

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ARTHUR C. RUPERT, et al.,	)	
	)	
Plaintiffs,	)	Case No. 2:07-cv-00705
	)	
v.	)	Judge Arthur J. Schwab
	)	
PPG INDUSTRIES, INC.,	)	<i>ELECTRONICALLY FILED</i>
	)	<i>LEAD CASE</i>
Defendant.	)	

ARTHUR C. RUPERT, et al.,	)	
	)	
Plaintiffs,	)	Case No. 2:08-cv-00616
	)	
v.	)	
	)	
PPG INDUSTRIES, INC.,	)	
	)	
Defendant.	)	

PPG'S SECOND AMENDED COUNTERCLAIM

In accordance with the Court's June 15, 2009 Order, defendant PPG Industries, Inc. ("PPG"), files its second amended counterclaim in response to the complaint (Doc. 13).

Background

1. In this attempted class action, 61 former PPG employees allege that their age was "a motivating factor" when their PPG employment was terminated. PPG denies this allegation.

2. When their PPG employment ended in early 2006, all of these former employees (except one) induced PPG to pay substantial severance by promising not to sue for age discrimination.

3. The Court has ruled that PPG cannot enforce these promises as contracts.

4. With its second amended counterclaim, PPG seeks recovery of the severance it paid, under theories of unjust enrichment and promissory estoppel.

5. The total recovery PPG seeks exceeds \$2.1 million.

Parties, Jurisdiction and Venue

6. PPG asserts its counterclaims against representative plaintiffs Arthur C. Rupert, Linda K. Austin, and Larry L. Campbell, as well as opt-in plaintiffs¹ Adair Becer, Leslie M. Beck, Marianna Beveridge, Celeste M. Bey, William M. Bishop, Wade Bittner, Lorene C. Boettcher, Richard Bradstreet, Robert Curtis Burns, Virgil C. Caserta, Kathleen L. Sample, Edward R. Coleridge, Sr., Daniel J. Conroy, Raymond F. Cornuet, Jr., Bruce C. Crivaro, Frank V. De Carlo, Donaldson J. Emch, Andrew C. Feldpausch, Christopher L. Fredrickson, David H. Gang, April G. Giel, Gail E. Goodall, Cindy Hinich, Kenneth J. Hunt, David F. Jeffrey, Wilda M. Jones-Howe, Tim Kerchenski, Edward F. Kobe, David E. Kubicek, Quinton Lawson, Laura L. Leslie, Kevin Scott Lightsey, Pamela M. Longo, James L. Miles, Richard M. Nugent, Jr., Susan L. Prodoehl, J. A. Rakvic, Monica L. Rupert, Joseph C. Sawicki, Debra A. Scott, Gary R. Schmidt, Howard Sipe, Chris Marvin Smith, Elizabeth J. Smith, Michael L. Sproule, Raymond R. Stec, Melvin Terrell, Calvin Thornton, Edward L. Vandevort, Jr., Shirley L. VanDyke, Kevin Walters, Richard Welesko, Karl M. Wisniewski, Roberta Ann Wojtysiak, Warren R. Yaiser, John Zern and Edward P. Zilla (representative plaintiffs and above opt-in plaintiffs collectively hereinafter referred to as the "Counterclaim Defendants").

7. The Court has supplemental jurisdiction over PPG's counterclaims under 28 U.S.C. § 1367(a).

8. Venue is proper for PPG's counterclaims because they are ancillary to the claims brought by Counterclaim Defendants.

¹ Of the 58 total opt-in plaintiffs, the only person not named as a Counterclaim Defendant is Matthew S. Miller, Sr.

Facts Giving Rise to Counterclaims

9. Each of the Counterclaim Defendants executed a "Separation Agreement and Release" (collectively, "Release Agreements"), copies attached as Exhibit A, in exchange for lump-sum severance payments to which they were otherwise not entitled.

10. PPG's inside and outside legal counsel drafted the template for the Release Agreements with the specific intent to comply with the requirements of the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f), which contains the minimum requirements for releases of age discrimination claims under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, et seq.

11. PPG's understanding and intent was that the Release Agreements would be enforceable as contracts precluding lawsuits asserting ADEA claims.

