency of an appeal should not impact the collateral estoppel effect of an otherwise final and valid judgment").

by failing to apply the *Frommert* rulings to other Similarly Situated Plan Participants because (a) Defendants, or their privies, were parties to both cases; (b) both cases involved the identical issues of whether the Plan Administrators breached their fiduciary duties by failing to apply the *Frommert* rulings to other similarly situated Plan participants and whether those claims are time-barred; and (c) the estopped issues were actually litigated and necessary to the final determination in the *Testa*.

B. The Undisputed Evidence Shows that Defendants Breached Their Fiduciary Duties to Mr. McNeil and Similarly Situated Plan Participants by Violating the Clear Directives of the Second Circuit in *Frommert.*

Even in absence of issue preclusion the *Testa* decision is still determinative. Summary judgment must enter in favor of Mr. McNeil because the undisputed evidence in this case establishes (a) that Defendants applied and continue to apply the phantom account offset to the plan participants like Mr. McNeil, who left Xerox, received a lump sum cash distribution at that time they left, and were re-hired prior to the issuance of the September 1, 1998 SPD; and (b) that the formula used to calculate benefits for plan participants like Mr. McNeil who left Xerox, received a lump sum cash distribution at that time they left, and were re-hired prior to September 1, 1998, is worse than the new hire formula, all in violation of the clear directives of the Second Circuit in *Frommert 2006,* 433 F.3d at 263, and *Frommert 2013*, 738 F.3d at 529-530. Thus, this Court should enter summary judgment, as it did in the *Testa* case, on the claim for equitable relief pursuant to ERISA Section 502(a)(3), 29 U.S.C. §1132(a)(3), for Defendants' past and continuing breach of their fiduciary duties under ERISA Sections 404 and 409, 29 U.S.C. §§1104, 1109.

As this Court held in *Testa*: "Th[e] refusal, by the plan fiduciary, to follow controlling court decisions is what forms the basis of this claim…. As has been made abundantly clear, that refusal was unjustified and constituted a breach of the administrator's fiduciary duty to plaintiff." *Testa*, 2017 U.S. Dist. LEXIS 70984, at *13-15. This Court should therefore enter summary judgment in favor of Mr. McNeil and the Similarly Situated Plan Participants on his claims that Defendants violated ERISA Sections 404, 409 and 502(A)(3), 29 U.S.C. §§1104, 1109 and 1132(A)(3), as it did in *Testa*. Furthermore, as in *Testa,* "there is no reason here to deviate or depart from the remedy that

this Court imposed in *Frommert*." 2017 U.S. Dist. LEXIS 70984, at *18.

Thus, this Court should enjoin Defendants from applying the phantom account offset to Mr. McNeil and the Similarly Situated Plan Participants. It should further order Defendants to re-calculate – or in the case of Similarly Situated Plan Participants who like Ms. McElwaney have not yet retired, when they retire calculate – their benefits using the new hire methodology. Prejudgment interest should be awarded pursuant to this Court's November 3, 2016 and May 4, 2017 Orders on prejudgment interest in the *Frommert* case.

C. <u>This Court Has Broad Remedial Authority to Enter Declaratory and Injunctive Relief to Remedy Defendants' Continuing Violations of ERISA.</u>

ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), authorizes a plan beneficiary, participant, or fiduciary to bring a civil action:

> "(A) **<u>to enjoin any act or practice which violates any provision of [ERISA]</u>** or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of [ERISA] or the terms of the plan. (emphasis added).

