17-1826(L), 17-1985(XAP)

United States Court of Appeals

for the

Second Circuit

ROBERT TESTA, an individual,

Plaintiff-Appellee-Cross-Appellant,

– v. –

LAWRENCE BECKER, as plan administrator of the Xerox Corporation Retirement Income Guarantee Plan, XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN, an Employee Pension Benefit Plan,

Defendants-Appellants-Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANTS-APPELLANTS-CROSS-APPELLEES

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ISSUE PRESENTED FOR REVIEW ON PLAINTIFF-APPELLEE CROSS-APPELLANT'S CROSS-APPEAL

Whether an appellate court should consider Plaintiff-Appellee-Cross-Appellant's argument related to an alleged unlawful forfeiture of accrued benefits where such claim is advanced for the first time on this appeal.

SUMMARY OF ARGUMENT

Plaintiff-Appellee-Cross-Appellant Robert Testa ("Plaintiff") erroneously contends that his claims were filed within the statute of limitations period established under the Employee Retirement Income Security Act ("ERISA"). (Pl. Br. 4, 16).[1] Plaintiff, however, interposed a claim for benefits based on the terms of the Retirement Income Guarantee Plan (the "RIGP" or the "Plan") and its Summary Plan Description ("SPD") under ERISA, 29 U.S.C. § 1132(a)(1)(B), by filing this lawsuit six years after his statute of limitations expired.

Relying on well-established law that the statute of limitations for a claim for benefits under ERISA in New York is six years and relying on the Ninth Circuit's decision in *Miller v. Xerox Corp. Ret. Income Guar. Plan*, 464 F.3d 871 (9th Cir. 2006) ("*Miller*") and this Court's decision in *Frommert v. Conkright*, 433 F.3d 254, 260 (2d Cir. 2006) ("*Frommert I*"), the District Court properly concluded that

[1] References to the Brief for Plaintiff-Appellee-Cross-Appellant (Dkt. No. 104) are designated "Pl. Br. [page number]."

Plaintiff had adequate notice of the offset provision for prior distributions by 1998 and that his claim for benefits was untimely interposed.

The District Court impermissibly allowed Plaintiff to escape the consequences of his lack of diligence in pursuing his ERISA claims for twelve years by contending a new breach of fiduciary duty claim arose in 2006 based on the Ninth Circuit decision in *Miller* and a Second Circuit "directive" in *Frommert I* that the offset provision could not be applied to employees rehired before issuing the 1998 SPD. (A-281-284).[2] Plaintiff similarly claims, because the *Frommert* action had been timely commenced in 1999, he could simply sit on the sideline and await the outcome of that litigation to benefit him. (Pl. Br. 18-25). The District Court's determination and Plaintiff's claim are not a basis for excusing Plaintiff's failure to commence his own timely suit. The law imposes deadlines within which to commence actions and Plaintiff failed to comply with those deadlines.

The *Frommert* action is an individual action that was joined by over 100 individuals after the suit was timely commenced. *See Frommert I*, 433 F.3d at 257. Other individuals timely commenced related actions, including, but not limited to, the plaintiffs in *Miller*, 464 F.3d 871, *Anderson v. Becker*, 614 F. App'x 38 (2d Cir. 2015), and *Clouthier v. Becker*, No. 08-CV-6441L, 2016 U.S. Dist. LEXIS 7196 (W.D.N.Y. Jan. 21, 2016). Like these individuals, Plaintiff could

[2] References to the Joint Appendix are designated as "A [page number.]"

have joined the *Frommert* action or commenced his own timely suit, neither of which he did.

Plaintiff now incorrectly claims that his cause of action did not accrue in 1998 because there was "no clear repudiation" by Defendants because the *Frommert* action was pending, Defendants knew full well that the outcome of that litigation was uncertain, and that any ruling would have to be applied to similarly-situated individuals. (Pl. Br. 18-21). This argument lacks merit. The critical issue is whether Defendants clearly repudiated the plan participant's entitlement to the benefits and not whether the outcome of a lawsuit brought by others was uncertain. This Court already determined that such clear repudiation occurred in 1998 in *Frommert I*. *See* 433 F.3d at 434. Defendants' position from the commencement of the *Frommert* litigation through the final rulings on liability consistently demonstrated their unequivocal repudiation of the *Frommert* plaintiffs' claims that they were entitled to any additional benefits based on the terms of the Plan. *See Frommert I*, 433 F.3d 254. In 2004, (the year in which Plaintiff's six-year statute of limitations expired on his ERISA claims), the status of the *Frommert* litigation was *not* in the *Frommert* plaintiffs' favor.

