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

BRIEF FOR PLAINTIFF-APPELLEE-CROSS-APPELLANT

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JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction over the appeal and cross-appeal of the final judgment entered by the district court pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED ON APPEAL

I. Are Testa's Claims Timely?

a. Did the District Court Properly Determine that Testa Made a Timely Breach of Fiduciary Duty Claim Where the Claim Was Made Soon after the Plan Administrator Refused to Apply the Pension Plan in the Manner Directed by this Court's Prior Decisions regarding the Plan?

b. Did the District Court Improperly Dismiss Testa's Other Claims on Statute of Limitations Grounds Where Testa Asserts that the Plan Administrator Computed his Benefit Unlawfully and Testa Filed Suit Promptly after his Benefit Commencement Date?

II. Did the District Court Properly Determine that Testa Is Entitled, on His Claim for Breach of Fiduciary Duty, to a Pension Benefit at Least Equal to that Computed under the "New Hire" Approach Developed after Nearly Two Decades of Litigation in the *Frommert v. Conkright* Case?

III. Is the Phantom Account Pension Offset an Unlawful Forfeiture of Accrued Benefits in Violation of ERISA and, if so, Is the Lawful Offset to Testa's Pension Benefit Limited to the Accrued Benefit that Was Actually Satisfied by the Previous Benefit Payment made to Testa?

STANDARD OF REVIEW

This Court reviews legal issues, including the application of the statute of limitations, *de novo*. *Golden Pacific Bancorp v. FDIC*, 273 F.3d 509, 515 (2d Cir. 2001).

STATEMENT OF THE CASE

A. Introduction.

For nearly twenty years, employees who were rehired for a second period of service at Xerox Corporation ("Xerox") have sought judicial relief, under the Employment Retirement Income Security Act ("ERISA"), to stop the Plan Administrator of Xerox's Retirement Income Guarantee Plan (the "Plan" or the "RIGP") from unlawful use of a "phantom account" under that Plan. The phantom account pretends that most or all of the benefits earned after rehire were already satisfied by a hypothetical appreciation of prior distributions.

In 2006, this Court ruled that—for Xerox employees rehired by 1998—Xerox's purported adoption of the phantom account in 1998 was invalid because it unlawfully took away benefits that had already accrued and therefore violated ERISA § 204(g); 29 U.S.C. § 1054(g). The Court also ruled that the phantom account was independently invalid because, for these same employees, defendants failed to give the advance notice required by ERISA that this purported Plan amendment would decrease the rate of future benefit accruals. ERISA § 204(h); 29

U.S.C. § 1054(h). For those reasons, this Court held that the phantom account amendment never became part of the Plan for employees rehired during or before 1998. *Frommert v. Conkright*, 433 F.3d 254, 263 (2d Cir. 2006) ("*Frommert I*").

This Court was clear: "We also hold that . . . the phantom account may not be applied to employees rehired prior to the issuance of the 1998 SPD." *Id*. at 263. In short, for employees rehired before 1998, the phantom account was never validly part of the Plan. Not in 1989. Not in 1998. Not today. Never.

Defendants are fiduciaries charged with protecting the interests of RIGP participants. Yet, shockingly, Defendants continue to apply the phantom account to individuals rehired before September 1998 in flagrant disregard of this Court's express holding.

One of those individuals is the plaintiff herein, Robert Testa. In 2008, Testa requested his pension from Defendants. Notwithstanding this Court's clear order, Defendants gutted his pension benefit by applying a phantom account offset. So, in 2010, Testa sued.

Testa asserted four causes of action. Defendants asserted that all of those causes of action arose in 1998 and are thus barred by the statute of limitations. The district court disagreed with that sweeping conclusion, and rightfully so. As the district court held, Testa's claim for breach of fiduciary duty for Defendants' failure to comply with this Court's 2006 order surely did not arise in 1998 because

this fiduciary breach did not even exist then. Instead, this claim arose after 2006—and within the limitations period—when Defendants refused to comply with that order and is thus timely.

In the present appeal Defendants make the same timeliness argument that they made, and that this Court rejected, in 2006. Defendants assert that they properly added (and told their employees all about) the phantom account by 1998, and that this disclosure provided actual notice of the resulting offset and hence commenced the limitations period. But this Court disagreed, and held that the resulting breaches of fiduciary duty were both ongoing and timely litigated. That is why Defendants were ordered by this Court, *inter alia*, not to apply this phantom account to, among others, Testa. That is, because as an employee rehired before 1998, Testa's claim arose not in 1998, but in 2009, when he requested and was denied his properly calculated pension.

Because his lawsuit was timely filed, Testa is entitled to—at a bare minimum—the "new hire" benefits ordered by the district court, and that are further required (as a minimum) under the rulings of this Court.

Moreover, as discussed *infra*, Testa is also entitled to additional relief because the phantom account also violates ERISA accrued benefit rules in ways not yet addressed in this Circuit.

This Court should accordingly affirm the grant of relief ordered by the district court and remand for determination of the additional benefits to which Testa is entitled.

B. Prior Court Decisions Regarding the RIGP Phantom Account.

This case is one of several related actions that present similar claims by current and former employees of Xerox regarding their pension benefits and the phantom account offset. This Court has repeatedly considered these issues. A short synopsis of these RIGP cases follows.

First, in *Layaou v. Xerox Corp*., 238 F.3d 205 (2d. Cir. 2001) ("*Layaou*"), this Court considered plan disclosure documents. This Court determined that the Plan's summary plan description ("SPD") was inadequate, and that the "administrator's interpretation of the SPD as permitting application of the phantom account offset [was] unreasonable." *Id.* at 211. As a remedy on remand, the district court held that the appropriate offset was the actual dollar amount of the prior retirement plan distribution. *Layaou v. Xerox Corp*., 330 F. Supp. 2d 297, 304 (W.D.N.Y. 2004).

Next, the Ninth Circuit held in *Miller v. Xerox Corp Ret. Income Guar. Plan*, 447 F.3d 728 (9th Cir. 2006), *amended by* 464 F.3d 871 (9th Cir. 2006) ("*Miller*"), that the phantom account violated ERISA's substantive rules protecting participants' vested rights to "accrued benefits." *Id*. at 874. That court accordingly

held that the plaintiffs and similarly situated employees were entitled to their accrued benefit offset only by the portion of the benefit attributable to prior Plan distributions, and that the phantom account could not be applied. *Id.* at 877-78.

The principal litigation in this Court has been *Frommert v. Conkright*, which was filed in 1999.[1] *Frommert I*, 433 F.3d at 254. In 2006, in *Frommert I*, this Court held that the phantom account did not become part of the plan for any employee before 1998. *Id*. at 257. This Court further held that, for employees rehired before 1998 (e.g., Testa), the phantom account was never validly part of the Plan, and thus could not be used (then or now) to reduce the pension benefits of such employees because any application of that account to such employees would violate both ERISA § 204(g); 29 U.S.C. § 1054(g) (illegal cutback) as well as ERISA § 204(h); 29 U.S.C. § 1054 (h) (failure to give advance notice of reduction in prospective accruals). *Id.* at 263.

This Court similarly held that plaintiffs had properly pled and proved a claim for continuing breaches of fiduciary duty arising out of Defendants' "publishing and supplying misleading information in SPD's, annual Personal Benefits Statements, and in response to Plaintiffs' requests for clarification of their rights under the Plan." *Id*. at 270. This Court concluded that the substantive as well

[1] The Complaint was originally filed in Connecticut and transferred to the Western District of New York in 2000.

as "ongoing" nature of these misrepresentations made these fiduciary duty claims timely. *Id*. at 272-73.