Since ERISA's fiduciary standards are derived from the common law of trusts "bearing in mind the special nature and purpose of employee benefit plans," *Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996), in applying the remedial provisions of ERISA, the federal courts have drawn upon the traditionally wide remedial discretion afforded to courts in trust cases. *Crawford v. La Boucherie Bernard Ltd.*, 815 F.2d 117, 120 (D.C. Cir. 1987). "Trust law contemplates the use of broad and flexible equitable remedies as means for dealing with breaches of fiduciary duty, and it imposes the obligation upon the courts to use the remedy that is most advantageous to the participants and that will most closely effectuate the purposes of the trust." *Id.*

Because of its origins in the common law of trusts, Congress made provision for equitable relief for violations of the ERISA statutes. Section 502(a)(3) of ERISA, 29 U.S.C. §1132(a)(3), allows a plan beneficiary to bring a civil action "to enjoin any act or practice" that violates the ERISA statutes, or "to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions" of the ERISA statutes. Pursuant to this provision, and the remedial law of

trusts, this Court has "broad authority under ERISA to fashion appropriate equitable relief to protect the rights of pension plan participants." *Fechter v. HMW Indus., Inc.,* 879 F.2d 1111, 1120 (3d Cir. 1989) citing *Donovan v. Mazzola*, 716 F.2d 1226 (9th Cir. 1983). "Congress clearly intended to provide the Secretary, as well as participants and beneficiaries, with the 'full range of legal and equitable remedies,' including injunctions to prevent future violations..." *Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 310 (7th Cir. 1985). *See also Nat'l Carriers' Conference Comm. v. Heffernan,* 440 F. Supp. 1280, 1284 (D. Conn. 1977) ("The very terms of ERISA indicate that Congress intended private plaintiffs' access to the federal courts to be no less than that of the Secretary of Labor's. Under the statute either a 'participant, beneficiary or fiduciary,' 29 U.S.C. § 1132(a)(3), or the Secretary of Labor, 29 U.S.C. § 1132(a)(5), can sue to enjoin any act or practice which violates Title I of ERISA or to obtain other equitable relief.")

"Where there has been a breach of fiduciary duty, ERISA grants to the courts broad authority to fashion remedies for redressing the interests of participants and beneficiaries." *Donovan v. Mazzola*, 716 F.2d 1226, 1235 (9th Cir. 1983); *see also Delgrosso v. Spang & Co.*, 769 F.2d 928, 937 (3d Cir. 1985) ("A federal court enforcing fiduciary obligations under ERISA is thus given broad equitable powers to implement its remedial decrees."). In selecting the appropriate remedy, "courts must always bear in mind the ultimate consideration whether allowance or disallowance of particular relief would best effectuate the underlying purposes of ERISA – enforcement of strict fiduciary standards of care in the administration of all aspects of pension plans and promotion of the best interests of participants and beneficiaries." *Chemung Canal Tr. Co. v. Sovran Bank/Md.*, 939 F.2d 12, 18 (2d Cir. 1991).

This Court recognized that it had such broad equitable powers in *Kunsman 2017*, when it held that "converting this to a class action is unnecessary. The Court can simply order appropriate declaratory relief." *Kunsman 2017* at 12-13. It can do so pursuant to its broad remedial authority "to enjoin any act or practice which violates any provision of [ERISA]" under Section 502(a)(3) of ERISA, 29 U.S.C. §1132(a)(3).

D. The Court Should Enjoin Defendants and Xerox From Applying the Phantom Account Offset to Similarly Situated Plan Participants and Order Defendants and Xerox to Apply the New Hire Methodology to Similarly Situated Plan Participants

This Court should enter an injunction, pursuant to its broad equitable authority under ERISA, prohibiting Defendants from using the phantom account offset to calculate the benefits of Mr. McNeil, the *Kunsman* Plaintiffs and Similarly Situated Plan Participants, and ordering Defendants to calculate their benefits using at least the new hire methodology.

Defendants have admitted in this case that:

> The outcome of the claims asserted by Plaintiff McNeil and the other Kunsman Plaintiffs in this case (whether or not part of the putative 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.

Doc. No. 68 at 16.