By Decision and Order, dated July 20, 2004, the District Court had granted summary judgment to Defendants, dismissing the *Frommert* Complaint in its entirety. *Frommert v. Conkright*, 328 F. Supp. 2d 420 (W.D.N.Y. July 20, 2004).

Defendants maintained their unequivocal position regarding the offset provision through the *Frommert* plaintiffs' subsequent appeal. *See Frommert I,* 433 F.3d 254. Plaintiff has no factual or legal basis for contending that *Defendants' position* regarding the offset provision was equivocal or uncertain merely because the *Frommert* plaintiffs had sued challenging that position.

Similarly, Plaintiff's reliance on "judicial estoppel" to extend his time within which to sue is misplaced. Plaintiff selectively misquotes representations submitted to the District Court by the Defendants in the *Kunsman v. Conkright* matter, Civil Action No. 08-CV-6080 (W.D.N.Y.), in 2014 (ten years after Plaintiff Testa's statute of limitations had expired) about the applicability of the *Frommert* remedy to other related matters. (Pl. Br. 34). Plaintiff neglected to advise this Court that Defendants expressly stated that whether a plan participant was entitled to a remedy at all would require a court to determine first whether the plan participant was similarly-situated to the *Frommert* plaintiffs or whether the remedy was barred by an applicable defense such as the statute of limitations or that a plan participant signed an enforceable release. (*Kunsman v. Conkright*, No. 08-CV-6080 (W.D.N.Y.), Dkt. No. 68, at 13, 16, 18). Here, Plaintiff is not similarly-situated to the *Frommert* plaintiffs because his ERISA claims are barred by the statutes of limitations or repose.

Relying on the District Court's Decision and Order, Plaintiff next claims he could not have commenced his breach of fiduciary duty claim within six years of 1998 because he did not have actual knowledge until 2006 that Defendants would refuse to comply with the Second Circuit's directive in *Frommert I* that the phantom account offset may not be applied to employees who were rehired before issuing the 1998 SPD. (Pl. Br. 30-33). This argument makes no sense. Defendants had no fiduciary duty to pay benefits on a time-barred claim, and no fiduciary duty arose before the issuance of *Frommert I* to advise plan participants to sue for benefits based on the offset provision within the statute of limitations, particularly in light of the District Court's grant of summary judgment in favor of Defendants in 2004.

This conclusion is supported by the Supreme Court's decision in *Heimeshoff v. Hartford Life & Accident Ins. Co*., ("*Heimeshoff*") 134 S. Ct. 604, 612 (2013), in which the Supreme Court upheld the denial of benefits by a plan administrator based upon a plan's contractual limitations period, reasoning that the administrator was fulfilling its duty under ERISA in denying the claim. *Heimeshoff*, 134 S. Ct. at 612. To rule otherwise would create a continuing violation of Defendants' fiduciary obligations towards rehired plan participants who, unlike the *Frommert* plaintiffs, slept on their rights and waived any claims they may have had to assert claims based on the alleged statutory and/or disclosure violations, which were

admittedly cured with issuing the 1998 SPD. This Court has rejected the imposition of such continuing violation in situations, such as this one, where the negative effects of a single wrongful act continue to be felt over time. *See e.g.*, *Novella v. Westchester Cty*., 661 F.3d 128, 146 (2d Cir. 2011).

This conclusion is particularly warranted with regard to a claim for breach of fiduciary duty under ERISA, which is governed by the limitations period in Section 413 of ERISA, 29 U.S.C. § 1113. As the Supreme Court recently recognized, this limitations period is a statue of repose, *California Pub. Empls.' Ret. Sys. v. ANZ Securities, Inc.*, 137 S. Ct. 2042, 2050 (2017), the object of which is "to grant complete peace to defendants" and "supersedes the application of a tolling rule based in equity." *Id*. at 2052. *Accord Leber v. Citigroup 401(k) Plan Inv. Comm*., No. 07-Cv-9329, 2017 U.S. Dist. LEXIS 194293 (S.D.N.Y. Nov. 27, 2017) (noting that the limitations periods in ERISA § 413 is a statute of repose); *Malone v. Teachers Ins. & Annuity Ass'n of Am*., No. 15-cv-08038, 2017 U.S. Dist. LEXIS 32308 (S.D.N.Y. Mar. 7, 2017). Plaintiff's breach of fiduciary duty claim, which relies on this Court's ruling in *Frommert I* and the Ninth Circuit's ruling in *Miller* (A-283), was already time-barred at the time the rulings in *Frommert I* and *Miller* were issued in 2006 and could not be revived by the District Court.

