UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BRUCE D. KUNSMAN, et al.,

Plaintiff,

-against-

SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ AND LAWRENCE M. BECKER, IN THEIR CAPACITY AS XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN ADMINISTRATORS AND AS INDIVIDUALS, XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN, XEROX CORPORATION, HEWITT ASSOCIATES, and HEWITT MANAGEMENT COMPANY LLC,

Defendants.

Civil Action No. 08-CV-6080L

DEFENDANTS' MEMORANDUM OF LAW SUBMITTED IN RESPONSE TO THIS COURT'S APRIL 19, 2019 ORDER

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INTRODUCTION

On December 12, 2018, the Second Circuit issued an Opinion and Judgment in *Testa v. Becker*, 910 F.3d 677 (2d Cir. 2018) ("*Testa*"), affirming, in part, and reversing, in part, the Judgment of this Court, entered on May 8, 2017 and reported at *Testa v. Becker*, No. 10-CV-6229L, 2017 U.S. Dist. Lexis 70984 (W.D.N.Y., May, 9, 2017), which had, *inter alia*, granted Plaintiff Testa summary judgment on his breach of fiduciary duty claim under Section 502(a)(3) of the Employee Retirement Income Security Act ("ERISA"), as amended, 29 U.S.C. § 1132(a)(3). In its 2017 Decision and Order in *Testa*, 2017 U.S. Dist. Lexis 70984, this Court had held that the Plan Administrator had breached his fiduciary duty to Plaintiff by applying the phantom account offset when calculating his pension benefits under the Retirement Income Guarantee Plan ("RIGP" or "Plan") and granted Testa, not Defendants, summary judgment on the breach of fiduciary duty claim. *See Testa*, 910 F.3d at 681 (explaining that the District Court had rejected Defendants' argument that it was not a breach of fiduciary duty to continue to apply the phantom account offset contained in the RIGP to Testa because Testa could no longer bring a timely denial of benefits claim, since the District Court had concluded that the alleged mandate of the Second Circuit, issued in *Frommert v. Conkright*, 433 F.3d 254 (2d Cir. 2006) ("*Frommert I*") had directed the Plan Administrator not to apply the phantom account to any employees rehired before 1998).

It was on this issue that the Second Circuit in *Testa* reversed and found "that Becker, not Testa, is entitled to summary judgment on the fiduciary-duty claim." *Testa,* 910 F3d. at 686. The Second Circuit also affirmed that portion of this Court's 2013 Decision and Order in *Testa* which had previously granted judgment to Defendants dismissing Testa's claim for benefits under Section 502 (a)(1)(B) of ERISA, 29 U.S.C. §1132 (a)(1)(B), on timeliness grounds. *Id.* at 684. By Order dated April 19, 2019, this Court has now directed the parties to file additional memoranda

concerning how they believe the Court "should proceed in this case in light of the Court of Appeals' decision in *Testa v. Becker*, and any other recent case authority." (Dkt. No. 97).[1]

Under well-established principles of *stare decisis*, where a new rule of law has been applied by an appellate court to the litigants in one case, such rule must be applied to other litigations in that circuit whose cases were not final at the time of such decision. *See. e.g., Welch v. Texas Dep't of Highways & Public Transp.*, 483 U.S. 468, 478-479 (1987) ("The rule of law depends in large part on adherence to the doctrine of *stare decisis*. Indeed, the doctrine is 'a natural evolution from the very nature of our institutions.'") (internal quotation omitted); *Lilly v. Lewiston-Porter Cent. Sch. Dist.*, No. 10-CV-548S, 2014 U.S. Dist. LEXIS 43978, *5 fn4 (W.D.N.Y. Mar. 31, 2014) ("'Vertical *stare decisis* is absolute and requires lower courts to follow applicable Supreme Court [and appellate court] rulings in every case.'") (quoting *United States v. Duvall*, 740 F.3d 604, 609 (D.C. Cir. 2013)). A fundamental component of *stare decisis* and the rule of law generally is the principle that litigants in similar situations be treated the same. *Green v. Humana at Home, Inc.* 2017 U.S. Dist. LEXIS 162961, *14 (S.D.N.Y. Sept. 29, 2017) (citing *James B. Beam Distilling Co. v. Georgia*, 502 U.S. 529, 537 (1991). *Stare decisis* applies here.[2]

The *Testa* Court held that the alleged mandate in *Frommert I* was not intended to preclude Defendants from properly denying Testa's claim for benefits. The *Testa* Court further held that there was no breach of fiduciary duty when the Plan Administrator applied the phantom account offset to those rehired employees to whom one or more defenses applied, including the defenses of timeliness of the claim for benefits and the assertion that a claim was barred by a release.