Thus, in denying Mr. McNeil's motion for class certification, the Court observed that "[i] n opposing McNeil's motions … defendants state that '[t]he decision reached in *Frommert* regarding the method of calculated benefits will, as a matter of law, be applicable to those in the putative *Kunsman* class.'" *Kunsman 2017*, at p. 14. The Court assumed "that defendants mean it when they say that the *Frommert* decision and remedy will apply to the entire putative class here." *Id.* at p. 15. The Court then "caution[ed] defendants … that if they fail to follow through on their protestations pledging uniform treatment to all proposed class members, the Court will revisit the issue of whether this case should be converted to a class action." *Id.* at p. 16.[3]

[3] Indeed, such uniform treatment is mandated by Department of Labor ("DOL") regulations. Under DOL regulations, ERISA plans are required to establish reasonable safeguards to ensure that "the plan provisions have been applied consistently with respect to similarly situated claimants." 29 CFR § 2560.503-1(b)(5). As the Ninth Circuit held in *Stephan v. Unum Life Ins. Co. of Am.*, 697 F.3d 917 (9th Cir. 2012), a plan administrator and fiduciary "is required by law to ensure that 'the plan provisions' are 'applied consistently with respect to similarly situated claimants. *Id.* at 936 quoting 29 C.F.R. § 2560.503-1(b)(5); *see also Tillotson v. Life Ins. Co. of N. Am.*, 2011 U.S. Dist. LEXIS 9071, at *6 (D. Utah Jan. 28, 2011) ("The Regulations underlying ERISA require that all participants and beneficiaries of an employee group welfare benefit plan be treated equally and consistently by the plan and its fiduciaries"); *Stephan v. Unum Life Ins. Co. of Am.*, 697 F.3d 917, 936 (9th Cir. 2012) (a fiduciary under ERISA is required by law to ensure that the plan provisions are applied consistently with respect to similarly situated claimants).

Notwithstanding their assurances, Defendants have repeatedly ignored those decisions and directives with respect to the Plan participants who are not named as plaintiffs in the *Frommert* case including Mr. McNeil, the *Kunsman* Plaintiffs and the Similarly Situated Plan Participants. As seen in the case of Kathy McElwaney, Defendants continue to apply the phantom account offset in calculating benefits for Similarly Situated Plan Participants who worked for Xerox; left Xerox and took a lump sum distribution; came back to work for Xerox prior to the issuance of the SPD on September 1, 1998, and did not sign a release of their claims. Furthermore, notwithstanding the promise Defendants made to this Court that "the *Frommert* decision and remedy will apply to the entire putative class here," when Plaintiff's counsel recently asked Defendants' counsel whether Defendants would agree to apply the ruling of the Second Circuit in the appeal of the *Testa* judgment which applied the *Frommert* rulings to Mr. Testa, in the *McElwaney* case, they refused to agree. Blauner Aff., ¶6.

Thus, it has become abundantly clear that Defendants will not follow the clear directives of this Court and the Second Circuit, and apply them to the Similarly Situated Plan Participants unless expressly ordered by this Court to do so with an order that is backed by the Court's contempt powers. At this point the only way to insure that Defendants, who are plan fiduciaries, follow this Court's directives is to enter an injunction pursuant to ERISA Section 502(a)(3), 29 U.S.C. §1132(a)(3), and this Court's inherent equitable authority to fashion a remedy designed to ensure compliance with fiduciary obligations.

Accordingly, Mr. McNeil respectfully moves this Court to enter an order which:

(a) Declares that the Defendant Plan Administrators and Xerox, and their successors, have and continue to violate ERISA, §502(a)(3) by applying the phantom account offset to Plaintiff McNeil, the other Kunsman Plaintiffs and the Similarly Situated Plan Participants;

(b) Declares that the Defendant Plan Administrators and Xerox, and their successors, have and continue to violate ERISA §502(a)(3) by calculating and paying benefits to Plaintiff McNeil, the other Kunsman Plaintiffs and the Similarly Situated Plan Participants using a formula that is worse than the new hire formula;

(c) Enjoins the Defendant Plan Administrators and Xerox, and their successors, from using

the phantom account offset in calculating the plan benefits for Plaintiff McNeil, the other Kunsman Plaintiffs and the Similarly Situated Plan Participants;

(d) Enjoins the Defendant Plan Administrators and Xerox, and their successors, from using any formula to calculate benefits for Plaintiff McNeil, the other Kunsman Plaintiffs and the Similarly Situated Plan Participants that treats them worse that "new hires"; and

(e) Orders the Defendant Plan Administrators and Xerox, and their successors, to recalculate the benefits for Plaintiff McNeil, the other Kunsman Plaintiffs and all Similarly Situated Plan Participants who have retired by using at least the new hire formula, together with pre-judgment interest thereon pursuant to this Court's November 3, 2016 and May 4, 2017 Orders in the *Frommert* case;

(f) Orders the Defendant Plan Administrators and Xerox, and their successors, to calculate the benefits of Similarly Situated Plan Participants, who like Kathy McElwaney, have not yet retired by using at least the new hire formula, when they retire.