Plaintiff raises, for the first time on this appeal, the substantive argument that the offset provision in the Plan violates the rules in ERISA prohibiting the

forfeiture of "accrued benefits." (Pl. Br. 43; A-196-221, A-302-422, A-503-514). This issue is of no assistance to Plaintiff in reviving his time-barred claims and does not warrant an affirmance of the Decision and Order for Plaintiff on his motion for summary judgment. It is the general rule that a federal appellate court does not consider an issue not passed upon below. *Singleton v. Wulff*, 428 U.S. 106, 120-121 (1976); *Carlson v. Principal Fin. Group*, 320 F.3d 301, 305 (2d Cir. 2003).

Plaintiff's claims in his Complaint regarding an alleged failure to comply with ERISA's benefit accrual rules are governed by the same six-year statute of limitations as his claim for benefits under 29 U.S.C. § 1132(a)(1)(B), which was properly dismissed by the Court as time-barred. *See Romero v. Allstate Corp*., 404 F.3d 212 (3d Cir. 2005); *Novella*, 661 F.3d at 144. Plaintiff waived any claim he may have had under 29 U.S.C. § 1054 (g) and (h) (or any other similar ERISA provision) by not timely commencing an action or asserting such claim in this case. The terms of the Plan may be applied to Plaintiff in the same manner as they may be applied to those plan participants who were rehired by Xerox after the issuance of the 1998 SPD and had signed releases. *See e.g*., *Frommert v. Conkright,* 535 F.3d 111, 122-123 (2d Cir. 2008) ("*Frommert II*") (reversing the District Court's Decision and Order which had denied Defendants' motion for summary judgment

dismissing the claims of eighteen *Frommert* plaintiffs, rehired before issuing the 1998 SPD, because they had signed valid releases).

This Court should also reject outright Plaintiff's attempts to rely on the doctrine of "equitable estoppel." Citing the Supreme Court's 1974 decision in *American Pipe & Const. Co. v. Utah*, 414 U.S. 538 (1974), Plaintiff claims that the limitations periods should be tolled because a motion to intervene was filed in the *Frommert* action in 2009 by one plaintiff in *Kunsman v. Conkright*. (Pl. Br. 36-39). This argument is flawed.

Unlike *American Pipe*, the *Frommert* action is not a class action, and no motion for class certification was ever filed in the *Frommert* action, which are two of the prerequisites for collateral estoppel to apply. Rather, one plaintiff in a related action merely moved to intervene in *Frommert*, which was denied. Filing a motion to intervene does not toll the statute of limitations for the individual who attempted to intervene in the *Frommert* action, Joseph McNeil (who had already commenced his own action), let alone for another plan participant who had not yet sued.

This is because the predicate for the tolling of a statute of limitations under *American Pipe* is there was a pending class action already filed during which the limitations period had been tolled for the putative class members. The filing of a motion to intervene in the *Frommert* matter occurred too late to benefit Plaintiff.

Plaintiff's ERISA claims had already expired in 2004 and filing the motion to intervene in 2009 could not have revived a stale claim.

There is yet another reason Plaintiff's reliance on *American Pipe* is misplaced. *American Pipe* cannot equitably toll claims under ERISA § 413, including Plaintiff's breach of fiduciary duty claims as a matter of law because, as recently recognized by the Supreme Court, the equitable tolling permitted under *American Pipe* does not apply to statutes of repose like this statutory provision. *California Pub. Empls.' Ret. Sys*, 137 S. Ct. at 2052.

The District Court's Decisions and Orders refusing to dismiss Plaintiff's Third Claim for failure to follow the directives of the Circuit Courts of Appeal should be reversed and judgment should be entered for Defendants dismissing the Complaint in its entirety. The District Court's Decision and Order granting Plaintiff summary judgment on his claim for breach of fiduciary duty should be reversed and judgment should be entered for Defendants dismissing Plaintiff's breach of fiduciary duty claims in their entirety.

ARGUMENT

PLAINTIFF'S ERISA CLAIMS ARE UNTIMELY

Plaintiff's first two claims are for benefits under Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B). (Pl. Br. 12; A-29-30). Contrary to well-established law, Plaintiff claims that the statute of limitations for such benefits

claims is derived from ERISA 413, 29 U.S.C. § 1113. (Pl. Br. 16-17). This statutory provision of ERISA, however, by its terms, applies to claims of breach of fiduciary duty, and not to claims for benefits arising under ERISA 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

ERISA 502 (a)(1)(B) does not contain an express statute of limitations. As recognized by this Court in other ERISA cases, when Congress omits a statute of limitation for a federal cause of action, the courts borrow the local time period that is most analogous to the case at hand. *Novella*, 661 F.3d at 144; *Burke v. PriceWaterHouseCoopers LLP Long Term Disability Plan*, 572 F.3d 76, 78 (2d Cir. 2009). In New York, an ERISA claim for benefits is governed by the six-year statute of limitations in New York Civil Practice Law and Rules § 213. *Burke*, 572 F.3d at 78. *Accord Moses v. Revlon Inc*., 691 Fed. Appx. 16, 18 (2d Cir. 2017) (summary order).