12. PPG's "Salaried Severance Plan," which was published as of November 1, 2005 to Counterclaim Defendants (and all PPG employees), sets forth the lump-sum severance payment and extended benefit coverage that will be paid to eligible participants upon termination of employment due to specified reasons.

13. Under PPG's Salaried Severance Plan, upon the termination of their employment, Counterclaim Defendants were eligible to receive specified lump-sum severance payments in exchange for their execution (without revocation) of the Release Agreements. The lump-sum severance paid in exchange for signing a Release Agreement is referred to in the Salaried Severance Plan as the "Maximum Benefit."

14. All Counterclaim Defendants signed their Release Agreements, thus inducing PPG to take action by paying lump-sum severance amounts equal to the Maximum Benefit.

15. If the Counterclaim Defendants had decided not to sign their Release Agreements, then they would not have received the Maximum Benefit. Instead, they would have received lump-sum severance payments equal to 20% of the Maximum Benefit. This lesser payment is referred to in the Salaried Severance Plan as the "Alternate Benefit."

16. Thus, when their PPG employment ended, the Counterclaim Defendants had a decision to make as to which of the two lump-sum severance amounts they wanted -- the Maximum Benefit, or the Alternate Benefit. Each of the Counterclaim Defendants induced PPG to pay the Maximum Benefit by signing the Release Agreements.

17. After signing their Release Agreements, each of the Counterclaim Defendants had seven days in which they could have revoked their promises, if they changed their minds. (Exhibit A.) None of them revoked.

18. The PPG "Salaried Severance Plan Worksheets" for each Plaintiff, which reflect the amount they were each paid as the Maximum Benefit upon signing their Release Agreement, and the Alternate Benefit they would have been paid had they not signed the Release Agreement, are attached as Exhibit B.

19. The following chart sets forth the total lump-sum severance payment received by each Counterclaim Defendant in exchange for signing their Release Agreement (the "Maximum Benefit" as reflected on Exhibit B), and the lesser lump-sum severance amount that would have been paid had they not signed their Release Agreement (the "Alternate Benefit" as reflected on Exhibit B), and the difference between the two. PPG seeks recovery of the difference as the appropriate measure of restitution.

		<u>Total Severance (Maximum Benefit)</u>	<u>Alternate Benefit</u>	<u>Difference</u>
1)	<u>Austin</u>	\$57,311.23	\$11,462.25	\$45,848.98
2)	<u>Becer</u>	\$96,222.43	\$19,244.49	\$76,977.94
3)	<u>Beck</u>	\$41,794.99	\$ 8,359.00	\$33,435.99
4)	<u>Beveridge</u>	\$41,095.20	\$ 8,219.04	\$32,876.16
5)	<u>Bey</u>	\$37,440.00	\$ 7,488.00	\$29,952.00
6)	<u>Bishop</u>	\$63,449.00	\$12,689.80	\$50,759.20
7)	<u>Bittner</u>	\$42,931.01	\$ 8,586.20	\$34,344.81
8)	<u>Boettcher</u>	\$12,166.81	\$ 2,433.36	\$ 9,733.45
9)	<u>Bradstreet</u>	\$73,356.00	\$14,671.20	\$58,684.80
10)	<u>Burns</u>	\$15,886.09	\$ 3,177.22	\$12,708.87
11)	<u>Campbell</u>	\$39,360.94	\$ 5,872.19	\$33,488.75
12)	<u>Caserta</u>	\$32,913.38	\$ 6,582.68	\$26,330.70
13)	<u>Sample</u>	\$32,348.32	\$ 6,469.66	\$25,878.66
14)	<u>Coleridge</u>	\$70,908.77	\$14,181.75	\$56,727.02
15)	<u>Conroy</u>	\$35,367.17	\$ 7,073.43	\$28,293.74
16)	<u>Cornuet</u>	\$35,332.03	\$ 7,066.41	\$28,265.62
17)	<u>Crivaro</u>	\$42,233.76	\$ 8,446.75	\$33,787.01
18)	<u>De Carlo</u>	\$57,089.57	\$11,417.92	\$45,671.65
19)	<u>Emch</u>	\$75,374.90	\$15,074.98	\$60,299.92
20)	<u>Feldpausch</u>	\$26,963.51	\$ 5,392.70	\$21,570.81
21)	<u>Fredrickson</u>	\$31,152.03	\$ 6,230.41	\$24,921.62
22)	<u>Gang</u>	\$51,550.37	\$10,310.07	\$41,240.30
23)	<u>Giel</u>	\$42,607.97	\$ 8,521.59	\$34,086.38
24)	<u>Goodall</u>	\$34,848.26	\$ 6,969.65	\$27,878.61
25)	<u>Hinich</u>	\$16,652.54	\$ 3,330.51	\$13,322.03
26)	<u>Hunt</u>	\$56,544.00	\$11,308.80	\$45,235.20
27)	<u>Jeffrey</u>	\$49,539.76	\$ 9,907.95	\$39,631.81
28)	<u>Jones-Howe</u>	\$11,380.09	\$ 2,276.02	\$9,104.07
29)	<u>Kerchenski</u>	\$29,239.00	\$ 5,847.82	\$23,391.18

