UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL J. FROMMERT, et al.

Plaintiff,

V.

SALLY L. CONKRIGHT, et al.

Defendants.

Civil Action No.
6:00-cv-6311

PLEASE TAKE NOTICE that upon the annexed Affidavit of John A. Strain, Esq., and the proposed brief *amicus curiae* annexed thereto, John A. Strain on behalf of Robert Testa shall move this Court, before the Honorable David G. Larimer, United States District Judge, at the United States Courthouse, 100 State Street, Rochester, New York at a date and time to be determined by the Court, for leave to file the proposed brief *amicus curiae*.

Manhattan Beach, California

Dated: March 18, 2011

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL J. FROMMERT, et al. Plaintiff, V. SALLY L. CONKRIGHT, et al. Defendants.	Civil Action No. 6:00-cv-6311

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

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Attorneys for Robert Testa as *Amicus Curiae*

Introduction

John A. Strain respectfully submits this memorandum of law in support of Robert Testa's motion for leave to file a brief *amicus curiae* in the above captioned matter.

Interest of Proposed Amicus

Robert Testa is the plaintiff in *Testa v. Becker*, Dkt. 6:10-cv-6229 currently before this Court. That case involves Defendants' failure to properly calculate retirement benefits and raises issues that are similar in many respects to those in this *Frommert* case. Because of procedural and other differences, the result eventually reached in the *Frommert* case could have unexpected consequences for Testa and others similarly situated to Testa. Accordingly, Testa's counsel is submitting this proposed brief because Testa rightfully has an interest in the matters at issue before the Court in *Frommert v. Conkright*.

That conclusion is particularly true because of the complexity and long procedural history of the matters before this court. Also, for over ten years, Testa's counsel (the undersigned) has been deeply involved in the various litigation related to the Xerox "phantom account" matter. In addition to Testa, the undersigned represents over two dozen plaintiffs in *Kunsman v. Conkright*, Dkt. 6:08-cv-06080-DGL. For the same reasons as Testa, those Plaintiffs also have an interest in the outcome of this case. The undersigned also represented the plaintiffs in *Miller v. Xerox Corp. Ret. Inc. Guar. Plan*, 464 F.3d 871 (9th Cir. 2006) between 1997 and 2011 and provided substantial assistance to Plaintiffs' prior counsel (the Law Offices of Robert Jaffe) in the current case for well over ten years (and provided assistance to Stris & Maher with respect to briefs filed with

the U.S. Supreme Court). In addition, the undersigned currently represents two plaintiffs in this *Frommert* case itself as well as the Law Offices of Robert Jaffe, which has a substantial economic interest in the outcome of this current case.

The acceptance of this Brief will provide the Court with a more complete understanding of the issues in the case and perhaps will help to expedite or shorten the necessary considerations in the Testa and Kunsman cases.

Argument

"Federal courts have discretion to permit participation of amici where such participation will not prejudice any party and may be of assistance to the court." *Strougo v. Scudder, Stevens & Clark, Inc.*, 1997 WL 473566 (S.D.N.Y. Aug. 18, 1997) (*citing Vulcan Society of New York City Fire Dep't, Inc. v. Civil Service Comm'n*, 490 F.2d 387, 391 (2d Cir. 1973)). *See also Zell/Merrill Lynch Real Estate Opportunity Partners Limited Partnership III v. Rockefeller Center Properties, Inc.*, 1996 WL 120672 (S.D.N.Y. March 19, 1996) (granting amicus leave to appear and argue, citing cases "uniform in support of a district court's broad discretion to permit or deny amici appearances"); *United States v. Gotti*, 755 F. Supp. 1157, 1158 (E.D.N.Y 1991) (amici can "provide supplementary assistance to existing counsel and insur[e] a complete and plenary presentation of difficult issues so that the court may reach a proper decision").

Given the number of individuals who are likely to be affected by the outcome in this case and its complex history, by considering the views of the *Amicus Curiae*, the considerations required in other cases before the Court may be shortened or expedited. Additionally, no party will be prejudiced by this submission.

Conclusion

For the foregoing reasons, I respectfully submit that the Court should grant leave to file the proposed brief *amicus curiae*.