The case was remanded to "craft" a remedy. On remand, the district court determined that the appropriate remedy was—as in *Layaou*—to offset the final pension benefit by whatever amount had been paid out at the earlier time (without interest). *Frommert v. Conkright*, 472 F. Supp. 2d 452, 458 (W.D.N.Y. 2007) ("*Frommert 2007*").[2] On appeal, this Court largely affirmed, holding that the remedy crafted by the district court was proper.[3] *Frommert v. Conkright*, 535 F.3d 111, 119-20 (2d Cir. 2008) ("*Frommert II*").

The Supreme Court subsequently reversed the plan interpretation remedy granted in *Frommert II* on procedural grounds, holding that the district court erred by not granting the Plan Administrator discretion in interpreting the Plan on the second go-round. *Conkright v. Frommert*, 559 U.S. 506, 521-22 (2010). In discussing the breadth of such possible discretion on remand, the Court stated that "[m]ultiple erroneous interpretations of the same plan provision, even if issued in good faith, might well support a finding that a plan administrator is too

[2] The District Court also considered a motion to add plan participants who had not yet retired as plaintiffs and held that it was not necessary to add those plaintiffs to the lawsuit because the Second Circuit's ruling in *Frommert I* "would certainly seem to foreclose defendants from utilizing the phantom account in calculating 'new' retirees' pension benefits." *Frommert 2007*, 472 F. Supp. 2d at 467.

[3] This Court reversed the district court's decision that certain release documents were not a bar to claims of plaintiffs who has signed such releases. *Frommert II*, 535 F.3d at 122-23. That release issue is not relevant here.

incompetent to exercise his discretion fairly." *Id*. at 521. With respect to violations of ERISA notice requirements, the Supreme Court stated: "we leave it to be decided, if necessary, on remand." *Id*. at 522. n. 2. Nothing in the Supreme Court's decision altered the basic conclusions of *Frommert I* or *Miller* regarding the phantom account's violations of ERISA.

On remand from the Supreme Court, the district court determined that the Plan Administrator's new interpretation of the Plan (the "Plan Administrator Method") was reasonable and was not invalidated by lack of notice to participants. *Frommert v. Conkright*, 825 F. Supp. 2d 433, 446, 448 (W.D.N.Y. 2011).

But this Court again reversed. *Frommert v. Conkright*, 738 F.3d 522, 535 (2d Cir. 2013) (*Frommert III*). This Court held that (1) the Plan Administrator Method was unreasonable because it treated rehires less favorably than new hires, and also (2) that, even if that approach had been reasonable, it still violated ERISA's notice requirements. *Id.* at 529. This Court thus remanded both of these claims.

On remand, the District Court imposed an equitable remedy for defendants' violations of ERISA's notice provisions that treated plaintiffs as new hires, and granted various other relief. *Frommert v. Conkright*, 153 F. Supp. 3d 599, 611 (W.D.N.Y. 2016). Various portions of the *Frommert* litigation are currently pending in this Court. Docket No. 17-114.

Further, during the ongoing *Frommert* litigation, in 2008 four dozen plan participants filed *Kunsman v. Conkright* making, among other claims, the same fiduciary duty claims at issue in *Frommert I* and claiming, *inter alia*, that their benefits should be calculated in accordance with *Frommert I*. Defendants argued that this litigation was filed beyond the statute of limitations, just as they had so argued in *Frommert I*. The district court largely disagreed. *Kunsman v. Conkright*, 977 F. Supp. 2d 250 (W.D.N.Y. 2013) (*Kunsman I*). As in Testa's case, the district court held in *Kunsman* that the action was timely and that "…plaintiffs have stated a facially valid claim for breach of fiduciary duty [because] defendants have ignored and refused to follow the Second Circuit's directives in its 2006 *Frommert* decision." *Id.* at 263.

One of the *Kunsman* plaintiffs, Joseph McNeil, also moved for class certification. Defendants repeatedly argued that class certification was not needed because under ERISA the decision in *Frommert* regarding the method of calculating benefits would, as a matter of law, be applicable to those similarly situated plan participants like Testa. After taking "defendants at their word" that "the *Frommert* decision and remedy will apply to the entire putative class here," the Court denied class certification "largely on the ground that class certification is unnecessary here." *Kunsman v. Conkright*, No. 08-CV-6080, Decision and Order, ECF 83 at 14 (W.D.N.Y. July 7, 2017) ("*Kunsman II*").

C. Factual and Procedural History for Testa.

The present action involves yet another lawsuit filed to compel Defendants to comply with the fiduciary duties and other obligations under ERISA. The facts relevant to the present appeal are not in dispute.

Testa worked for Xerox from 1972 until 1983,[4] and again from 1985 to 2008. (A-23, ¶¶ 51-53). When Testa left Xerox in 1983, he had earned an accrued benefit under the RIGP consisting of a pension of approximately $775 per month. (A-24, ¶ 59). At that time, he received about $30,000 as a distribution from Xerox's Profit Sharing Plan (the "PSP"). (A-23-24, ¶ 54). Defendants treated that PSP distribution as satisfying Testa's right to a pension benefit under the RIGP, although Testa did not in fact receive any distribution from the RIGP. (*Id*.).

After a very brief respite, Testa was rehired by Xerox in 1985. (A-23, ¶ 52). Upon rejoining Xerox, Testa was not given the opportunity to repay any part of that 1983 distribution (with or without interest) back to the Plan to restore the situation to the *status quo ante*. (A-422, ¶ 5). Nor was Testa told that his pension benefits would be reduced by a phantom account. (A-26 ¶ 75). Also, by the time of the 1998 SPD, Testa had already earned thirteen years of accrued RIGP benefits for his work during his second period of employment. It was only after those

[4] Testa had a short break in employment from May 12, 1977, until October 3, 1977. (A-23 ¶ 51).

thirteen years of work that Defendants issued the 1998 SPD that purported to gut Testa's pension with a phantom account.

Ten additional years later, on or about July 24, 2008, Testa received a "Pension Calculation Statement" from the Plan Administrator. (A-326-30). As shown on that Statement, Testa was credited for more than 30 years of "Benefit Service" under the RIGP (the maximum recognized under that Plan) and had a Final Average Monthly Compensation of $10,614.18. Under the defined benefit formula stated in Section 4.2 of the RIGP, Testa's total monthly accrued benefit (expressed as a single life annuity starting at normal retirement age) should have thus been $4,457.96 (1.4% of $10,614.18 times 30).

But the Pension Calculation Statement did not show that total benefit at all. It instead only showed a "Reduced Benefit" expressed as a single life annuity of $1,703.65 per month. (A-326). Nothing in that statement or the subsequent claim denial letter explained how the Plan Administrator determined that "Reduced Benefit." (A-325; A-342).

On July 28, 2009, Testa appealed the Plan Administrator's "Reduced Benefit" decision citing *Miller*, *Frommert*, and *Layaou*. (A-345-46). On August 4, 2009, the Plan Administrator rejected that appeal. (A-502). The Plan Administrator stated that it had elected to apply the phantom account to Testa because he "is not a

plaintiff in [those actions] and is not necessarily entitled to the same relief when such final decisions are rendered." (A-502).

On February 4, 2009, Testa received a RIGP lump sum distribution in the amount of $309,842.46, based on a monthly benefit of $1,703.65. (A-327, A-342). Defendants' application of the phantom account accordingly reduced Testa's pension by 61.8 percent (equivalent to a lump sum reduction of roughly $501,263).