[1] References to the Court's Docket in this case are designated "Dkt No. [number]."

[2] Defendants further note that Plaintiffs in this action, as well as the Court, have previously indicated, directly and indirectly, that the outcome in <u>*Testa*</u> is "determinative here." (Dkt. No. 84-2 at 6. *See also, e.g.*, Dkt. Nos. 83 at 9; 85-1 at 7).

Because *Testa* is controlling authority on a material issue of law pending before this Court, summary judgment is warranted in favor of Defendants on the breach of fiduciary duty claim. *See LI Neuroscience Specialists v. Blue Cross Blue Shield of Fla.*, 361 F. Supp. 3d 348 (E.D.N.Y. Feb. 25, 2019) (recognizing that Second Circuit precedent is binding on the district court case); *Oltra, Inc. v. Pataki*, 273 F. Supp. 2d 265, 274 (W.D.N.Y. 2003) ("When faced with Second Circuit precedent squarely addressing the issue at bar, it is not this Court's role to second guess or declare that precedent inapplicable based upon an allegation that its clear holding was based on an allegedly incorrect assumption or underdeveloped factual record."); *Turay v. Aetna U.S. Healthcare*, 160 F. Supp. 2d 557, 561 (S.D.N.Y. 2001) ("It is a cardinal rule that a district court must follow the applicable precedents of the relevant circuit court.").

Accordingly, this Court should grant Defendants' cross-motion for summary judgment dismissing the sole remaining breach of fiduciary duty claim in the *Kunsman v. Becker* action and deny Plaintiffs' motions for summary judgment and injunctive relief.

RELEVANT FACTS AND PROCEDURAL HISTORY

The relevant facts in the related *Testa* case and the related *Frommert* cases are set out in detail in the *Testa* Opinion, *Testa*, 910 F.3d at 679-682, and the relevant facts in this case are set out in Defendants' initial summary judgment cross-motion, and neither are repeated here (*see* Dkt. Nos. 88 and 89). Briefly summarized, Plaintiffs, like the plaintiffs in *Frommert* and *Testa* cases, are or were employees of Xerox Corporation ("Xerox") and participants in the RIGP. Like the plaintiffs in *Frommert* and *Testa*, the *Kunsman* Plaintiffs left Xerox's employ at some point, took a lump-sum distribution of their accrued RIGP benefits, but returned to employment with Xerox prior to the issuance of the 1998 Summary Plan Description ("SPD") for the RIGP. The similarities between the *Frommert* plaintiffs and the *Kunsman* and *Testa* plaintiffs end there.

In 1999, a group of plaintiffs commenced the action in *Frommert v. Conkright*, challenging the offset provision for prior distributions contained in the RIGP. *Testa*, 910 F.3d at 680. In *Frommert I*, the Second Circuit held for the plaintiffs based on the lack of notice of the amendment of the Plan to include the offset provision for prior distribution prior to the issuance of the 1998 Summary Plan Description ("SPD") for the RIGP. *Id*.

After *Frommert I* was decided, the Plan Administrator continued to apply the offset provision to some employees who were not parties to the *Frommert* litigation. As recognized by the Second Circuit in *Testa*, this spawned a new batch of litigation, including *Testa* and this case. *Id.* The *Kunsman* Plaintiffs commenced this suit in 2008,[3] ten years after the issuance of the 1998 SPD, and Testa commenced his action in 2010, twelve years after. In both *Testa*[4] and *Kunsman*[5], this Court granted, in part, Defendants' initial Rule 12(b)(6) motions to dismiss the Complaints to the extent that the plaintiffs interposed claims for benefits under section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1123(a)(1)(B), finding that these benefit claims accrued upon the issuance of the 1998 SPD and were time-barred under New York's six-year statute of limitation. *See Testa 2013*, 979 F. Supp. 2d 379. (*See* Dkt. No. 53). This Court denied, however, the portions of Defendants' motions to dismiss the breach of fiduciary duty claims on the grounds that Testa and the *Kunsman* Plaintiffs stated a plausible breach of fiduciary duty based on allegations which arose out of the