		<u>Total Severance (Maximum Benefit)</u>	<u>Alternate Benefit</u>	<u>Difference</u>
30)	<u>Kobe</u>	\$56,369.41	\$11,273.88	\$45,095.53
31)	<u>Kubicek</u>	\$57,457.63	\$11,491.53	\$45,966.10
32)	<u>Lawson</u>	\$29,312.12	\$ 5,862.42	\$23,449.70
33)	<u>Leslie</u>	\$39,243.25	\$ 7,848.65	\$31,394.60
34)	<u>Lightsey</u>	\$58,352.80	\$11,670.56	\$46,682.24
35)	<u>Longo</u>	\$40,573.13	\$ 8,114.63	\$32,458.50
36)	<u>Miles</u>	\$66,588.00	\$13,317.60	\$53,270.40
37)	<u>Nugent</u>	\$71,633.57	\$14,326.71	\$57,306.86
38)	<u>Prodoehl</u>	\$42,632.83	\$ 8,526.57	\$34,106.26
39)	<u>Rakvic</u>	\$79,351.97	\$15,870.39	\$63,481.58
40)	<u>A. Rupert</u>	\$64,121.63	\$12,824.33	\$51,297.30
41)	<u>M. Rupert</u>	\$25,403.05	\$ 5,080.62	\$20,322.43
42)	<u>Sawicki</u>	\$24,952.46	\$ 4,990.49	\$19,961.97
43)	<u>Schmidt</u>	\$79,578.43	\$15,915.69	\$63,662.74
44)	<u>C. Smith</u>	\$25,864.00	\$ 5,172.80	\$20,691.20
45)	<u>E. Smith</u>	\$25,929.06	\$ 5,185.81	\$20,743.25
46)	<u>Scott</u>	\$12,695.70	\$ 2,539.14	\$10,156.56
47)	<u>Sipe</u>	\$20,869.96	\$ 4,173.99	\$16,695.97
48)	<u>Sproule</u>	\$78,470.40	\$15,694.08	\$62,776.32
49)	<u>Stec</u>	\$64,559.23	\$12,911.85	\$51,647.38
50)	<u>Terrell</u>	\$34,510.53	\$ 6,902.11	\$27,608.42
51)	<u>Thornton</u>	\$20,251.69	\$ 4,050.34	\$16,201.35
52)	<u>Vandevort</u>	\$64,759.20	\$12,951.84	\$51,807.36
53)	<u>VanDyke</u>	\$31,478.55	\$ 6,295.71	\$25,182.84
54)	<u>Walters</u>	\$52,000.61	\$10,400.12	\$41,600.49
55)	<u>Welesko</u>	\$84,129.60	\$16,825.92	\$67,303.68
56)	<u>Wisniewski</u>	\$45,123.34	\$ 9,024.67	\$36,098.67
57)	<u>Wojtysiak</u>	\$31,737.20	\$ 6,347.44	\$25,389.76
58)	<u>Yaiser</u>	\$32,153.36	\$ 6,430.67	\$25,722.69

		<u>Total Severance (Maximum Benefit)</u>	<u>Alternate Benefit</u>	<u>Difference</u>
59)	<u>Zern</u>	\$47,096.83	\$ 9,419.37	\$37,677.46
60)	<u>Zilla</u>	\$34,374.43	\$ 6,874.89	\$27,499.54

20. PPG paid the above Maximum Benefit severance believing that by doing so, the Counterclaim Defendants came under a contractual duty to honor all terms and conditions of the Release Agreements.