D. Procedural History of this Case.

In January of 2010, Testa filed his Complaint in the Central District of California (where he lived and had worked for Xerox). The Complaint asserts four causes of action:

(1) For "accrued benefits" based on the valid terms of the Plan (under ERISA § 502(a)(1)(B); 29 U.S.C. § 1132(a)(1)(B));

(2) For "accrued benefits" based on the lawful portions of the summary of the Plan in its SPD (under ERISA § 502(a)(1)(B); 29 U.S.C. § 1132(a)(1)(B));

(3) For an order to enforce the Ninth Circuit's order in *Miller v. Xerox*, (under ERISA § 502(a)(3)(B); 29 U.S.C. § 1132(a)(3)(B) and inherent powers of the court); and

(4) For appropriate equitable relief pursuant to ERISA § 502(a)(3)(B); 29 U.S.C. § 1132(a)(3)(B). (A-29-31).

Testa's action was thereafter transferred to the Western District of New York, and after the transfer, Defendants filed a motion to dismiss on statute of limitations grounds. (A-37). In 2013, the district court resolved the limitations motions pending in both *Testa* and in *Kunsman*, and in both cases, held that some (but not all) of these claims were timely filed. *Kunsman I*, 977 F. Supp. 2d. at 268; *Testa v. Becker*, 979 F. Supp. 2d 379, 384 (W.D.N.Y 2013) ("*Testa 2013*"); (A-283). The Order in this case held:

> Plaintiff may have been on notice since 1998 of the existence and operation of the phantom account mechanism, but he could not have anticipated, after both the Second and Ninth Circuits disapproved of the use of that mechanism in 2006, that defendants would essentially ignore those rulings, and continue to apply the phantom account as to anyone who had not won a victory in court.
>
> In my view then, plaintiff has stated a facially valid claim for breach of fiduciary duty based on defendants' alleged refusal to follow either *Frommert* or *Miller* with respect to his benefits.

Testa 2013, 979 F. Supp. 2d at 384; (*A*-283).

Testa subsequently filed a motion for summary judgment on the merits, and Defendants filed a cross motion. (A-302-04; A-423; A-451). The district court held that the Plan Administrator had indeed breached his fiduciary duties by applying the phantom account to Testa despite this Court's decision in *Frommert I* that prohibited that practice, and accordingly granted Testa some relief on the merits, essentially awarding him the same "new hire" relief that it had earlier granted to

the *Frommert* plaintiffs. (SPA-11). Defendants and Testa thereafter timely filed appeals regarding the 2013 and 2017 Orders and the resulting judgment.

SUMMARY OF ARGUMENT

The Plan Administrator—a fiduciary obligated to administer the Plan in the interests of the Plan's participants—continues to fight "block by metaphorical block"[5] to avoid paying benefits to these employees. In 2006, this Court held that the phantom account could not be applied to employees rehired before September 1998. *Frommert I*, 433 F.3d at 257. In that same year, the Ninth Circuit held that the phantom account itself violated ERISA's substantive accrued benefit rules. *Miller*, 464 F.3d at 874. Yet, eleven years later, in disregard of these final judgments, the Plan Administrator continues to apply the phantom account to Testa and its other employees rehired before September 1998.

When opposing the class action motion in *Kunsman*, the Plan Administrator stated that he would apply—and would legally be required to apply—the result of the *Frommert* decision to all similarly situated Plan participants, including those employees who are plaintiffs in *Testa* and *Kunsman*. But despite those judicial representations, the Plan Administrator refuses to follow either *Frommert* or *Miller* and continues to apply the phantom account to Testa and other pre-1998 rehires, even after this Court has expressly held that it may not permissibly do so.

[5] *Frommert 2016*, 153 F. Supp. 3d at 610.

This intransigence is abhorrent. It is bad enough for a fiduciary to perform his trust functions in an arbitrary and unreasonable manner. *See Frommert III*, 738 F.3d at 529-30. It is even worse when he continues to do so after courts have repeatedly determined that his actions were wrongful.

Defendants defend their snubbing of judicial mandates by contending that the claims at issue are barred by the statute of limitations, arguing—just as they argued in *Frommert I*—that the limitations period expired prior to the filing of this suit. But *Frommert I* held expressly to the contrary. In that opinion, this Court held that the phantom account amendment could not be applied to any individual rehired prior to 1998 because that 1998 change in Plan terms violated the cutback rules of ERISA § 204(g); 29 U.S.C. § 1054(g), as well as the amendment-notice rules of ERISA § 204(h); 29 U.S.C. § 1054(h).[6] And with respect to the timeliness of the resulting fiduciary duty claims, this Court explicitly held that the 1998 SPD did not start the limitations period on these claims because that notice did not provide "all material facts" related to these claims. *Frommert I*, 433 F.3d at 272.

The district court thus correctly held that Testa asserted a valid and timely claim for breach of fiduciary duty. That decision is consistent with—and indeed compelled by—*Frommert I* and should accordingly be affirmed.

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[6] ERISA § 204(g); 29 U.S.C. § 1054(g) prohibits reduction of already accrued benefits. ERISA § 204(h); 29 U.S.C. § 1054(h) prohibits a reduction in the future rate of accrual of benefits, unless the requisite advance notice is given.

Testa has also filed a cross appeal. The Ninth Circuit's decision in *Miller* held that the phantom account violates ERISA's substantive provisions that protect "accrued benefits." In its statute of limitations decision in this case (and in the companion *Kunsman* case), the district court dismissed this claim as time-barred. That conclusion, which failed to distinguish accrued benefit claims from notice claims, was erroneous. This claim involves ongoing violations of ERISA by use of the phantom account approach. There is no authority that allows a plan to violate ERISA forever simply because it has done so for a while. In any event, Testa's dismissed claims are in fact timely. Testa is entitled to an "actual annuity offset" pursuant to this claim, if that amount exceeds the "new hire" benefits awarded below.

ARGUMENT

I. Testa's Claims Are Not Time-Barred.

Testa's claims were timely filed, including but not limited to the claim for which the district court granted relief below. Testa filed his lawsuit in 2010, and his claims accrued in 2009 when Testa requested his retirement benefits and the Defendants paid him a pension that was improperly reduced by the phantom account. Testa's suit was filed well within the limitations period established by ERISA. *See ERISA* § 413; 29 U.S.C. § 1113 (statute of limitations for ERISA claims is "six years after . . .the date of the last action which constituted part of the

breach or violation," or "three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation," whichever ends first, but, in any event, may be extended in the case of fraud or concealment).

Defendants claim that Testa's claim instead arose in 1998 when they issued an SPD that mentioned the phantom account. That contention is erroneous for five independent reasons:

- It conflicts with precedent, which holds that the limitations period for ERISA fiduciary duty claims commence only when the participant has "actual notice" of the particular claim;
- It conflicts with *Frommert I*, which held both that the fiduciary duty claim was timely given the ongoing nature of the breaches and that the SPD did not provide actual notice of that claim;
- It does not bar Testa's claims that Defendants breached their fiduciary duties when they failed to comply with the mandate of *Frommert I*, which (as the district court correctly held) arose only after that decision was issued in 2006;
- It conflicts with the express and repeated representations of Defendants to the judiciary and is barred by judicial and collateral estoppel; and

- It fails to recognize that the filing of *Frommert* in 1999 was indisputably within the limitations period and tolled the statute for Testa and well as the other pre-1998 rehires.

A. Testa's Claims Were Timely Because He Was Not On Actual Notice of These Claims Until 2009.

The general rule is that the statute of limitations on a participant's ERISA benefit claims starts to run with the benefit commencement date; e.g., when the participant requests retirement benefits. *Carey* v. *IBEW Local*, 201 F.3d 44, 47 (2d Cir. 1999). For Testa, this was indisputably in 2009. He filed his lawsuit in 2010, well within the limitations period.