A. Accrual Occurs Upon a Clear Repudiation by the Plan

A plaintiff's cause of action under ERISA accrues upon a clear repudiation by the plan that is known, or should be known, to the plaintiff, *regardless as to whether or not the plaintiff has filed a formal application for benefits*. *Novella*, 661 F.3d at 147 (explaining that a reasonableness approach "best balances a pension plan's legitimate interest in predictability and finality with a pensioner's equally legitimate interest in having a fair opportunity to challenge a

miscalculation of benefits when it becomes known—or should have become known—to him"); *Carey v. Int'l Broth. Of Elec. Workers Local 363 Pension Plan*, 201 F.3d 44, 48 (2d Cir. 1999) (a cause of action under ERISA accrues when there is "a clear repudiation [of benefits] that is known, or should be known, to the plaintiff"); *Hirt v. Equitable Ret. Plan for Emples., Managers & Agents*, 285 F. App'x 802, 804 (2d Cir. 2008) (a plaintiff's ERISA cause of action in New York accrues, and the six year statute of limitation period runs, when there is "a repudiation by the fiduciary which is *clear* and made known to beneficiaries") (emphasis in original) (citation omitted); *Anderson v. Xerox Corp.*, 29 F. Supp. 3d 323, 331-32 (W.D.N.Y. 2014), aff'd, 614 F. App'x 38 (2d Cir. 2015), (where the plaintiff had asserted claims virtually identical to those in *Frommert* and *Testa*, the District Court found that the plaintiff "received clear notice of defendants' repudiation of his present claim for benefits in 1998" and, thus, were time-barred).

B. Plaintiff's Claim for Benefits Accrued in 1998

To create a factual issue where none exists, Plaintiff claims he was not on actual notice of his claims until 2009. (Pl. Br. 18). Plaintiff's reasoning defies any logic or common sense. Plaintiff contends there was no clear repudiation of benefits by Defendants with the issuance of the 1998 SPD because Defendants had repeatedly stated that they would not apply phantom accounting to anyone if they ultimately lost the *Frommert* action, which they did. (Pl. Br. 20-21).

Notably, Plaintiff's claim is devoid of any evidentiary support, because there is none. A review of the Decisions and Orders in *Frommert* show that in 2004, the District Court issued a grant of summary judgment for Defendants on liability. *Frommert*, 328 F. Supp. 2d 420. Defendants' position from the commencement of the litigation consistently demonstrated an unequivocal repudiation of the *Frommert* plaintiffs' claims that they were entitled to any additional benefits based on the terms of the Plan through summary judgment on liability, and they maintained this same position through the subsequent appeal. *See Frommert I*, 433 F.3d 254.

In *Frommert I*, upon which Plaintiff and the District Court heavily rely, the Second Circuit itself found that any alleged deficiency in notice of the phantom account offset provision was cured with the issuance of the 1998 SPD. *Frommert I*, 433 F.3d at 268-69. Plaintiff has alleged that "before 1998" the SPDs and other notices provided to him were inadequate, a concession that the SPDs were adequate after 1998. (A-27, ¶ 75). Thus, Plaintiff's claim for benefits under Section 502 (a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B) accrued in 1998, and the District Court properly dismissed his claims for benefits as untimely interposed. *See Hirt*, 285 F. App'x at 804 (holding that the plaintiffs' cause of action accrued upon the distribution of a 1992 SPD which "unequivocally repudiated" their understanding on their entitlement to certain benefits and

dismissing such claims as time-barred); *Bielello v. JPMorgan Chase Ret. Plan*, 607 F. Supp. 2d 586, 593 (S.D.N.Y. 2009) (finding that the SPD provided notice of clear repudiation of a plan's terms and granting Rule 12(b)(6) motion to dismiss ERISA claims on statute of limitations grounds).

C. Plaintiff's Breach of Fiduciary Duty Claim Accrued in 1998

Unlike a claim for benefits, a claim for breach of fiduciary duty is governed by ERISA § 413, 29 U.S.C. § 1113, which contains a three or six-year time period within which to commence suit. [3] Based on the undisputed facts discussed by this Court in *Frommert I* and below, in applying ERISA § 413, 29 U.S.C. § 1113, the last action that could have constituted the breach or violation of ERISA occurred before the issuance of the September 1998 SPD. (A-39-119).