Manhattan Beach, California

Dated: March 18, 2011

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AFFIDAVIT OF JOHN A. STRAIN

I, John A. Strain, hereby declare:

I am counsel to Robert Testa, the Plaintiff in *Testa v. Becker*, Dkt. 6:10-cv-6229. I am also counsel to over 25 plaintiffs in *Kunsman v. Conkright*, Dkt. 6:08-cv-06080-DGL.

I submit this Affidavit to provide the Court with a copy of the brief I propose to file as *amicus curiae* on behalf of Plaintiffs in the above captioned matter, attached hereto as Exhibit A. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Manhattan Beach, California

Dated: March 18, 2011

John A. Strain
LAW OFFICES OF JOHN A. STRAIN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL J. FROMMERT, et al. Plaintiff, V. SALLY L. CONKRIGHT, et al. Defendants.	Civil Action No. 6:00-cv-6311

BRIEF OF ROBERT TESTA AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS

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I. Introduction. This case and several related cases arose because Xerox Corporation pulled the rug out from under retiring employees. After touting substantial retirement benefits for many years in ERISA-required disclosure documents, Xerox offered measly benefits when these long-service employees actually reached retirement.[1]

The Second Circuit's decisions in this case and in *Layaou v. Xerox Corp.*, 238 F.3d 205 (2d Cir. 2001), and this Court's decision and remedy in *Layaou* on remand from the Second Circuit, 330 F. Supp. 2d 297 (W.D.N.Y. 2004), recognized that ERISA disclosure rules protect Plan Members' rights to benefits promised to them by the Plan's Summary Plan Description and the related Value Added statements.[2] The principal issue in this case relates to such disclosure matters and will be discussed in the Reply to be filed by Stris & Maher. This brief deals only with a secondary issue in this case – the proper interpretation of the applicable terms of the RIGP plan – Sections 9.6 and 1.1. The Plan Administrator and his lawyers refuse to address those actual terms. They obviously understand that those terms do not support their position.

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[1] Defendants' argument that such employees were treated just like other employees is absurd. Those who had not previously been laid off continued to accrue benefits (and to receive a salary) and in fact received substantial retirement benefits at their retirement date as they had been promised. Those who had previously been laid off were "phantomed" and received little or nothing for their period of reemployment.

[2] ERISA requires the plan administrator to provide annual benefit statements that inform the participant of his total accrued benefit. ERISA § 105(a)(1); 29 U.S.C. § 1025(a)(1).

II. The Terms of the Remand. In 1989, Xerox restructured its retirement plans. In this litigation, the Plan Administrator claimed that certain "phantom account" terms were somewhere in the 1989 RIGP Restatement. However, the Second Circuit held in 2006 that those terms were not added until Plan Members were informed of the changes in 1998. Thus, under the clear law of the case, the "phantom account" terms are not part of the restated RIGP applying to the Plaintiffs or to others who were rehired before 1998. In its 2006 order, the Second Circuit remanded and directed that "the remedy crafted by the district court for those employees rehired prior to 1998 should utilize an appropriate pre-amendment calculation to determine their benefits." Understandably, this Court perceived that remand as a direction to fashion an equitable remedy.

The Supreme Court decision in this case focused only on the issue of how the restated plan (after exorcising the phantom account terms) should be interpreted. As to that issue, the Supreme Court (as quoted in the Second Circuit's actual Remand order to this court) concluded that "a single honest mistake *in plan interpretation* [does not] justif[y] stripping the administrator of that deference for subsequent related *interpretations of the plan*" (emphasis added). Thus, deference should apply to the Plan Administrator's interpretation of the pre-1998 Plan terms. As discussed below, even before considering the Plan Administrator's conflict of interest as a factor (*see Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008)), the pre-1998 Plan cannot reasonably be construed to support the Plan Administrator's position.