Defendants rely exclusively upon a limited exception to this general rule that provides that the limitations period may also commence when there has been a "clear and unambiguous repudiation" of benefits and the plaintiff has actual notice of this repudiation. Appellants' Br. ECF 61 at 22 (September 21, 2017). Under such circumstances, the fully-aware plaintiff has no reason not to immediately sue, rather than to wait until his benefits are *pro forma* denied at some later date.

But this doctrine is inapplicable here. First, there was no clear and unequivocal repudiation; indeed, by contrast, Defendants repeatedly said that they would not apply the phantom account to *anyone*, including Testa, if they ultimately lost *Frommert* (which they did). Second, independently, as this Court has already held, the 1998 SPD did not provide participants like Testa with "actual knowledge"

of their claims sufficient to commence the limitations period. The exception to the general rule thus does not apply, and Testa's claims are timely.

1. There Was No Clear and Unequivocal Repudiation

The early commencement of the limitations period under ERISA first requires an unambiguous and unequivocal declaration by the defendants that they will unquestionably deny the benefits at issue. As this Court explained in *Carey*:

> In sum, we hold that a cause of action under ERISA accrues upon a clear repudiation by the plan that is known, or should be known, to the plaintiff—regardless of whether the plaintiff has filed a formal application for benefits. . . .Whether or not Carey filed a formal application for benefits before his retirement in 1992, the Plan clearly and unequivocally repudiated Carey's entitlement to benefits in its October 28, 1991 letter, which reported that the Plan Trustees had denied his appeal.

Carey, 201 F.3d at 49 (emphasis added).

Defendants assert that the 1998 SPD unequivocally indicated that they intended to apply the phantom account. But immediately after that 1998 SPD, in 1999, *Frommert* was filed, an action that challenged that intention and seeking a judicial declaration that the phantom account could not, in fact, be applied. Under Department of Labor Regulations, ERISA plans are required to ensure that plan provisions are "applied consistently with respect to similarly situated claimants." 29 C.F.R. § 2560.503-1(b)(5). Uniform treatment of Plan participants is similarly required by precedent. A plan fiduciary "is required by law to ensure that 'the plan provisions' are 'applied consistently with respect to similarly situated claimants.'"

Stephan v. Unum Life Ins. Co., 697 F.3d 917, 936 (9th Cir. 2012) (citing 29 C.F.R. § 2560.503-1(b)(5)).

Defendants (as well as participants in the Plan) accordingly knew full well that the phantom account would not be applied were the plaintiffs to prevail in *Frommert*, a litigation filed well within the limitations period. That's what federal law as well as precedent required. If the *Frommert* plaintiffs established——as they did——that the Plan did not properly include a phantom account for them (because they were rehired before the 1998 SPD), then Defendants would be compelled to treat identically to those *Frommert* plaintiffs every other participant rehired before that same date. *See, e.g.*, *K.M. v. Regence BlueShield*, No. C13-1214 RAJ, 2014 WL 801204, *15 (W.D. Wash. Feb. 27, 2014) (holding that because ERISA requires plan provisions to be "applied consistently with respect to similarly situated claimants . . . Thus, were this Court to find that the Plan requires Defendants to act in a certain fashion, ERISA would require [Regence] to act in a similar fashion toward all beneficiaries.").

Accordingly, within a mere year after the 1998 SPD, it was uncertain—i.e., equivocal——whether the phantom account would indeed be applied, because if Frommert prevailed in his 1999 litigation, Defendants would be required to ignore this account and to instead apply whatever holding was rendered in *Frommert* to all of the other participants in the Plan. It was not just the participants who

understood this, but Defendants as well. As Defendants themselves told the district court in the related *Kunsman* litigation:

> The outcome of the claims asserted by Plaintiff McNeil and the other *Kunsman* Plaintiffs in this case (whether or not part of the putative class) is controlled by the outcome of the *Frommert* action. The decision reached in *Frommert* regarding the method of calculated benefits will, as a matter of law, be applicable to those in the putative *Kunsman* class.

Kunsman v. Conkright, No. 08-CV-6080, Ds. Mem. in Opp. ECF 68 at 16 (June 13, 2014) (cited in *Kunsman II*, No. 08-CV-6080, Decision and Order, ECF 83 at 14 (July 7, 2017)).

There is a "clear and unequivocal" repudiation of benefits when, as in *Carey*, defendants deny a participant's appeal and tell him that his benefits will not under any circumstances be paid. *Carey*, 201 F.3d at 49. But that is not what transpired here. Instead, here, Testa did not file his benefit appeal until 2009, and although Defendants mentioned the existence of the phantom account in the 1998 SPD, whether that account would actually be applied (i.e., whether it was validly part of the Plan) was hotly contested——i.e., equivocal——within a mere year. And even long after that purportedly "clear and unequivocal" 1998 SPD, Defendants themselves continued to say that they would not apply the phantom account to participants like Kunsman and Testa if they lost *Frommert*, since "[t]he decision in Frommert regarding the method of calculated benefits will, as a matter of law, be applicable" to everyone rehired before the 1998 SPD.

These facts alone are fatal to Defendants' limitations arguments. There was no "clear and unequivocal" repudiation of benefits, so the general rule applies, and Testa's claims are timely.

2. The 1998 SPD Did Not Impart Actual Knowledge of the Claims

Independently, this Court has repeatedly made clear that the expedited limitations period applies only when the participants have "actual knowledge" of the details of their particular claims. For example, Defendants cite *Novella v. Westchester County*, 661 F.3d 128 (2d Cir. 2011), as applying the early commencement rule, and indeed it did. That is because *Novella* held that the statute of limitations may begin to run when a plaintiff has sufficient information to know of a miscalculation of his benefits: "We conclude that notice of a miscalculation can be imputed to a pensioner—and the statute of limitations will start to run—when there is enough information available to the pensioner to assure that he knows or reasonably should know of the miscalculation." *Id*. at 147 (emphasis added).

This Court recently reaffirmed and built on these principles in *Osberg v. Foot Locker, Inc.*, 862 F.3d 198 (2d Cir. 2017) ("*Foot Locker*"), and that holding is dispositive here. *Foot Locker* involved a plan amendment adopted in 1996 that converted a traditional defined benefit plan into a cash balance plan. *Id*. at 202. Were the actuarial and investment implications of that conversion fully understood,

for most plan participants overall benefits under the plan would be "frozen" for a significant period of time until the cash balance account grew to the size of the accrued benefit already earned under the defined benefit provisions applicable before the 1996 amendment. *Id*. at 203.

The phantom account at issue here has a similar effect; until the hypothetical appreciation of the prior distribution is overcome by additional years of service, an employee's benefits are "frozen" for years (and, for some employees, forever). Defendants insist that the limitations period runs once the relevant plan provision is adopted (or, at the latest, when participants are informed of that adoption). Under that theory, the claims in *Foot Locker* would be untimely, since that action was filed over a decade after the 1996 amendment was enacted and distributed. *Id*. at 205. Indeed, Foot Locker made precisely such a limitations argument. *Id*. at 206.