This is because, according to the Second Circuit in *Frommert I*, by September 1998, the Plan fiduciary had cured any alleged breach or omission when it disclosed the terms of the offset provision to plan participants. *Frommert I*, 433

[3] The statute of limitations, 29 U.S.C. § 1113, provides in pertinent part that: (a) No cause of action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty or obligation under this part, or with respect to any obligation of this part, after the earlier of (1) six years after (A) the date of the last act which constituted the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach, or 2 three years ager the earliest date (A) on which the plaintiff had actual knowledge of the breach or violation, or (B) on which a report from which he could reasonably be expected to have obtained knowledge of such breach or violation was filed with the Secretary of State under this Title; except that in the cases of fraud or concealment, such action may be commenced within six years after the date of the discovery of such fraud or concealment.

F.3d at 268-69. The latest date by which Plaintiff could have timely commenced a breach of fiduciary duty claim arising from any alleged failure to disclose the terms of the offset provision adequately, as alleged in the Complaint, was September 2004, under the most generous six-year deadline imposed by 29 U.S.C. § 1113. (A-14-32).

Plaintiff admittedly did not commence this action until 2010, approximately twelve years too late. (Pl. Br. 3). Any breach of fiduciary duty claim arising from failing to disclose the phantom account offset provision, is time-barred. *See Martin v. Public Svc. Elec. & Gas Co., Inc*., 271 F. App'x 258, 261 (3d Cir. 2008); *Keen v. Lockheed Martin Corp*., 486 F. Supp. 2d 481 (E.D. Pa. 2007); *Hirt*, 285 F. App'x 802. *Accord Winnett v. Caterpillar, Inc*., 609 F.3d 404, 414 (6th Cir. 2010).

Plaintiff relies on the Ninth Circuit's 1988 ruling in *Meagher v. Int'l Assoc. of Machinists and Aerospace Workers Pension Plan*, 856 F.2d 1418, 1423 (9th Cir. 1988) for the proposition that a fiduciary continues to violate its fiduciary duty by applying an illegal plan term. (Pl. Br. 40). Such reliance is misplaced. This Court and other circuit courts of appeals have refused to adopt a continuing violation theory of liability. *Novella v. Weschester v. Co*., 661 F.3d at 146; *Miller v. Fortis Benefits Ins. Co*., 475 F.3d 516, 522 (3rd Cir. 2007). *Accord Moses v. Revlon Inc*., 2016 U.S. Dist. Lexis 106431, * 17 (2d Cir. Aug. 11, 2016).

Unlike here, the *Meagher* case involved an alleged reduction of a plan participant's accrued benefits by way of a plan amendment which had never been approved by the Secretary of Labor, and hence, never became effective. In contrast here, the Plan was amended in 1998. *See Frommert I*, 433 F.3d at 268-69.

As this Court discussed in *Frommert I*, the offset provision was always contained in the Plan, but it had not been adequately disclosed until the issuance of the 1998 SPD. *Id.* at 264-69. This Court held that the disclosure of the offset provision in the 1998 SPD was sufficient to constitute an amendment of the Plan. *Id.* at 268-69. Unlike in *Meagher*, any alleged deficiency had been cured. If Plaintiff had a viable claim related to the allegedly inadequate disclosure of the offset provision, or any other statutory violation, his statutory time to commence suit accrued in 1998. *Romero v. Allstate Corp.*, 404 F.3d 212. There is no continuing violation. *Novella*, 661 F.3d at 144.

D. There Was No Fraudulent Concealment

This Court should also reject Plaintiff's attempt to rely on the fraudulent concealment doctrine to extent his statute of limitations on his breach of fiduciary duty claim beyond 2004. (Pl. Br. 22-27). As discussed on *Osberg v. Foot Locker*, 862 F.3d 198 (2d Cir. 2017), upon which Plaintiff relies, the Court applies a "reasonableness approach" in determining when a statute of limitations runs in a miscalculation of benefits case. *See* 862 F.3d at 206. Relying on *Layaou v. Xerox*

Corp, 238 F.3d 205, 209 (2d Cir. 2001), the Court also reasoned that the SPD is a document that ERISA contemplates will the plan participants primary source of information regarding their employee benefits. *Osberg*, 862 F.3d at 204. Unlike here, the SPD in *Osberg* falsely indicated to plan participants "that their actual retirement benefits were fully reflected in the account balances." *Id*. at 204. The Court reasoned that the facts in that case triggered the fraudulent concealment provision of 29 U.S.C. § 1113 (a), such that the plaintiff's statute of limitations was calculated from the date of the discovery of the affirmative misstatements. *Id.* at 209-211.