[3] Although a small group of 24 of the *Kunsman* Plaintiffs made a limited attempt to join in the *Frommert* action, which they withdrew, that motion was filed in November 2006, two years after their ERISA claims had already expired. Thus, their motion should have been denied because their ERISA claims would not have related back to the timely filed claims of the *Frommert* plaintiffs. (*See* Dkt. No. 49).

[4] This Court's Decision and Order on Defendants' motion to dismiss in *Testa* is reported at *Testa v. Becker*, 979 F. Supp. 2d 379 (W.D.N.Y. 2013) ("*Testa 2013*").

[5] This Court's Decision and Order on Defendants' motion to dismiss the Complaint in this case (Dkt. No. 53) is reported at *Kunsman v. Conkright*, 977 F. Supp. 2d 250 (W.D.N.Y. 2013) ("*Kunsman 2013*").

Plan Administrator's allegedly having ignored court rulings, particularly the statement in *Frommert I* that "the phantom account offset may not be applied to employees rehired prior to the issuance of the 1998 SPD." *Testa 2013*, 979 F. Supp. 2d 379. (Dkt. No. 53 at 2-3) (quoting *Frommert I*).

Following service of answers in each case, the parties filed cross-motions for summary judgment in both *Testa* and in *Kunsman*. (*See* Dkt. Nos. 58, 84, 85, 88, and 89). *See Testa*, 910 F.3d at 681. In *Testa*, this Court granted summary judgment in Testa's favor, in part, and denied it, in part. *Testa*, 2017 U.S. Dist. LEXIS 70984. While reaffirming that the benefits claims had properly been dismissed as untimely, this Court granted summary judgment to Testa and denied Defendants' cross-motion for summary judgment on the breach of fiduciary duty claim, reasoning that there was a "directive" from the Second Circuit that the offset provision, also referred to as the "phantom accounting," could not be applied to employees rehired before the issuance of the 1998 SPD, and that the failure to comply with that directive gave rise to a claim for breach of fiduciary duty. *Id*. The District Court awarded Testa the same remedy as the District Court had awarded plaintiffs in the *Frommert* action. *Id*.

Both parties appealed. This Court stayed this action pending the outcome of the appeal in *Testa*, reasoning that: "'A court may properly exercise this power when a higher court is close to settling an important issue of law bearing on the action.'" (Dkt. No. 95) (internal citation omitted). The Second Circuit reversed the judgment in favor of Testa and ordered the District Court on remand to enter judgment in favor of Defendants. *Testa*, 910 F.3d at 686.

I. THE SECOND CIRCUIT'S DECISION IN *TESTA* REQUIRES DISMISSAL OF PLAINTIFFS' BREACH OF FIDUCIARY DUTY CLAIM

On appeal, the Second Circuit in *Testa* reviewed essentially the following two questions:

- Whether a litigant may bring a benefits claim under ERISA when the limitations period is six years and his claim accrued twelve years before he sued; and

- *Whether Frommert I directed the Plan Administrator not to apply the offset* provision of the Plan for prior distributions to all plan participants who were rehired before the issuance of the 1998 SPD, even those who did not bring timely claims.

Testa, 910 F.3d at 679. The Second Circuit held that the answer to both of the questions is "no," and affirmed this Court's dismissal of Testa's benefits claim, but reversed this Court's May 2017 grant of summary judgment to Testa on his breach of fiduciary duty claim arising out of the alleged failure to follow the Second Circuit's "directive" in *Frommert I*. *Id.* at 679, 684 and 686.