But this Court disagreed. This Court cited *Layaou*, and observed that the SPD was the primary source of information about the plan. *Id*. at 205. The SPD and other plan disclosures in *Foot Locker* indeed provided a general description of Foot Locker's new cash balance methodology. But those disclosures, while accurately describing the plan provisions, did not mention that, as a result, accrued benefits were effectively frozen. *Id*. This fact, this Court concluded, was

dispositive. The disclosure of the plan provision did not commence the limitations period.[7]

This Court's discussion of the "fraudulent concealment doctrine" in *Foot Locker* is instructive. That doctrine provides that "when a defendant's wrongdoing 'has been concealed, or is of such character as to conceal itself, the statute of limitations does not start to run until the wrongdoing is discovered' by the plaintiff." *Id*. at 210 (citing *Caputo v. Pfizer, Inc*., 267 F.3d 181, 189 (2d Cir 2000)). Knowing that something is "off" does not start the statute. *Caputo*, 267 F.3d at 193 (stating that while the "announcement should have (and did) give plaintiffs reason to <u>suspect</u> that Pfizer had lied to them, '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].'") (alterations and emphasis in original). The disclosure of plan provisions instead commences the limitations period only when those disclosures fully inform the participants of the

[7] Other circuits have adopted this identical holding. *See, e.g., Romero v. Allstate Corp.*, 404 F.3d 212, 223 (3d Cir. 2005) ("[W]hen an ERISA plan is amended but the fact that amendment actually affects a particular employee or group of employees cannot be known until some later event, the cause of action of the employee will not accrue until such time as the employee knew or should have known that the amendment has brought about a clear repudiation of certain rights that the employee believes he or she had under the plan."); *Meagher v. Int'l Assoc. of Machinists and Aerospace Workers Pension Plan*, 856 F.2d 1418, 1422 (9th Cir. 1988) (rejecting the district court's ruling that the cause of action accrued when the inoperative amendment was passed or when plaintiff found out that the amendment was passed, and holding that plaintiff "was harmed only by the wrongful <u>application</u> of the amendment. Only then were his accrued benefits <u>decreased</u>.") (emphasis in original).

facts that are sufficient for an understanding of the particular claims and breaches of duty at issue.[8]

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).

In short, the Plan Administrator did not in 1998 nor any other year clearly and unambiguously disclose facts that were critical for Testa and similarly situated

[8] *See also Thompson v. Ret. Plan for Emps. of S.C. Johnson & Son, Inc.*, 651 F.3d 600, 605-06 (6th Cir. 2011) (SPD informing participants of conversion to cash balance plan "would not likely alert a participant that he was being deprived of something to which he might be entitled" and thus did not start the statute of limitations on claims regarding defects in the cash balance plan features). Also, compare this Court's Summary Order in *Hirt v. Equitable Ret. Plan for Emps., Managers, and Agents, 285* Fed. Appx. 802, 804 (2d Cir. 2008), finding that a 1992 SPD "unequivocally repudiated" the terms of the pre-amendment plan, with *Hirt v. Equitable Ret. Plan for Emps., Managers, and Agents*, 533 F.3d 102 (2d Cir. 2008), decided the same day and addressing the merits of claims that the substance of the new terms violated ERISA's accrued benefit rules.

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. The Plan Administrator could have, but did not, inform participants that he would not follow *Frommert*. The Plan Administrator could have, but did not, inform participants that he would apply the phantom account even though it was not in the Plan for employees rehired before the 1998 SPD. And he could have, but did not, inform participants that he had no intention of treating employees consistently under the Plan.

These are not minor or meaningless omissions by a fiduciary. *Kalda v. Sioux Valley Physician Partners, Inc*., 481 F.3d 639, 644 (8th Cir. 2007) ("The duty of loyalty requires a fiduciary to disclose any material information that could adversely affect a participant's interests."); *Ervast v. Flexible Prods. Co.*, 346 F.3d 1007, 1016 n.10 (11th Cir. 2003) (stating a "fiduciary's duty to provide 'complete and accurate information to its beneficiaries' 'entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful'"). Testa did not file suit in 1998 because he was not told that Defendants intended to ignore a Department of Labor regulation, apply a provision that was not in the Plan, treat beneficiaries inconsistently, and ignore express commands of the Second and Ninth Circuits. Nor did he sit on his rights; instead, everyone understood that the *Frommert* action filed one year after the 1998 SPD would be determinative, so there was no reason (even had he been fully

informed) for Testa to act. Only when Defendants thereafter repudiated their express representations, ignored the order of this Court, and denied his benefits in 2009 did Testa have actual knowledge of the fiduciary breaches and an obligation to act. And he did so, less than a year later. That is timely under ERISA.

B. Testa's Action Is Timely Under *Frommert I*.

This Court need not, however, analyze in detail the limitations precedent as applied to the 1998 SPD, because it has already done so in *Frommert I*. This Court rejected, in that previous case, the same limitations argument made by Defendants in the present action. That language, and holding, controls.

On the substantive merits, this Court's opinion in *Frommert I* first held that the phantom account was never validly a part of the Plan with respect to individuals (like Testa) rehired before 1998. As this Court explained:

> [W]e hold that application of the phantom account by the defendants prior to its inclusion in the Plan by amendment constituted a prohibited reduction of justified expectations of rehired employees' accrued benefits in contravention of § 204(g). We also hold that the defendants failed to meet their obligations to provide advance notice of the amendment as required by § 204(h), meaning that 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. By contrast, the phantom account could be applied to individuals rehired after 1998 because they were not participants in the Plan before that date and thus were not exposed to unlawful forfeitures under ERISA § 204(g); 29 U.S.C. § 1054(g) (since they had no unsatisfied accrued benefits) nor

unlawful prospective plan amendments under ERISA § 204(h); 29 U.S.C. § 1054(h) (since the plan terms were changed before they were rehired). *Id*. at 269 n.12.

After addressing the merits, this Court then resolved the timeliness argument that Defendants made therein (and that they repeat in the present appeal). This Court held not only that employees rehired before 1998 (e.g., Testa) had a cognizable claim for breach of fiduciary duty arising out of Defendants' various inadequate and inaccurate representations to participants, *id*. at 272, but also found those claims—the same ones made by Testa herein—timely, and reversed the district court's contrary decision below.

The decisive language in *Frommert I* states:

> 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.

Id. at 272-73 (alterations in original) (emphases added).

This express holding is dispositive. Testa, like the plaintiffs in *Frommert*, has made claims based not on the adoption of the phantom account, but because “defendants made ongoing misrepresentations” about it. *Id*. at 273. Due to those “ongoing misrepresentations” by Defendants, Testa, like the *Frommert* plaintiffs, did not have “actual knowledge that a breach of fiduciary duty had occurred,” notwithstanding “learning the manner in which the phantom account functions” in 1998. *Id*. Moreover, even though Testa (like the *Frommert* plaintiffs) may arguably have been on notice in 1995 (or 1998) “that [their] benefits would be lower than they expected,” those disclosures “certainly did not inform the plaintiffs that the phantom account was being applied in contravention of the Plan’s terms.” *Id*. Those failures to inform—and affirmative misrepresentations—did not place plaintiffs (including Testa) on “actual notice” of the relevant fiduciary breaches. The limitations period thus did not commence in 1998.

The claims in the present appeal are thus timely for the precise reasons—and pursuant to the exact language—articulated by this Court in *Frommert I*. Defendants breached their fiduciary duties by affirmative, ongoing

misrepresentations about the nature of the phantom account and its alleged inclusion in the Plan. Participants were, as this Court held, not put on actual notice of those claims, or those ongoing misrepresentations, as a result of the 1998 SPD. The limitations period thus did not commence. Defendants' arguments to the contrary conflict with the holding of *Frommert I*—which is not only precedent, but which collaterally estops Defendants from arguing to the contrary—and those legal contentions are, in any event, meritless for the precise reasons articulated by this Court therein.

