17-1826(L)

17-1985(XAP)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ROBERT TESTA, an individual,

Plaintiff-Appellee-Cross-Appellant,

—against—

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 PLAINTIFF-APPELLEE-CROSS-APPELLANT

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BACKGROUND

In the administration of Xerox Corporation's Retirement Income Guarantee Plan (the "RIGP" or the "Plan"), Defendants have utilized a unique approach they call the "phantom account." This approach negates most or all of the RIGP "accrued benefits" rehired employees earn after rehire. This approach is unlawful. This Court so held in *Frommert v. Conkright*, with respect to employees who were rehired before September 1998. 433 F.3d 254, 268 (2d Cir. 2006) ("*Frommert I*"). For separate reasons, the Ninth Circuit so held with respect to all rehired employees. *Miller v. Xerox Corp. Ret. Income Guar. Plan*, 464 F.3d 871, 878 (9th Cir. 2006).

Defendants do not like or respect those decisions. Thus, they continue to use the "phantom account" for rehired employees (including those rehired before September 1998) and do all they can to stretch out this matter so they can realize "actuarial gain" as retirees die off or give up all hope of getting some retirement payment before they die. *Frommert v. Conkright* is currently in the midst of its fourth trip to this Court. This *Testa* case has followed close behind and will most likely be followed by a larger parallel case, *Kunsman v. Conkright*.

Defendants' current ploy seeks to kill the *Testa* and *Kunsman* cases (and any other claims of affected RIGP retirees) by alleging that applicable statutes of limitations require retirees to file pension-benefit suits years before they even

retire. In both cases, the District Court granted Defendants' motion to dismiss as to some of the plaintiffs' theories of recovery (which is the subject of Testa's cross-appeal). However, crucially, the District Court denied Defendants' request regarding claims for breach of fiduciary duty. That court then granted summary judgment to Testa since Defendants had not raised any defense other than the limitations statute. A parallel summary judgment motion is now pending in the District Court in the *Kunsman* case.

Defendants appealed the rulings that disfavored them and filed their opening brief on September 22, 2017 ("Defendants' Principal Brief") Testa appealed the RIGP decisions that disfavored him and filed his opening brief on November 13, 2017 ("Testa's Principal Brief"). Defendants filed a response and reply brief on January 12, 2018 ("Defendants' Response"). This current brief is Testa's Reply.

The function of a Reply brief is to respond to new contentions and authorities set forth in Defendants' Response. Since Defendants' Response merely recycled Defendants' prior arguments—and ignored the most significant arguments and authorities discussed in Testa's Principal Brief—this current Reply will be short.

ARGUMENT

I. Testa Was Never Informed That the Phantom Account Was Not Properly Adopted.

As already held in *Frommert I,* the statute of limitations on Testa's claims did not start to run with the 1998 description of how the "phantom account" method worked because that disclosure did not inform Testa that Plan terms did not in fact allow that method to be applied to him.

Defendants repeatedly assert—as the foundation for their appeal—that: "The critical issue is whether Defendants clearly repudiated the plan participant's entitlement to the benefits . . ." and that "This Court already determined that such clear repudiation occurred in 1998 in *Frommert I. See* 433 F.3d at 434." (Defs. Response at 9).

A mystery arises here since there is no such page in *Frommert I* and, more significantly, since this Court said no such thing anywhere in that decision. Here is what this Court actually said on this point:

> As we have indicated above, the 1998 SPD amended the text of the Plan to include the phantom account and comparative methodology by fully setting out how they are used to calculate rehired employees' benefits. . . . Employees hired after this amendment to the Plan occurred, unlike those rehired before then, became Plan participants under the terms of the amended Plan. As such, the phantom account may permissibly be applied to them. With full notice of the phantom account's existence, these rehired employees, unlike their predecessors

> who lacked such information, had the opportunity to make an informed decision about taking or leaving the terms of the deal offered to them under the Plan.