Regarding the disclosure of the offset provision to plan participants, as recognized by the Supreme Court, although the plan administrator may have made a mistake in his interpretation of the RIGP's offset provisions prior to 1998, there has been no finding by the lower courts that the plan administrator had acted in bad faith in doing so. *Conkright v. Frommert*, 130 S. Ct. 1640, 1648 (2010). In *Frommert I*, this Court held that the language of the 1998 SPD was sufficient to put plan participants on notice of the details of how the offset provision would be used in calculating pension benefits. *Frommert I*, 433 F.3d at 260 ("[T]he details of the phantom account offset functions were set out in full in the 1998 Summary Plan Description.").

Accordingly any alleged "fraudulent misrepresentations" about or "concealment" of the offset mechanism ended with the issuance of the September 1998 SPD. Plaintiff had six years from September 1998 within which to sue. He did not do so, and any breach of fiduciary duty claim is time-barred.

Plaintiff's claim that Defendants "fraudulently concealed" their intent to not comply with *Frommert I* which was issued in 2006 is based on pure speculation and surmise and not actual evidence. (Pl. Br. 22-27). During the 1998 to 2004 time period, Defendants had contested any liability, and Plaintiff was not a party in that case. (*See Frommert*, Civil Action No. 00-CV-06311 (DGL) (W.D.N.Y.)). By 2004, the *Frommert* plaintiffs' claims had been dismissed on summary judgment. *Frommert*, 328 F. Supp. 2d 420. Plaintiff had elected not to pursue his own claim for benefits regarding the offset provision. That the Defendants interposed the defense of the statute of limitations in such circumstance was warranted and not fraudulent or a breach of fiduciary duty.

E. Plaintiff's Time Period Was Not Tolled

Relying on the Supreme Court's 1974 decision in *American Pipe*, 414 U.S. 538, Plaintiff claims that the limitations periods applicable to his breach of fiduciary duty claims were tolled by a motion to intervene filed by one of the *Kunsman* plaintiffs in 2009 in the *Frommert* action. (Pl. Br. 20-21). This argument, however, is flawed for multiple reasons.

The Supreme Court in *American Pipe* held that the commencement of a class action suspended the statute of limitations for all members of a class who have been a party to the suit or could have been a party to the suit if it could continue as a class action. *Id.*, 414 U.S. at 554. The *Frommert* action, however, was not commenced as a class action, and no motion was ever filed in the *Frommert* action seeking class certification or to proceed as a class. (*See Frommert*, Civil Action No. 00-CV-6311(DGL) (W.D.N.Y.)) Rather, the *Frommert* action was commenced by twelve individual plaintiffs and other groups of individuals joined. (*Id.*).

While a plaintiff from the *Kunsman* action, Joseph McNeil, moved to intervene in the *Frommert* action, there is no legal basis under *American Pipe* upon which to toll the statute of limitations based on the filing of that motion. (*See Frommert*, Civil Action No. 00-CV-06311 (DGL) (W.D.N.Y.), Dkt. Nos. 167, 168). McNeil did not seek class certification in the *Frommert* action, and his motion to intervene in *Frommert* (a multi-plaintiff action) was denied. (*Frommert*, Civil Action No. 00-CV-06311 (DGL) (W.D.N.Y.), Dkt. No. 237). The tolling of the statute of limitations permitted under *American Pipe* for members of a putative class where class certification is later denied is inapplicable as a matter of law to Plaintiff based on the McNeil motion to intervene in *Frommert*, where class certification was never sought.

Second, the equitable tolling permitted under *American Pipe* does not apply to a statute of repose, as compared to a statute of limitations. *California Pub. Empls.' Ret. Sys*, 137 S. Ct. at 2052. This is because the object of a statute of repose is to grant complete peace to defendants. *Id.* *See also Police & Fire Ret. Sys. v. IndyMac MBS, Inc*., 721 F.3d 95 (2d Cir. 2013). A claim for breach of fiduciary duty under ERISA is governed by the limitations period in Section 413 of ERISA, 29 U.S.C. § 1113 (*see supra* Section C), which the Supreme Court recently recognized is a statue of repose. *California Pub. Empls.' Ret. Sys*., 137 S. Ct. at 2050. *Accord Leber v. Citigroup 401(k) Plan Inv. Comm.*, No. 07-CV-9329, 2017 U.S. Dist. LEXIS 194293 (S.D.N.Y. Nov. 27, 2017) (noting that the limitations periods set forth in ERISA § 413 is a statute of repose); *Malone v. Teachers Ins. & Annuity Ass'n of Am.*, No. 15-cv-08038, 2017 U.S. Dist. LEXIS 32308 (S.D.N.Y. Mar. 7, 2017). *American Pipe* cannot toll claims under ERISA § 413, including Plaintiff's breach of fiduciary duty claims, as a matter of law.