C. Testa's *Frommert I* Claim Was Timely.

Third, at a minimum, the district court properly concluded that Testa's claim that Defendants breached their fiduciary duties by not complying with this Court's decision in *Frommert I* was timely filed. Defendants assert that this claim, which arose after 2006, somehow arose in 1998 as well. Not so.

An honest fiduciary will comply with judicial orders, particularly those that conclusively hold that a prior contrary course of conduct was illegal. Defendants were told in 2006—and repeatedly thereafter—that they could not apply the phantom account to Testa or other employees rehired prior to the 1998 SPD. Those binding instructions were clear, unambiguous, and consistently reiterated:

- "[T]he phantom account may not be applied to employees rehired prior to the issuance of the 1998 SPD." *Frommert v. Conkright*, 433 F.2d 254, 263 (2d Cir. 2006) ("*Frommert I*")

- "Xerox may not lawfully use the phantom account mechanism, as to either the named plaintiffs in this lawsuit, or anyone else who was rehired by Xerox prior to [September] 1998, after having previously received a distribution of pension benefits." *Frommert v. Conkright*, 472 F. Supp. 2d 452, 456-57 (W.D.N.Y. 2007) ("*Frommert 2007"*)

- "We also held that the 1998 Benefits Update . . . was effective only to employees hired after the issuance of the Update." *Frommert v. Conkright*, 738 F.3d 522, 527 n.4 (2d Cir. 2013) ("*Frommert 2013"*)

- "It is hard to imagine how anyone could read the Second Circuit's directive and still persist in using the phantom account. This is especially so for a fiduciary. It is difficult to see, then, how the plan administrator could read the Second Circuit's language in *Frommert* and continue to apply the phantom account to employees rehired before 1998, consistent with that decision and with the administrator's fiduciary duty to act in the interests of plan participants." *Kunsman v. Conkright*, 977 F. Supp. 2d 250, 263 (W.D.N.Y. 2013) ("*Kunsman I"*).

- "The Second Circuit's statement that 'the phantom account may not be applied to employees rehired prior to the issuance of the 1998 SPD hardly sounds like *dictum.* . . . To the contrary, it seems like a clear directive." *Testa v. Becker*, 6:10-CV-06229, 2017 WL 1857384, *5 (W.D.N.Y. May 9, 2017) ("*Testa 2017"*); (SPA-8).

As the district court found, Testa asserted a valid cause of action for breach of fiduciary duty based upon Defendants' refusal to follow those judicial directives and findings. Nor was that cause of action untimely or accrued in 1998. As the district court concluded:

> Plaintiff may have been on notice since 1998 of the existence and operation of the phantom account mechanism, but he could not have anticipated, after both the Second and Ninth Circuits disapproved of the use of that mechanism in 2006, that defendants would essentially

> ignore those rulings, and continue to apply the phantom account, as to anyone who had not yet won a victory in court.

Testa 2013, 979 F. Supp. 2d at 384; (A-309).

Testa could not have brought this claim in 1998 not only because he could not have anticipated it (and hence did not have "actual knowledge" of it), but also for the simple reason that this claim did not yet even exist. It arose in 2006 and thereafter, when the judiciary made dispositive findings, and thereafter when the Defendants breached their fiduciary duties to participants by deliberately refusing to follow those neutral instructions. As the district court correctly explained:

> In 2006, the Second Circuit held that the phantom account may not be applied to an employee rehired prior to 1998. That same year, the Ninth Circuit in *Miller* did so as well. Plaintiff Testa was rehired prior to 1998, and he finally retired and sought benefits in 2008. In 2009, the Plan administrator issued a decision, as to Testa, that essentially ignored the Second and Ninth Circuit's 2006 proscription of the application of the phantom account to employees rehired prior to 1998. That refusal, by the plan fiduciary, to follow controlling court decisions is what forms the basis of this claim . . .
>
> [P]laintiff's third cause of action is timely, and [] plaintiff is entitled to relief on that claim . . . Plaintiff's § 502(a)(3) claim presumably arose no earlier than 2006, but no evidence has been presented to this Court that plaintiff was made aware, more than three years before he filed suit in January 2010, that defendants would refuse to abide by the 2006 directives of the Second and Ninth Circuits. For all that the record shows, it was not made known to plaintiff that his pension benefits would be reduced based on the phantom account (in apparent contravention of the court of appeals' disapproval of the application of that account) until after his 2008 retirement.
>
> All the evidence in the record indicates that this claim did not accrue until the administrator denied plaintiff's claim in 2009. No

> additional proof has been presented to the Court indicating that plaintiff was apprised, prior to the denial of his claim in 2009, that the administrator would refuse to apply the *Frommert* holding to Testa or to anyone else who was not a plaintiff in *Frommert*. As has been made abundantly clear, that refusal was unjustified and constituted a breach of the administrator's fiduciary duty to plaintiff.

Testa 2017, 2017 WL 1857384, *8-9 (W.D.N.Y. May 9, 2017) (emphasis in original) (footnote omitted); (SPA-8-9).

Defendants, as fiduciaries, had a duty to comply with judicial directives. They breached that duty. That claim did not exist in 1998 and then "spring back to life" in 2006, for the simple reason that at no time before 2006 had defendants breached that duty. Which in turn is why Testa could not, and did not, bring a claim in 1998 that did not yet exist. His assertion of that claim in January 2010, after Defendants applied the phantom account to him in breach of this fiduciary duty, was timely.

D. Defendants Are Estopped to Assert a Timeliness Claim.

Defendants would also be estopped to assert their timeliness claim even in the event it had merit. Defendants asserted and lost this precise claim in *Frommert I*, and that decision collaterally estops them from arguing to the contrary in the present case. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326-33 (1979) (authorizing issue preclusion in such settings). Moreover, Defendants are also judicially estopped from asserting this timeliness claim based upon their representation to the judiciary that they would be legally bound to apply the

Frommert holding to all participants in the Plan (including Testa)—a representation that the district court expressly relied upon as the basis for granting Defendants' request to not certify a class. In *Kunsman*, plaintiff McNeil pled and sought certification of a class consisting of participants in the Plan rehired before 1998 who were not yet named parties in any of the existing lawsuits. *Kunsman v. Conkright*, No. 08-CV-6080, M. to Cert. Class, ECF 66 (March 31, 2014). Defendants opposed class certification, arguing that a class was unnecessary because, as a matter of law, they would be required to apply whatever remedy was granted in *Frommert* to all participants (including Testa). Defendants told the district court:

> The outcome of the claims asserted by Plaintiff McNeil and the other *Kunsman* Plaintiffs in this case (whether or not part of the putative class) is controlled by the outcome of the *Frommert* action. The decision in *Frommert* regarding the method of calculated benefits will, as a matter of law, be applicable to those in the putative *Kunsman* class.

Kunsman v. Conkright, No. 08-CV-6080, Ds. Mem. in Opp. ECF. 68, at 16 (June 13, 2014). The district court in turn relied on this express representation by defendants to deny class certification. The district court stated:

> In opposing McNeil's motions, however, defendants state that '[t]he decision reached in *Frommert* regarding the method of calculated benefits will, as a matter of law, be applicable to those in the putative *Kunsman* class.' Defendants seem, then, to recognize the plan administrator's duty to apply the court-ordered remedy across the board.

> The Court will take defendants at their word, and deny McNeil's motion for class certification, largely on the ground that class certification is unnecessary.

Kunsman II, No. 08-CV-6080, Decision and Order, ECF 83, at 14 (July 7, 2017).