III. The Plan Administrator May Not Insert an Offset into the Plan. The Plan Administrator's Declaration and his lawyers' Brief focus almost entirely on what they claim ERISA allows or on terms that may be in other plans. In paragraph 9 of his Declaration, the Plan Administrator describes IRS "safe-harbor" Regulations applying to floor offset plans. *See* 26 C.F.R. § 1.401(a)(4)-8(d)(1)(i). He then concludes: "It is this approach that I have concluded is reasonable to use here." This contention — that the Plan Administrator may insert any offset terms that the Plan might legally have specified — is certainly not the law.[3] Nothing in the Supreme Court decision (or in any other authority) suggests that the Plan Administrator may insert into the Plan some sort of offset that he believes might have been part of a reasonable plan design. Changes to the Plan require a plan amendment approved by the employer and satisfying the anti-cutback rules of ERISA Sections 204(g) and (h) and other applicable rules.

While many of Defendants' characterizations and representations (including their interpretation of the "safe harbor" Regulations) are erroneous, such assertions are just not relevant to this case.[4] The question here is what the

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[3] It is the law of this case that, if a plan does not provide that benefits will be offset by prior distributions, an amendment adding such an offset violates the anti-cutback prohibition of ERISA § 204(g), 29 U.S.C. § 1054(g). See also *Michael v. Riverside Cement Co. Pension Plan*, 266 F.3d 1023, 1027-28 (9th Cir. 2001); *Heinz v. Central Laborers Pension Fund*, 308 F.3d 802 (7th Cir. 2002), *aff'd* 541 U.S. 739 (2004).

[4] For example, the Plan Administrator ignores Section 1.3 of the Plan which expressly defines "Actuarial Factors" by reference to the rates used by the insurance company in a contract with the Profit Sharing Plan.

pre-1998 Plan actually did say and not the largest offset that might have been permitted under ERISA and tax law.[5]

IV. Section 9.6 Uses Terms that Have a Precise Meaning. This Court, in its January 24, 2007 decision (and the Second Circuit in its 2006 decision), already determined that the relevant pre-1998 Plan terms are Section 9.6 and 1.1. This Court then properly analyzed and explained those provisions. Those words have not been changed by any subsequent development in this case and cannot be ignored under a "deference" standard. Section 9.6 (which has not materially changed at any time) states:

> Section 9.6. Nonduplication of Benefits. In the event any part of or all *of a Member's accrued benefit* is distributed to him prior to his Normal Retirement Date . . . and such Member at any time thereafter recommences active participation in the Plan, the accrued benefit of such Member based on all Years of Participation shall be offset by the accrued benefit attributable *to such distribution*. (emphasis added)

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[5] The Plan Administrator also refers to the September 22, 2010 Order issued in *Miller v. Xerox Corp. Ret. Inc. Guar. Plan*, (C.D. Cal. CV 98-10389). Beyond the obvious fact that this is an unpublished minute order, several distinctions should be noted. *Miller* involved the implications of the Ninth Circuit's Order that the RIGP violates substantive terms of ERISA (related to actuarial factors). The Miller case "present[ed] different issues [than Frommert] . . . and [did] not reach the Employees' disclosure-related claims. . . ." *Miller v. Xerox Corp. Ret. Inc. Guar. Plan*, 464 F.3d 871, 877 n.7 (9th Cir. 2006). Thus, the remand in *Miller* did not call for an interpretation of the "pre-1998 Plan." In addition, portions of the recent Miller Order were wrongly decided. The case was settled under terms "mutually satisfactory to the parties" and did not proceed to an appealable order.

A valid offset in this case can only be based on the terms of Section 9.6. It is amusing to see how intent the Plan Administrator is to make the Court look way from those terms. The Plan Administrator's lengthy Declaration explaining his position mentions Section 9.6 only in passing ("the 1989 Restatement of the Plan . . . provides for an offset for prior distributions. . .; 1989 Restatement § 9.6"). In their lengthy attempt to defend the Plan Administrator's position, his lawyers only briefly refer to portions of Section 9.6 (Def.'s. Br. at 11), and then redact the key language. Specifically, Defendants' Brief asserts that Section 9.6 of the pre-1998 Plan specifies that an employee's current retirement benefit must be offset by "the accrued benefit attributable' to *any prior distribution made to* that employee" (Def.'s Br. at 11) rather than (as Section 9.6 actually says) to amounts attributable to a distribution "*of a Member's accrued benefit.*" The correct reading is clear and simple. The "accrued benefit" (if any) that was determined under the RIGP terms and actually distributed from the RIGP in the earlier year should be subtracted from the RIGP "accrued benefit" computed on the subsequent retirement. The balance of that final accrued benefit is payable.