California Pub. Empls.' Ret. Sys. is instructive. There, the Supreme Court discussed the applicability of *American Pipe* to toll a statute of repose, and clarified that the limitations period in Section 413 of ERISA is a statute of repose. The Supreme Court noted that the Court had previously stated "repeatedly . . . in broad terms that statutes of repose are not subject to equitable tolling." 137 S. Ct. at 2051-52. The Supreme Court stated that "a statute of repose supersedes a

court's equitable balancing powers by setting a fixed time period for claims to end." *Id*. at 2053 (emphasis added).

This follows the Second Circuit's recent decisions to the effect that statutes of repose affect the underlying right, not just the remedy, and runs without interruption once the triggering event occurs even if equitable considerations would warrant tolling and even if the plaintiff had not discovered or could not discover that she has a cause of action. *Federal Hous. Fin. Agency v. UBS Americas, Inc.*, 712 F.3d 136, 140 (2d Cir. 2013); *Police & Fire Ret. Sys. v. IndyMac MBS, Inc.*, 721 F.3d 95.

Thus, Plaintiff's attempt to rely on *American Pipe* to toll his time within which to commence his breach of fiduciary duty claim is misplaced. Any breach of fiduciary duty claim must be dismissed as untimely filed in 2010.

F. Judicial Estoppel Does Not Apply

Plaintiff also erroneously claims that Defendants are judicially estopped from taking a different position than it took in a prior proceeding adopted by that tribunal. (Pl. Br. 35). The Second Circuit has stated that "judicial estoppel will apply if: 1) a party's later position is 'clearly inconsistent' with its earlier position; 2) the party's former position has been adopted in some way by the court in the earlier proceeding; and 3) the party asserting the two positions would derive an

unfair advantage against the party seeking estoppel." *DeRosa v. Nat'l Envelope Corp*., 595 F.3d 99, 103 (2d Cir. 2010).

Plaintiff contends that Defendants are judicially estopped from taking a position inconsistent with the statement made by Defendants that if they lost in *Frommert* they would be compelled as a matter of law to apply that remedy to all participants in the Plan. (Pl. Br. 35). Notably absent is any record evidence of such a statement being made by Defendants in any judicial action. A fair review of the record shows that Defendants have consistently raised defenses to claims, including when claims were barred by releases and/or the statutes of limitations. (*See, e. g.*, *Kunsman*, Civil Action No. 08-cv-6080 (DGL) (W.D.N.Y.), Dkt. No. 68, at 13, 16, 18). Further, the District Court recognized in its decision denying the motion for class certification in *Kunsman* that Defendants may have, and can assert, defenses to claims that may be asserted by individuals who were members of the purported putative class in *Kunsman*. (*See Kunsman*, Civil Action No. 08-cv-6080 (DGL), Dkt. No. 83 at 16-17). There is no judicial bar.

G. Plaintiff Cannot Raise Issues Not Raised Below

In yet another attempt to avoid dismissal of his time-barred claims, Plaintiff improperly raises, for the first time on this appeal, the substantive argument that the offset provision in the Plan violates the rules in ERISA prohibiting the forfeiture of "accrued benefits." (Pl. Br. 43). It is the general rule that a federal

appellate court refuses to consider an issue which was not passed upon below. *Singleton v. Wulff*, 428 U.S. 106, 120-121 (1976); *Carlson v. Principal Fin. Group*, 320 F.3d 301, 305 (2d Cir. 2003).

H. Summary Judgment in Favor of Defendants is Warranted

Plaintiff Testa's claim regarding an alleged failure to comply with ERISA's benefit accrual rules, as set out in 29 U.S.C. § 1054(g), form the basis of his claims for benefits under the FIRST and SECOND Causes of Action. (A-14-32). They are governed by the same six-year statute of limitations as his claim for benefits under 29 U.S.C. § 1132(a)(1)(B), and were properly dismissed by the Court as time-barred. *See Romero v. Allstate Corp*., 404 F.3d 212 (3d Cir. 2005); *Novella*, 661 F.3d at 144. (A-277-284).

Plaintiff waived any claim he may have had under 29 U.S.C. § 1054(g) and (h) (or any other similar ERISA provision) by not timely commencing an action. Therefore, Defendants can properly apply the terms of the Plan to Plaintiff in the same manner as they may apply the terms to those plan participants who were rehired by Xerox after the issuance of the 1998 SPD and had signed releases. *See e.g*., *Frommert II*, 535 F.3d at 122-123.