21. The ADEA claims Counterclaim Defendants now assert in this civil action are those explicitly released by the Release Agreements.

22. The Release Agreements contain, in addition to and separate from the general release of all claims, promises and obligations "never to file a lawsuit or become a member of a class asserting any claims that are released."

23. The Release Agreements contain, in addition to the general releases of all claims and the promises not to sue, material representations of fact, including but not limited to the fact that each Counterclaim Defendant entered into their Release Agreement of his or her own free will and without coercion or duress, intending to be legally bound.

24. Despite the obligations, promises, and material representations of fact contained in the Release Agreements, relied on by PPG to its detriment when paying lump sum severance amounts equal to the Maximum Benefit, the Counterclaim Defendants have filed ADEA claims, which they explicitly promised not to do.

25. Despite the obligations, promises, and material representations of fact contained in the Release Agreements, relied on by PPG to its detriment when paying lump sum severance amounts equal to the Maximum Benefit, Counterclaim Defendants have become members of a class asserting ADEA claims, which they explicitly promised not to do.

26. Despite filing claims they promised not to file under the Release Agreements, and becoming members of a class they promised not to join, Counterclaim Defendants retained the entirety of the lump-sum severance amounts paid to them by PPG in consideration for these now broken promises.

27. Thus, Counterclaim Defendants have not complied with the terms and conditions of the Release Agreements, despite PPG's understanding and intent that the Release Agreements would be enforceable as contracts.

Counterclaims and Recovery Sought

28. On September 10, 2007, PPG filed a counterclaim for breach of contract against plaintiffs Rupert, Austin, Campbell, Hunt and Bittner based upon their breach of obligations contained in the Release Agreements.

29. On February 26, 2009, the Court dismissed PPG's breach-of-contract counterclaim with prejudice, and adopted the Special Master's recommended ruling that, as a matter of law, the Release Agreements are not enforceable as contracts. (Doc. 133.)

30. The Court has permitted PPG to file amended counterclaims in quasi-contract seeking restitution of severance paid. (Doc. 133.)

31. Although PPG paid substantial lump-sum severance payments intending for contractual obligations to arise that would preclude the assertion of ADEA claims in a lawsuit, the Court's February 26, 2009 determination that the Release Agreements are not enforceable as contracts means that Counterclaim Defendants in this action were unjustly enriched. Accordingly, PPG asserts a counterclaim against Counterclaim Defendants for unjust enrichment.

32. PPG justifiably and detrimentally relied on the promises and material representations of fact in the Release Agreements when taking action by paying the Maximum Benefit severance to Counterclaim Defendants. Accordingly, PPG asserts a counterclaim against Counterclaim Defendants for promissory estoppel.

33. Regardless of whether they ultimately prevail on the merits of their ADEA claims, the Counterclaim Defendants are liable to PPG for restitution equal to the difference between the lump-sum severance PPG paid in exchange for execution of the Release Agreements and the lesser lump-sum severance PPG would have paid had they not executed the Release Agreements. The specific amount of restitution sought is as follows:

Restitution sought from:

Linda K. Austin	\$45,848.98
Thomas Adair Becer	\$76,977.94
Leslie M. Beck	\$33,435.99
Marianna Beveridge	\$32,876.16
Celeste M. Bey	\$29,952.00
William M. Bishop	\$50,759.20
Wade Bittner	\$34,344.81
Lorene C. Boettcher	\$ 9,733.45
Richard Bradstreet	\$58,684.80
Robert Curtis Burns	\$12,708.87
Larry L. Campbell	\$33,488.75
Virgil C. Caserta	\$26,330.70
Kathleen L. Sample	\$25,878.66
Edward F. Coleridge, Sr.	\$56,727.02
Daniel J. Conroy	\$28,293.74
Raymond F. Cornuet, Jr.	\$28,265.62
Bruce C. Crivaro	\$33,787.01
Frank V. De Carlo	\$45,671.65