Judicial estoppel applies when "a party both takes a position that is inconsistent with one taken in a prior proceeding, and has had the earlier position adopted by the tribunal to which it was advanced." *Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 148 (2d Cir. 2005). Those elements are satisfied here. Defendants told the district court 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. That representation conflicts with their current claim that they are not compelled to apply that remedy to Testa. Further, the district court relied upon that representation to deny class certification; as a result, Defendants' position was adopted by the district court.

Estoppel thus applies. Having lost *Frommert* and having told the district court that such a loss would result in all participants being granted that remedy as a matter of law, Defendants cannot now be heard to interpose a timeliness objection to deny that remedy.

E. Testa's Claims Were Properly Tolled.

Finally, not only were Testa's claims timely filed on their own right, but they were particularly timely given the pendency of the *Frommert* action filed in 1999, which, properly interpreted, tolled the limitations period as well.

Defendants insist that Testa was on notice and should have filed suit after the 1998 SPD was disclosed. But *Frommert* was filed in 1999, a mere year after that SPD. Moreover, that action was, and has consistently been, pending to challenge the legality of the phantom account to Plan participants.

As noted *supra*, pursuant to Department of Labor regulations and fiduciary duty precedent, Defendants were under a duty to apply any remedy granted in the pending *Frommert* action to all Plan participants, including but not limited to those who were not named plaintiffs in *Frommert* itself. Under such circumstance, there was no need for Testa to file his own suit; rather, such duplicative litigation would have been wasteful, unnecessary, and burdensome to both the court and to the parties.

In the particular context of ERISA, then, the representative *Frommert* action was akin to a putative class action. Because the outcome of *Frommert* would be applicable, under ERISA, to all participants, there was neither doctrinal reason nor practical need for the unnamed participants to formally join that action. In such a setting, as the Supreme Court held in the class context in *American Pipe &*

Construction Co. v. Utah, 414 U.S. 538, 554 (1974) ("*American Pipe*"), the filing of the initial action tolls the limitations period for any subsequent individual suits so long as the initial action remains pending. *See also Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54 (1983) (same).

The rationale for the Supreme Court's federal common law holding in *American Pipe* is equally applicable to participant ERISA actions such as the one in *Frommert*. The Supreme Court held that the filing of such actions should toll the limitations period because similarly-situated individuals (e.g., participants in a Plan or in a class) would otherwise be compelled to file duplicative lawsuits of their own in order to prevent the limitations period from expiring in the event the first-filed action did not grant them a remedy. *American Pipe*, 414 U.S. at 551. That would be a disaster, particularly where (as here) there were a number of such similarly-situated individuals. *Id*. The solution, the Court held, was to create federal common law tolling. That way, individuals could refrain from filing suit until the first-filed suit was no longer pending and/or it became clear that this action would not provide them with a remedy. *Id*.

So too here. Testa did not sit on his rights. If he had filed an action in 1999, that would have been not only identical to the claims that were already pending in *Frommert*, but that would have been identical to the thousands of other identical individual suits that would have been compelled under the limitations theory

advanced by Defendants herein. Instead, he filed his own action only once it became clear, after the denial of his benefits request in 2009, that Defendants would not, in fact, comply with whatever remedy was granted in the first-filed *Frommert* action. Those are precisely the circumstances that the Supreme Court held justify invoking federal common law tolling.

Testa and the other Plan participants thus did exactly what the Supreme Court in *American Pipe*, as well as the district court in *Frommert*, wanted them to do:

> To the extent that any of the proposed new plaintiffs have not yet retired from Xerox, I see no basis for adding them to this lawsuit. As stated earlier, the Second Circuit's holding that the 'phantom account may not be applied to employees rehired prior to the issuance of the 1998 SPD' would certainly seem to foreclose defendants from utilizing the phantom account in calculating "new" retirees' pension benefits.

Frommert 2007, 472 F. Supp. 2d at 467.

The judiciary knew that any decision in the first-filed action would be extended, "as a matter of law," to all participants, and Defendants themselves so argued. Given this reality, there was no need to file separate duplicative suits, nor to intervene in the existing action. So Testa did what he was told.

Common law tolling should be applied in such settings, just as it was applied for identical reasons in *American Pipe*. To do otherwise would needlessly compel duplicative, wasteful litigation. And it would also reward Defendants for their

deliberate refusal, even as fiduciaries, to comply with judicial mandates and to treat Plan participants equally. Such a result would conflict with the fundamental purpose of the common law. As the Supreme Court cogently explained in an analogous limitations action:

> To decide the case we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations.

Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231, 232-33 (1959).

At a minimum, then, Testa should be entitled to tolling of the statute pursuant to federal common law during the pendency of the *Frommert* action, which in turn would indisputably make his individual suit timely.

II. The District Court Properly Determined that Testa Is Entitled, on His Claim for Breach of Fiduciary Duty, to a Pension Benefit at Least Equal to that Computed under the "New Hire" Approach.

Eighteen years of litigation—and four visits to this Court of Appeals—have established that Xerox employees rehired by September 1998 are entitled to a RIGP benefit that is no worse than a "new hire" benefit. Defendants insisted and successfully argued that moving this case to the Western District would provide useful uniformity and reduce the burden on the federal court system. Defendants have received the uniformity they requested. Defendants do not appeal the basic substance of the breach of duty. Their sole argument on appeal (and below) was

timeliness. Thus, if the Court holds Testa's claims timely, the remedy granted below ("new hire") must be affirmed.

The district court properly determined that the Plan Administrator owed a duty to Testa and then breached that duty. *Testa 2017*, 2017 WL 1857384, *5 (W.D.N.Y. May 9, 2017); (SPA-8). This is for good reason, a breach of a fiduciary duty exists, for example when a fiduciary continues to apply an illegal plan term after the Court of Appeals holds that this term is unlawful, even in a case brought by different plaintiffs against the same plan. *Meagher v. Int'l Assoc. of Machinists and Aerospace Workers Pension Plan*, 856 F.2d 1418, 1421, 1423 (9th Cir. 1988).

At the very least, if the Plan Administrator planned to ignore judicial rulings regarding the RIGP, he had the obligation to inform Plan participants that he was taking such a position. Indeed, the only reason the plaintiff in *Meagher* knew that his benefits were being miscalculated was because the plan sent him (and other beneficiaries) a letter informing them of the applicable previous judgment and stating that they were only going to apply that judgment to the particular plaintiffs in that case. *Meagher*, 856 F.2d. at 1421. Without that notice, the beneficiary would assume that the plan administrator would have calculated his benefits without the illegal term. This is because ERISA fiduciary obligations are based on the common law applicable to trusts and such fiduciaries are "bound by 'the highest' duty 'known to the law'." *LaScala v. Scrufari*, 479 F.3d 213, 220 (2d Cir.

2007). Above all, the Plan Administrator must "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." ERISA § 404(a)(1)(A); 29 U.S.C. § 1104(a)(1)(A).

Defendants' appeal does not dispute the basic substance of breach of duty, instead their appeal focuses entirely on statute of limitations arguments, although cloaking them in various different semantics. The district court saw through this façade. "[Their] argument is simply a repackaging of defendants' argument . . . that plaintiff's § 502(a)(3) claim is time barred." *Testa 2017*, 2017 WL 1857384, *4 (W.D.N.Y. May 9, 2017) (SPA-6). Defendants have not stated any other objections to applying the outcome dictated by *Frommert*, nor have they met the burden of demonstrating that Testa had notice of such breaches more than six years before he filed suit.