The District Court should have permitted Defendants to interpose the statute of limitations defense both to the denial of a claim for benefits and as a valid defense to the Third Claim for breach of fiduciary duty for an alleged failure to

comply with *Frommert I* or *Miller*. There is nothing in ERISA, or the Plan, that requires the Plan Administrator pay benefits on a time-barred claim. This conclusion is supported by the Supreme Court's decision in *Heimeshoff*, where the Court upheld the denial of benefits by a plan administrator based upon a plan's contractual limitations period, reasoning that the administrator was fulfilling its duty under ERISA in denying the claim. *Heimeshoff*, 134 S. Ct. at 612.

A plan administrator is required by ERISA to discharge his duties "in accordance with the documents and instruments governing the plan." *See* 29 U.S.C. § 1104(a)(1)(D). *See, e.g.*, *Moses*, 691 Fed. Appx. 16 (summary order) (affirming the grant of a motion to dismiss a claim for additional pension benefits as time-barred under New York's six-year statute of limitations); *Reches v. Morgan Stanley & Co*., 687 Fed. App'x 49, 50-51 (2d Cir. 2017) (summary order) (affirming the dismissal of plaintiff's claim for pension and stock benefits based on timeliness grounds because the complaint was filed well outside the six-year statute of limitations and no extraordinary circumstances existed to consider equitable tolling); *Mazur v. UNUM Ins. Co.*, 590 F. App'x 518, 522-23 (6th Cir. 2014) (affirming the dismissal of a claim for ERISA benefits as time-barred).

Because the decision to deny Plaintiff's claim was a reasonable one, grounded in the Plan and the law, the District Court's determination that the denial itself was a breach of fiduciary duty lacks foundation and should be reversed. As

the District Court held in its 2013 Order, the gravamen of Plaintiff's claim is one for benefits under 29 U.S.C. § 1132(a)(1)(B), and not one for breach of fiduciary duty. (A-277-284). Such claim, had it been timely interposed and not dismissed, would have been reviewed under *Firestone's* deferential standard to determine whether the denial was arbitrary and capricious.

The District Court failed to consider the fact that the Plan Administrator had reviewed the *Frommert* and *Miller* Decisions when denying Plaintiff's untimely claim and considered that Plaintiff was not similarly-situated to the plaintiffs in those cases. Denying a claim that is untimely is not a breach of fiduciary duty. *See e.g.*, *Muehlgay v. Citigroup Inc*, 649 F. App'x 110, 111-12 (2d Cir. 2016) (summary order) (affirming dismissing of breach of fiduciary duty claim under ERISA on statute of limitations grounds where the plaintiffs had actual knowledge of the alleged breach but failed to timely commence an action); *Novella v. Empire State Carpenters Pension Fund*, No. 05 Cv. 2079 (BSJ), 2009 U.S. Dist. LEXIS 25245, at *11-*13 (S.D.N.Y. Mar. 26, 2009), *aff'd*, 353 F. App'x 596 (2d Cir. 2009) (rejecting plaintiff's argument that the statute of limitations runs from the date on which his benefits were miscalculated and holding that otherwise "'plaintiffs would be free to file ERISA claims whenever they concocted novel legal theories, no matter how many years after benefits had been miscalculated and plaintiff's complaints about miscalculation had been repudiated'…such a rule

would 'undermine the very principle of finality for which statutes of limitations are maintained'").

The District Court's Decisions and Orders below should be reversed, but only to the extent that the Court granted Plaintiff's motion for summary judgment on the breach of fiduciary duty claim on the basis Defendants failed to comply with purported directives of appellate courts and that it denied Defendants' motion to dismiss and/or for summary judgment dismissing that claim.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that this Court reverse the May 10, 2017 judgment entered in favor of Plaintiff on his motion for summary judgment both on the merits and as to the remedy; and further reverse the May 9, 2017 Decision and Order granting Plaintiff's motion for summary judgment and denying Defendants' cross-motion for summary judgment in favor of Defendants; and further order that judgment be entered in favor of Defendants dismissing the Complaint in its entirety including, but not limited to, the Third Claim in the Complaint, and further affirm the 2013 Order of the District Court granting the Defendants' Rule 12(b)(6) motion to dismiss the First, Second and Fourth Claims in the Complaint.

Date: January 12, 2018
Fairport, New York

/s/ Margaret A. Clemens

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P.32 (a)(7)(B) because it contains 6,066 words, excluding the parts of the brief exempt by Fed. R. App. P. 32(f) and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 Times New Roman.

Dated: Fairport, NY
January 12, 2018

/s/ Margaret A. Clemens
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