Frommert I, 433 F.3d at 268-69 (emphasis added).[1]

Based on that conclusion, this Court held that—for those rehired after September 1998—the phantom account could be treated as part of the Plan in existence when they were rehired because it would not result in any illegal cutback of benefits. *Id*. at 269. As a result, for that group, Defendants had no obligation to provide a notice of reduction of future benefit accruals (as otherwise required by ERISA § 204(h), 29 U.S.C. § 1054(h)) and there was no forfeiture of already accrued benefits (and thus no violation of ERISA § 204(g), 29 U.S.C. § 1054(g)). *See Frommert I*, 433 F.3d at 269 n.12. However, "the phantom account may not be applied to employees rehired prior to the issuance of the 1998 SPD." *Frommert I*, 433 F.3d at 263. Not in 1998. And not now.

But the Plan Administrator refused to follow that holding. Moreover, he failed in inform Testa and other pre-1998 rehires about its illegal grafting of the phantom account onto the Plan.

Testa's Principal Brief explained at some length how Defendants' assertion that there was a "clear repudiation" rests on a fundamental misreading of

[1] Defendants assert that this passage concludes that the September 1998 SPD "cured any alleged breach or omission." (Defs. Response at 13-14). It did no such thing. That decision merely stated that this SPD was sufficient to allow the phantom account to be applied to those rehired after the SPD was published.

Frommert I. That explanation bears repeating since it is so central to this case yet is simply ignored in Defendants' Response:

> In the present case, the Plan Administrator may have revealed in 1998 that certain plan provisions had been adopted. However, the Plan Administrator did not disclose (1) that the complex working of those Plan provisions would deprive Testa and similarly situated employees of accrued benefits (in violation of both ERISA § 204(g); 29 U.S.C. § 1054(g) and ERISA § 204(h); 29 U.S.C. § 1054(h)); (2) that those plan provisions were not applicable to employees (like Testa) rehired before 1998; (3) that he would refuse to comply with this Court's 2006 order that the phantom account not be applied to such employees; and (4) that he would apply one interpretation of the Plan to one set of employees (the plaintiffs in *Frommert*) and an inconsistent and non-uniform interpretation of that same Plan to others (e.g., *Testa*).

Testa's Principal Brief at 25.

A fiduciary's "clear repudiation" of Testa's right to RIGP accrued benefits involves more than knowing how the phantom account worked and that, if applied, it would decrease his benefit. To have a reasonable chance of understanding that he has valid claims, Testa also needed to know that the phantom account had not been properly adopted and thus did not lawfully apply to him (in 1998 or, as held in *Frommert I*, ever). Until a participant such as Testa knows that the phantom account is not part of the Plan lawfully applying to him, he does not have information necessary to see that he had a valid claim against Defendants. *See Osberg v. Foot Locker, Inc.*, 862 F.3d 198, 206 (2d Cir. 2017).[2]

[2] *Osberg* was discussed at length in Testa's Principal Brief at pages 22-35.

In short, the Plan Administrator did not in 1998 nor any other year clearly and unambiguously disclose facts that were required for Testa and similarly situated rehires to have a way to discover that they had these legal claims under ERISA, nor were such facts of a nature to disclose themselves.

These principles were clearly stated at the end of *Frommert I*. We repeat that decisive passage here:

> The flaw with the district court's conclusion is that the plaintiffs' claim for breach of fiduciary duty is not premised solely on the defendants' adoption of the phantom account; rather it is based on allegations that the defendants made ongoing misrepresentations about the origins of the phantom account in an effort to justify its usage. As a result, learning the manner in which the phantom account functions was not sufficient to provide "actual knowledge" that a breach of fiduciary duty had occurred. "[A] plaintiff has, actual knowledge of the breach or violation, within the meaning of ERISA § 413(2), 29 U.S.C. § 1113(2), when he has knowledge of all material facts necessary to understand that an ERISA fiduciary has breached his or her duty or otherwise violated the act." *Caputo v. Pfizer, Inc.* 267 3d. 181, 193 (2d Cir. 2001). Although the 1995 Benefits Update may have provided notice that the plaintiffs' benefits would be lower than they expected, it certainly did not inform the plaintiffs that the phantom account was being applied in contravention of the Plan's terms. Thus, while the Benefits Update may have heightened the plaintiffs' concerns regarding their expected benefits, "it is not enough that [plaintiffs] had notice that something was awry; [plaintiffs] must have had specific knowledge of the actual breach of duty upon which [they sued]." Id. . . . Such knowledge of an actual breach could only come with disclosure of the fact that the defendants misrepresented the terms of the Plan in justifying the usage of the phantom account.