Restitution sought from:

Donaldson J. Emch	\$60,299.92
Andrew C. Feldpausch	\$21,570.81
Christopher L. Fredrickson	\$24,921.62
Daniel H. Gang	\$41,240.30
April G. Giel	\$34,086.38
Gail E. Goodall	\$27,878.61
Cindy Hinich	\$13,322.03
Kenneth J. Hunt	\$45,235.20
David F. Jeffrey	\$39,631.81
Wilda M. Jones-Howe	\$ 9,104.07
Tim Kerchenski	\$23,391.18
Edward F. Kobe	\$45,095.53
David E. Kubicek	\$45,966.10
Quinton Lawson	\$23,449.70
Laura L. Leslie	\$31,394.60
Kevin Scott Lightsey	\$46,682.24
Pamela M. Longo	\$32,458.50
James L. Miles	\$53,270.40
Richard M. Nugent, Jr.	\$57,306.86
Susan L. Prodoehl	\$34,106.26
J. A. Rakvic	\$63,481.58
Arthur C. Rupert	\$51,297.30
Monica L. Rupert	\$20,322.43
Joseph C. Sawicki	\$19,961.97
Gary R. Schmidt	\$63,662.74
Chris Marvin Smith	\$20,691.20
Elizabeth J. Smith	\$20,743.25
Debra A. Scott	\$10,156.56
Howard Sipe	\$16,695.97
Michael L. Sproule	\$62,776.32

Restitution sought from:

Raymond R. Stec	\$51,647.38
Melvin Terrell	\$27,608.42
Calvin Thornton	\$16,201.35
Edward L. Vandevort, Jr.	\$51,807.36
Shirley L. VanDyke	\$25,182.84
Kevin Walters	\$41,600.49
Richard Welesko	\$67,303.68
Karl M. Wisniewski	\$36,098.67
Roberta Ann Wojtysiak	\$25,389.76
Warren R. Yaiser	\$25,722.69
John Zern	\$37,677.46
Edward P. Zilla	\$27,499.54

WHEREFORE, in addition to such other relief as the Court deems just and proper, PPG seeks restitution as follows:

- (a) As to all Counterclaim Defendants whose ADEA claims fail for any reason, PPG seeks affirmative recovery in an amount equal to the difference between the lump-sum severance those Counterclaim Defendants received in exchange for their execution of the Release Agreements (if applicable) and the lesser lump-sum severance they would have received had they not executed Release Agreements.
- (b) As to all Counterclaim Defendants who might be awarded monetary recovery of any amount, a set-off against their monetary recovery in an amount equal to the difference between the lump-sum severance those Counterclaim Defendants received in exchange for their execution of the Release Agreements (if

applicable) and the lesser lump-sum severance they would have received had they not executed Release Agreements.

Alternatively, PPG seeks restitution only in the form of a set-off, such that any monetary recovery that might be awarded to any of the Counterclaim Defendants is reduced by an amount equal to the difference between the lump-sum severance those Counterclaim Defendants received in exchange for their execution of the Release Agreements (if applicable) and the lesser lump-sum severance they would have received had they not executed Release Agreements.

Respectfully submitted,

/s/ James F. Glunt

Terrence H. Murphy (PA 36356)

terrence.murphy@bipc.com

Lisa M. Passarello (PA 64823)

lisa.passarello@bipc.com

James F. Glunt (PA 85555)

jay.glunt@bipc.com

Jaime S. Tuite (PA 87566)

jaime.tuite@bipc.com

Christian C. Antkowiak (PA 209231)

christian.antkowiak@bipc.com

BUCHANAN INGERSOLL & ROONEY PC

One Oxford Centre

301 Grant Street, 20th Floor

Pittsburgh, PA 15219-1410

Phone: (412) 562-8800

Fax: (412) 562-1041

Dated: June 30, 2009

Attorneys for Defendant