In addition, in light of Defendants repeated failure to heed the Court's directives, and in order to insure compliance with this Order, this Court should order the Defendants Plan Administrators and Xerox to provide to Plaintiffs' counsel the following detailed information regarding the Similarly Situated Plan Participants: i) name: ii) last known address; iii) social security number; iv) date of initial employment by Xerox; v) date first left Xerox's employ; vi) lump sum distribution taken at that time; vii) date of second employment by Xerox, viii) date left Xerox employment the second time, ix) all data regarding the amount of pension benefits provided and how calculated, and x) the amount of pension benefits to which they would be entitled under the new hire remedy. Finally, Plaintiffs should be directed to shall file a proposed notice to be sent to each of the Similarly Situated Plan Participants, informing them, *inter alia* of the pendency of this Action and the entry by this Court of this Order.

E. <u>Defendants Should Be Removed as Plan Fiduciaries if They Continue to Ignore the Directives of this Court.</u>

Given Defendants intransigence and refusal to follow the directives in *Frommert* in blatant disregard of their fiduciary duties under ERISA, it would be completely appropriate for the Court to remove Defendants as fiduciaries, and replace them with an independent fiduciary unaffiliated with

Xerox to be selected by the Court. As this Court observed in *Testa*, one might reasonably have thought that this issue of whether Defendants could continue to apply the phantom account offset to Plan participants who were re-hired prior to the issuance of the September 1, 1998 SPD was "dead and buried." 2017 U.S. Dist. LEXIS 70984, at *11. That was because the Second Circuit and this Court have repeatedly held since 2006, that they may not do so. Specifically, the Second Circuit and this Court have held:

- *Frommert 2006*: "[T]he phantom account may not be applied to employees rehired prior to the issuance of the 1998 SPD." 433 F.3d at 263.

- *Frommert 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 [September] 1998, after having previously received a distribution of pension benefits." 472 F. Supp. 2d at 456-57.

- *Frommert 2013*: "We also held that the 1998 Benefits Update…was effective only to employees rehired after the issuance of the Update." 738 F.3d at 527 n. 4.

- *Kunsman 2013*: "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 language in *Frommert*, and continue to apply the phantom account to employees rehired before 1998, consistent with that decision and with the administrator's fiduciary duty to act in the interest of plan participants." 977 F. Supp. 2d at 263.

- *Testa 2017*: "The Second Circuit's statement that 'the phantom account may not be applied to employees rehired prior to the issuance of the 1998 SPD' hardly sounds like *dictum*…. To the contrary, it seems like a clear directive." 2017 U.S. Dist. LEXIS 70984, at *13.

- *Kunsman 2017*: "I see no reason why plaintiffs in this action who have not validly released their claims should be barred from seeking relief under §502(a)(3), based on defendants' continued refusal to abide by the Second Circuit's directive in *Frommert*–which, despite defendants' protestations to the contrary, does not contain any limitations on its general prohibition against applying the phantom account to employees rehired prior to the issuance of the 1998 SPD." Decision and Order, at p. 9.

Notwithstanding these clear directives, Defendants have continued to apply the phantom account offset to plan participants re-hired prior to the issuance of the September 1, 1998 SPD. As this Court observed in *Kunsman 2017*:

The administrator has continued to apply the phantom account to some employees rehired

> prior to the issuance of the 1998 SPD, despite seemingly unambiguous directives from this Court and the Court of Appeals to the contrary. Defendants have typically done so by narrowly construing court-issued directives and court-imposed remedies, and applying those directives and remedies only to the plaintiffs in a given lawsuit, who, in defendants' view, had timely filed suit. But as this Court has noted before, the Second Circuit's statements have not been so narrowly expressed. In fact, it is the administrator's continued application of the phantom account, in contravention, if not defiance, of court orders and decisions, that has given rise to plaintiffs' remaining fiduciary duty claim in this and other cases.