Here, the Plan Administrator wants this Court to conclude that Testa should have assumed his fiduciary was going to continue to apply illegal plan terms without providing him notice of his intent to do so. Yet, the Plan Administrator represented that he would follow *Frommert* and was obligated to treat similarly situated participants the same. Participants are not obligated to file a lawsuit to cause the Plan Administrator to comply with settled law when there is no reason for them to expect that he will not, particularly when he says that he will. That is a

clear violation of the Plan Administrator's fiduciary duties and an appropriate basis for affirming the decision below.

III. The Phantom Account Pension Offset is an Unlawful Forfeiture of Accrued Benefits in Violation of ERISA. The Lawful Offset to Testa's Pension Benefit is Limited to the Accrued Benefit that Was Actually Satisfied by the Previous Benefit Payment to Testa.

Testa's First Cause of Action asserts, in part, that the phantom account violates substantive ERISA terms by unlawfully forfeiting statutorily protected "accrued benefits." The district court dismissed this claim on statute of limitations grounds. For reasons discussed above, that holding was erroneous. For that reason, this claim should, at a minimum, be remanded to the district court for a resolution of the merits.

But in the particular context of this case, the merits of this claim should be addressed and resolved on this appeal. Testa should not have to wait still more years for the answer to a simple legal question: does Treasury Regulations Section 1.411(a)-7(d)(6)(i) (26 C.F.R. § 1.411(a)-7(d)(6)(i)) permit the phantom account? As discussed below, clearly it does not. That section (and common sense) allows the total accrued benefit earned by Testa (a monthly annuity of $4,457.96) to be offset only by the accrued benefit he earned during his first period of service (a monthly annuity of roughly $775). The lump sum distribution he received when he left Xerox in 1983 satisfied only that $775 accrued benefit—nothing more.

The Ninth Circuit was presented with the question of whether the phantom account is consistent with detailed substantive ERISA terms that protect an employee's rights to actually receive the "accrued benefits" he has earned. It held that: "Xerox's method of accounting for prior distributions in calculating the Employees' final retirement benefits violates the substantive requirements of ERISA." *Miller* 464 F.3d. at 874.[9] That is the proper result.

ERISA includes detailed substantive rules related to the determination and payment of "accrued benefits" under the plan (ERISA § 204; 29 U.S.C. § 1054) and rules prohibiting forfeiture of those "accrued benefits" (ERISA § 203; 29 U.S.C. § 1053). These ERISA rules recognize two mutually exclusive kinds of "pension plans": defined benefit ("DB") plans such as the RIGP and defined-contribution ("DC") plans such as Xerox's previously maintained PSP. ERISA § 3(34), (35); 29 U.S.C. § 1002 (34), (35). *Miller*, *464 F.3d at 875; Lyons v. Georgia-Pac. Corp. Salaried Emp. Pen. Plan*, 221 F.3d 1235, 1237 (11th Cir. 2000). Specific ERISA rules on DB plans must be followed for all DB plans, including the RIGP. *See* ERISA § 3 (35); 29 U.S.C. § 1002 (35). A pension plan's "accrued benefit" is "in the case of a defined benefit plan, an individual's accrued benefit determined under the plan and . . . expressed in the form of an annual

[9] While noting that *Frommert I* allowed the phantom account to be applied to post-1998 rehires, this Court included a "but see" warning regarding the conclusions reached in *Miller* that the phantom account terms themselves violated ERISA. *Frommert II*, 535 F.3d at 116.

benefit commencing at normal retirement age." ERISA § 3(23); 29 U.S.C. § 1002(23).

The "accrued benefit" defined in the RIGP is a life annuity with monthly payments equal to the following formula amount:

1.4% of final average pay times years of credited service.

It is not hard to apply this formula to Testa's case. When he left Xerox in 1983, that accrued benefit amounted to an annuity with monthly payments of approximately $775 per month. When he subsequently retired at the end of his second period of employment, his aggregate "accrued benefit" for both periods of service was a monthly annuity of $4,457.96 per month. Part of that aggregate accrued benefit had already been satisfied by a 1983 distribution and part had not. Common sense tells us that the unsatisfied part was $3,682.96 per month (or an equivalent lump sum)—simply $4,457.96 minus $775.

Defendants' contention in this case is that the unsatisfied part was only about $1,703.65 per month (or an equivalent lump sum), and thus, in effect that $2,754.31 of the accrued benefit was satisfied in 1983. [10]

[10] ERISA does not allow Xerox to forfeit Testa's unsatisfied accrued benefit in that way. The statute specifically provides that a rehired employee's first service period may be disregarded only if the plan allows the participant to buy back into the plan by repaying the distribution at rehire. ERISA § 204(d), (e); 29 U.S.C. § 1054(d), (e). The RIGP did not give Testa (or other rehires) the opportunity to repay the prior distribution. Thus, to comply with ERISA, the Plan Administrator clearly must recognize all of Testa's years of service when computing his accrued benefit and his total accrued benefit has to be a life annuity of $4,457.96 per month.

That brings us to the crux of the dispute on this issue. Because the RIGP did not allow Testa to repay the prior distribution, nothing in the ERISA statute allows any offset at all for the prior distribution. However, a Treasury Regulation does. Specifically, the two-period accrued benefit amount may be offset "by the accrued benefit attributable to the [prior] distribution." Treas. Reg. § 1.411(a)-7(d)(6)(i); 26 C.F.R. § 1.411(a)-7(d)(6)(i).[11] Testa's First Cause of Action turns entirely on the meaning of this phrase because nothing else in ERISA allows any offset against—or forfeiture of—the protected accrued benefits.[12]

Defendants' apparent contention is that they can make up their own "attributable to" rules so as to associate far more than $775 of Testa's final accrued benefit to the payout that satisfied that $775 accrued benefit he had in 1983. That makes no sense. The "accrued benefit attributable to the [prior] distribution" is simply the $775 monthly annuity that was earned and then satisfied by the payout.[13] If the Treasury Department intended some other sort of "attribution," their Regulation would have said more about what that relationship might be.

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[11] ERISA's substantive requirements are mirrored in the Internal Revenue Code. The Treasury Department and the IRS have principal jurisdiction to interpret the Internal Revenue Code.

[12] In apparent reliance on this Regulation, Section 9.6 of the RIGP (which has been discussed throughout the *Frommert* litigation) contains very similar language. The interpretation of that language—as a Plan term—has involved administrative discretion. That discretion does not apply to interpreting the meaning of applicable Regulations.

[13] Under Defendants' position, the accrued benefit attributable to the 1983 distribution constantly changes over time.

The "accrued benefit attributable to the distribution" does not change based on subsequent events (including future plan service) after that distribution is made. A distribution in 1983 simply could not have satisfied or have been attributable to a RIGP accrued benefit that did not yet exist in 1983. No part of that 1983 distribution made to Testa in 1983 was attributable to benefits he earned later. He simply left Xerox in 1983 with money that belonged to him and no unpaid Plan benefits.

When Testa's full service from both periods of service is considered, his accrued benefit under the RIGP formula was a total of $4,457.96 per month. Very simply, the appropriate offset to this accrued benefit is the $775 per month that was satisfied in 1983. Therefore, as a matter of law, Testa is entitled to a monthly benefit of $3,682.96 per month.

CONCLUSION

Retired RIGP participants should not have to wait any longer for the Plan Administrator to do the right thing. Nor should this litigation drag out indefinitely, nor should any additional Xerox retirees die in the interim before receiving the retirement benefits that they are legally due. Testa timely filed his lawsuit. Defendants have acted in breach of their fiduciary duties. This Court should accordingly grant all of the relief discussed herein.

Dated: November 13, 2017
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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 11,576 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 2017 in 14 Times New Roman.

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