As the Second Circuit noted in its 2006 decision, 433 F.3d 254, 257 (2d Cir. 2006), this key term "accrued benefit" is defined in Section 1.1 (relevant portions of which have not materially changed with the various Plan restatements):

> 1.1 Accrued Benefit. The normal retirement benefit which a Member has earned up to any date, and which is payable at Normal Retirement Date in an amount computed in accordance with Section 4.2 or 4.3, *based,*

however, only upon Average Monthly Compensation received and Years of Participation rendered by a Member up to the date as of which the Accrued Benefit is computed. . . ." (emphasis added)

Even if some part of a Profit Sharing Plan payout in 1983 (for example) could somehow be construed as a distribution of a Member's RIGP "accrued benefit," that could only be true up to the RIGP "accrued benefit" measured by service and compensation earned before the payout occurred. Anything above that obviously was not a RIGP "accrued benefit" based on factors earned "up to [that] date." Nothing would allow a Profit Sharing payout to create a negative accrued benefit.

Also, Defendants' clever wordsmithing never acknowledges that very few of the Plaintiffs had received any "prior distributions" from the RIGP. The Plan Administrator has had plenty of time to explain how a payment from Xerox's defined contribution Profit Sharing Plan might be construed as a "distribution" by the RIGP, or as a distribution of an accrued benefit that did not then exist. If there were any such explanation, he should and would have made it.

V. Pre-1990 Profit Sharing Payouts Were not RIGP Accrued Benefits. Since the Second Circuit's 2006 decision determined that the RIGP's "phantom account" terms cannot be applied to Members rehired before 1998, understanding how those terms fit within the RIGP's structure and the definition of "accrued benefit" is important. This requires some understanding of the complex way in which Xerox's Plans were restructured in 1989. Prior to 1990, the "phantom account" was contained in Section 1.35 of the RIGP, which defines "Retirement

Account." The value of that Retirement Account (as grossed up in that manner) was not part of the RIGP "accrued benefit" but was explicitly subtracted from other sums in determining the amount of the "accrued benefit" specified in Section 4.3. As defined in Section 1.1, the RIGP "accrued benefit" was clearly the net amount under Section 4.3.

The RIGP was restated in 1989 to replace the "floor offset" arrangement with something different — an alternative defined contribution benefit within the defined benefit plan itself. Section 4.3 (later numbered 4.2) was changed so that the Retirement Account (renamed as the Transitional Retirement Account) was moved into the RIGP and became one of the alternative amounts for the "accrued benefit." Thus, after that date — but not before — this defined contribution feature became a benefit under the RIGP.

It was not until 1998, however, that the RIGP was amended so that the Transitional Retirement Account, as defined in that Plan, included prior distributions from that account (i.e., the "phantom account").[6] Under the law of the case (as held by the Second Circuit in 2006), the phantom account was simply not part of the RIGP until 1998. Thus, it is indisputable that between 1990 and 1998, there was no phantom account under the RIGP. The pre-1990 "Retirement Account" terms were not part of the restated Plan; the "phantom account" part of the post-1989 "Transitional Retirement Account" terms were not yet added.

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[6] Xerox may have had tax-law concerns with the complex Plan restructuring.

The Plan Administrator's current filing refers to Section 4.3(e) as if it incorporated "phantom account" elements of the restated plan during the pre-1998 period. He does not mention the Plan's definition of the "Transitional Retirement Account" which would show that such elements were not included in the Plan during that period. The Plan Administrator simply ignores the explicit rulings from the Second Circuit which are the law of this case.