Frommert I, 433 F.3d at 272-73 (alterations in original) (emphases added).[3]

Defendants' position is based almost entirely on purported "support" from *Frommert I*. Defendants' position in fact finds no support at all in *Frommert I* (nor any other authority).

Nor, in any event, would Testa's claims be time-barred even if Defendants had provided him with the requisite disclosure in 1998 that the Plan did not lawfully contain the terms that they intended to apply to him. Defendants repeatedly stated to all who would listen that they intended (and were required) to apply whatever decision was rendered in *Frommert I* to <u>all</u> rehired employees, including Testa. When Defendants thereafter reneged on these misrepresentations, Testa promptly and timely sued. *See Osberg*, 862 F.2d at 206.

Defendants' conduct constituted an independent actionable fiduciary breach even if the 1998 SPD had constituted sufficient disclosure for rehired employees like Testa (which it did not). Defendants insist that they told Testa in 1998 that he would not receive a full pension. But they indisputably told him something <u>different</u> later, when they said that he (and his colleagues) <u>would</u> receive a full pension if Defendants lost *Frommert*, since Defendants would then be required to apply that rule to everyone.

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[3] While *Frommert I* only specifically addressed this statute of limitations issue in connection with fiduciary breach claims, the same principles (as to what constitutes a clear and unequivocal repudiation) apply equally to other clams.

It may sometimes commence a limitations period to tell employees that they are no longer going to get a watch when they retire. But when the employer later tells employees that, yes, they'll indeed get a watch anyway if the Eagles ever win the Super Bowl, that is an independent fiduciary breach if and when the employer does not pay after a Philadelphia victory—a breach that is not time-barred merely because the employee did not sue the first time. A fiduciary cannot make one lie (e.g., that it will comply with *Frommert I*) and get away with it just because it previously made a different lie (e.g., that the phantom account was part of the Plan). Those are two different fiduciaries breaches, with different limitations periods for each.

The breach of fiduciary duty claims asserted by Testa are thus viable on multiple independent grounds.

II. Testa's Claims Were Tolled During *Frommert*.

Testa's claims were independently timely since they were tolled during the pendency of *Frommert* under the reasoning of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974).

Defendants first respond that *American Pipe* does not apply because *Frommert* was not a class action. But ERISA claims—which require a uniform employer response and treatment—have even stronger claims to tolling than class

actions. The rationale is the same; so long as the first-filed action is pending, it would be both inefficient to require alternative employee intervention as well as unjust not to permit tolling. The same result accordingly applies, and defendants cite no ERISA authority to the contrary.

Defendants then assert that *American Pipe* does not apply because the limitations period applying to fiduciary breach claims under ERISA § 413; 29 U.S.C. § 1113, is a statute of repose. But only part of that statute (§ 1113(1)) is a statute of repose, and that is not the part on which Defendants relied below nor would that provision apply any event. Section 1113 provides that no fiduciary breach claim may be brought after the earlier of:

> (1) six years after the date of the last action which constituted a part of the breach, or
>
> (2) three years after the earlier date on which the plaintiff had actual knowledge of the breach or violation.

ERISA § 413; 29 U.S.C. § 1113.

Only § 1113(1)—not § 1113(2)—is a statute of repose. *California Pub. Emp. Ret. Sys. v. ANZ*, 137 S. Ct. 2042, 2050 (2017); *Leber v. Citigroup 401(k) Plan Inv. Comm.*, No. 07-CV-9329, 2017 WL 56648050, *5 (S.D.N.Y. Nov. 27, 2017) ("Section 1131(1) [i]s a statute of repose."). And under § 1113(1), unlike §

1113(2), the limitations period does not even commence until "the last action which constitutes a part of the breach."

As noted *supra*, in the present case, not only were the misrepresentations by Defendants continuous and ongoing, but the "last act" that constituted these fiduciary breaches indisputably was Defendants' refusal after the *Frommert* opinion was rendered to follow that decision. Because Testa filed well within six years of that last act, § 1131(1) does not bar the claim, and Testa's claims are timely under *American Pipe*.