Id. at p. 13.

Defendants, in utter defiance of those directives, continue to ignore those orders and apply the phantom account offset in calculating benefits. As is seen in the example of Ms. McElwaney, they have affirmatively done so as recently as 2015.

In light of this entrenched disregard of and flouting, over many years, of unambiguous directives of the Second Circuit and this Court, and their continuing breach of their fiduciary duties, the imposition of a structural injunction which removes them as plan fiduciaries and appoints an independent fiduciary would be completely appropriate. As the Court held in *Cobell v. Norton,* 283 F. Supp. 2d 66, 133 (D.D.C. 2003):

> Trust law contemplates the use of broad and flexible equitable remedies as means for dealing with breaches of fiduciary duty, and it imposes the obligation upon the courts to use the remedy that is most advantageous to the participants and that will most closely effectuate the purposes of the trust." In applying the remedial provisions of ERISA, the federal courts have drawn upon the traditionally wide remedial discretion afforded to courts in trust cases. For example, they have appointed receivers to manage plans, and removed fiduciaries.
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> * * *
>
> [T]he issuance of a structural injunction is consistent with the broad remedial authority afforded to courts in trust cases, including federal courts applying the common law of trusts in ERISA cases. It also concludes that the issuance of structural relief against a trustee is an appropriate function for the judicial branch to exercise, in that the judiciary has long exercised substantive judgment in the area of trust law, and has frequently issued broad-ranging injunctive relief to compel a breaching trustee to comply with its fiduciary duties.

Id. at 132-133 (citation omitted) (citing *Beck v. Levering*, 947 F.2d 639, 642 (2d Cir. 1991) (affirming the issuance of an order permanently enjoining defendants from serving as fiduciaries or service providers to any ERISA plan); *Reich v. Lancaster*, 55 F.3d 1034, 1054 (5th Cir. 1995) (same); *Martin v. Feilen*, 965 F.2d 660, 673 (8th Cir. 1992) (same); *Martin v. Rutledge*, 807 F. Supp. 693, 697 (N.D. Ala.

1992) (same); *Whitfield v. Tomasso*, 682 F. Supp. 1287, 1306-07 (E.D.N.Y. 1988) (enjoining defendants from serving as fiduciaries or service providers to any ERISA plan, either permanently or for a ten-year period).

The removal of a fiduciary "and the appointment of a person to serve in their stead is appropriate under the statute when [the fiduciary has] engaged in 'repeated or substantial violation[s] of [his] responsibilities.'" *Hugler v. Byrnes*, 2017 U.S. Dist. LEXIS 45178, at *26 (N.D.N.Y. Mar. 28, 2017) (quoting *Katsaros v. Cody*, 744 F.2d 270, 281 (2d Cir. 1984) (quoting *Marshall v. Snyder*, 572 F.2d 894, 901 (2d Cir. 1978)); *see also Liss v. Smith*, 991 F. Supp. 278, 297 (S.D.N.Y. 1998) (the imposition of an injunction preventing trustee from continuing in their fiduciary capacity is particularly appropriate where there is "a pattern and practice" of fiduciary violations).

Thus, the Order to be entered by the Court pursuant to the instant motion should put the Defendants on clear notice that the time for flaunting and defying the Orders of the Second Circuit and this Court is over. This Court should expressly inform Defendants that anything other than complete, forthcoming and good faith compliance with the injunction to be issued will result, in addition to possible contempt, to their removal as Plan Administrators.

Dated: September 20, 2017

Respectfully submitted,

/s/ Edward F. Haber
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CERTIFICATE OF SERVICE

I, Edward F. Haber, hereby certify that on September 20, 2017, I caused a copy of the foregoing to be served by email via the ECF system on all counsel of record in the above-captioned action.

/s/ Edward F. Haber