Moreover, the Plan Administrator is trying to hoodwink the court regarding the meaning of section 4.3(e). That Section involves a two-step process. The RIGP defines how the TRA grows until the Member's retirement age. At that time — not before — actuarial factors are used to convert that lump sum into an annuity. For Members to whom Section 4.3(e) applies (unlike Plaintiffs), the question is what interest factors (if any) apply up to the normal retirement date. The annuitization at that date is based on the factors then in use under the RIGP in general.[7] The Plan Administrator ignores how the RIGP and Section 4.3(e) have always applied in hopes of locking in Xerox-favorable interest rates that happened to exist in the mid 1980s. In effect, the Plan Administrator asks this court to require retired Plan Members to pay Xerox 8.5% or more on phantom amounts for the rest of their lives while market interest rates hover near zero. The Plan Administrator obviously knows that his "revisionist" view of the Plan's history involves a huge windfall to Xerox — and it is clear whose pockets he is picking.

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[7] Each of the alternatives that have been considered reflects the "time value of money" at least after normal retirement age.

VI. The Appropriate Order in this Case. RIGP Members are upset because ERISA-required disclosure documents misled them about the most material aspects of the retirement benefits promised to them. Will they receive a significant retirement benefit or almost nothing? Because those disclosure problems persist, the Court should simply re-enter its prior remedial order.

If the Court determines for some reason that it should not enter that or some similar order based solely on the disclosure issues, the Court should consider whether the position advocated by the Plan Administrator is a reasonable exercise of the Plan Administrator's authority to construe the terms of the Plan. In fact, the Plan Administrator's position is neither based on the terms of the Plan nor consistent with those terms. Indeed, it is not a true fiduciary determination at all, but merely an effort to enrich the Plan Administrator's employer.

In view of the constraints placed by the Supreme Court, it appears that the best approach (if disclosure issues do not resolve this matter) is to determine that this position is an abuse of discretion, to give the Plan Administrator some further guidance in doing his job right, and to direct him to take another swing at the ball. The Court should issue an interlocutory order to avoid premature and time consuming appeals. Such an Order should include a term directing the Plan Administrator to immediately pay (to those who have reached pay status) that amount that does not remain in dispute in this case. The Plan Administrator's refusal to pay what he agrees must be paid is simply extortion.

This Court's prior order crafted a just remedy by allowing the RIGP some credit even though the valid terms of the Plan do not call for any offset for Profit Sharing Plan distributions. Some of the language of the Supreme Court's decision suggests a preference for an intellectually purer result. That purity could be achieved by allowing no offset at all (and thus no interest either) for the simple reason that the pre-1998 Plan does not allow for an offset. If the Plan Administrator can establish that the Plan or equity allows some offset, the result could limit the offset to the actual RIGP formula "accrued benefit" earned by the date of the prior distribution (that is, computed based on Compensation and Years of Participation then earned); or credit the entire Profit Sharing distribution with a modest rate of growth (such as the defined-contribution buy-back rate applying under ERISA §204(d), (e), 29 U.S.C. § 1054(d), (e)) and convert that balance to an annuity at final retirement based on actuarial factors then existing.

Finally, attention must eventually be given to each Plaintiff's particular facts (e.g., at least one individual received payments both from the RIGP and from the Profit Sharing Plan). The Plan should be properly applied to every Member based on actual facts pertinent to that Member.

Dated: March 18, 2011

Respectfully submitted,

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PROOF OF SERVICE

I, Amber M. Ziegler, hereby certify under penalty of perjury that on March 18, 2011, I served a copy of Robert Testa's Motion for Leave to File Brief *Amicus Curiae* and Brief of Robert Testa As *Amicus Curiae* in Support of Plaintiffs via U.S. mail to:

Robert Wick, Esq., Covington & Burling LLP, 1201 Pennsylvania Avenue NW, Washington, D.C. 20004 (counsel for defendants) at rwick@cov.com.

Margaret Clemens, Esq., Littler Mendelson PC, 400 Linden Oaks #110, Rochester NY 14625 (counsel for defendants) at mclemens@littler.com

Peter K. Stris, Stris & Maher LLP, 3333 Harbor Boulevard, Costa Mesa, CA 92626 (counsel for plaintiffs) at peter.stris@strismaher.com

I further certify that on March 18, 2011, I emailed Shaun Martin who agreed to electronically file the foregoing on behalf of the Law Offices of John A. Strain with the Clerk of the District Court using its CM/ECF system, which would then notify the above-mentioned participants in the case.

DATED: March 18, 2011

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