III. Judicial Estoppel Applies.

Defendants are independently judicially estopped to assert Testa's alleged non-entitlement to the benefits of *Frommert*. Defendants' sole response is a factual one: the assertion that there is no "record evidence" of any statement made by Defendants "in any judicial action" that they would apply the decision in *Frommert* to all rehired employees. With respect, Testa has identified an explicit and unambiguous statement; moreover, the District Court did the same, and it relied on such statement in making holdings below. Estoppel alone thus preserves Testa's entitlement.

IV. Testa Is Entitled to a "New Hire" Benefit and More.

After ruling for Testa as to Defendants' statute of limitations claim as pertaining to fiduciary breach, the District Court entered summary judgment in

Testa's favor and ordered computation and payment of benefits based on a "New Hire" approach. Defendants' appeal relates entirely to statute of limitations contentions. They have, literally or in effect, conceded that the summary judgment in Testa's favor is correct and final. As to that holding, this Court should remand for future proceedings at the District Court, with as much clarity as possible since the history of the RIGP litigation clearly informs us that Defendants will resist or ignore orders if they are given an inch of wiggle room.

Testa lived in California and worked for Xerox in that State. In 2006, while Testa was still working for Xerox, the Ninth Circuit ruled, in *Miller*, that the phantom account could not be applied to the plaintiffs in that case or to any similarly situated RIGP participants. *Miller*, 464 F.3d at 878. When Testa filed his complaint in the Central District of California, Defendants sought to undercut *Miller* by removing this case to this Circuit and then asking the court to ignore the *Miller* result. Defendants succeeded on the first part of their ploy and now ask this Court to help them complete the gambit.

On the first page of Defendants' Response, they pose a question of whether a new issue can be considered on appeal when—Defendants contend—it was not considered in the court below. That Response says nothing more about the question they pose. Of course, it is well established that an appellate court does not normally consider an issue not presented below. However, that matter is within the

discretion of the appellate court, which can consider new issues where justice requires. *See Greene v. United States*, 13 F.3d 577, 586 (2d Cir. 1994); *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

In any event, this matter (namely, consideration of ERISA's detailed substantive rules about computation and forfeiture of "accrued benefits") has been presented several times. It was decided by the Ninth Circuit for employees who are "similarly situated" to Testa. *Miller*, 464 F.3d at 878. It was a central part of Testa's complaint in this matter. (A-28 ¶ 88). And, for example, it was argued in Plaintiff's Opposition to Defendants' Motion to Dismiss. (A-203, A-205). Thus, the argument was raised below, and is a purely legal one in any event. There is no surprise, much less unjust surprise against Defendants in this matter.[4]

While Defendants' have mostly ignored Testa's arguments on the Cross-Appeal, its inattention should not prevent this Court from issuing a decision on those issues. Justice requires such attention. Litigation about the phantom account has been allowed to stretch out far too long. There is no doubt that Defendants will do all they can to delay consideration, determination, and final implementation of the proper result on this claim for as many additional years as they can. This constant battle over these matters has gone on long enough. Testa and others who

[4] The District Court ruled against "actual annuity offset" as the best remedy for disclosure violations. *Testa v. Becker*, 6:10-CV-06229, 2017 WL 1857384 *6 (W.D.N.Y. May 9, 2017). That is a different issue than whether such a result is dictated by ERISA's substantive rules that protect a participant's rights to his "accrued benefits" as carefully defined in ERISA.

will be affected by this determination are retirees. Clearly, for them, justice long delayed is justice denied.

CONCLUSION

Testa's claims were filed well within applicable statutes of limitations. This Court should affirm the district court's determination that fiduciary breach claims were timely, reverse the dismissal of claims for accrued benefits and remand for entry of judgment.

Dated: January 26, 2018
Manhattan Beach, California

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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); Local Rule 28.1(e)(2)(B) because it contains only 3032 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 proportionately spaced typeface using Microsoft Word 2017 in 14 Times New Roman.

Dated: January 26, 2018
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