As in the *Testa* case, this Court, in *Kunsman 2013*, properly dismissed three of the four claims asserted by the *Kunsman* Plaintiffs, on the grounds that the claims for benefits under 29 U.S.C. § 1132(a)(1)(B) and breach of fiduciary duty claim were time-barred. (Dkt No. 53). The Court found that a portion of Plaintiffs' breach of fiduciary claim, asserted under 29 U.S.C. § 1132 (a)(3), is based *solely* upon Defendants' alleged failure to comply with a directive issued by the Second Circuit in *Frommert I* that "the phantom account offset may not be applied to employees rehired prior to the issuance of the 1998 SPD" and was timely interposed. *Id.* The *Kunsman* Plaintiffs now urge the Court to grant them summary judgment and injunctive relief on this basis (*See e.g.*, Dkt. No. 85-1 ("Pl. Reply Mem.") at 2-3; Dkt. No. 84-2 ("Pl. McNeill's Mem.") at 1, 3, 10, 15, 16, 18).

We now know, however, that the Second Circuit has soundly rejected the argument that the Plan Administrator had a fiduciary duty arising under *Frommert I* not to apply the phantom account offset to all employees rehired before 1998. *See Testa*, 910 F.3d 677. We also know that the Second Circuit has squarely held that the failure to follow *Frommert I*'s alleged "directive" was not a breach of the Plan Administrator's fiduciary duty. *Id.* As reasoned by the Second Circuit, Testa's claim for benefits was clearly repudiated with the issuance of the 1998 SPD, and as a result, his ERISA claims were time-barred at the latest in 2004, well-before the issuance of *Frommert I*. *See Testa*, 910 F.3d at 682-86. This Court must apply these legal conclusions and

grant judgment in favor of Defendants on Plaintiffs' remaining breach of fiduciary duty claim.

The *Testa* Court stated that *Frommert I* did not address or resolve the precise issue that was before the *Testa* Court on appeal in 2018, that is, whether the *Frommert I's* alleged mandate that the phantom account offset could not be applied to employees rehired before the issuance of the 1998 SPD was intended to apply to a claim for benefits that was already time-barred or subject to other defenses because that issue was not before the Court in *Frommert I*. *Id*. at 685. Because the Court then had to address and resolve that issue, the Second Circuit did so, directly holding: (i) that, in reading *Frommert I* as a whole, the decision "did not direct Becker to stop applying the phantom account offset to every single employee rehired before the 1998 SPD was issued" and (ii) that *Frommert I* "did not foreclose Becker from raising legitimate affirmative defenses against rehired employees." *Id.* at 684-85. The resolution of these issues of law by the Second Circuit in favor of the Plan Administrator in *Testa* is controlling authority in this Circuit. There is no legal basis for a finding, as urged by Plaintiffs, that the Plan Administrator breached its fiduciary duty by failing to comply with the alleged "directive" in *Frommert I* because the Second Circuit has ruled that *Frommert I did not* direct Becker to stop applying the phantom account offset to every single employee rehired before the 1998 SPD was issued and that it was not a breach of fiduciary duty to apply the phantom account offset to Testa, whose claim was time-barred. *Id.* at 684-86.

The Second Circuit also properly rejected Testa's belatedly-interposed arguments as to why the 1998 SPD did not amount to a clear repudiation of benefits. This Court should similarly do so here. First, the Second Circuit rejected Testa's argument that the defendants were judicially estopped from asserting a timeliness defense. Noting that "the only 'misrepresentation' that Testa identified is a single sentence from a 2014 memorandum in *Kunsman v. Conkright*, in which . . . Becker admitted that '[t]he decision reached in *Frommert* . . . will, as a matter of law, be applicable

to' everyone rehired before 1998" (*id.* at 683 (citing Defs. Mem. in Opp'n at 16, *Kunsman v. Conkright*, No. 08-CV-6080 (W.D.N.Y. July 7, 2017))), the Second Circuit recognized that the quote was taken "out of context" and that the defendants in *Kunsman* repeatedly made the same argument made in the *Testa* case: that *Frommert I* permits the Plan Administrator "to apply the phantom account offset to rehired employees whose claims are untimely." *Testa*, 910 F.3d at 683. The Second Circuit also noted that the 2014 *Kunsman* memorandum could not have been "to the prejudice of" Testa because Testa's claims became untimely ten years before the memorandum was filed. *Id.* The same rationale applies here both because the *Kunsman* Plaintiffs have taken the statement in Defendants' 2014 memorandum out of context and because their claim for benefits was time-barred by 10 years when they filed the memorandum. (*See, e.g.*, Dkt. No. 84-2 at 15; Dkt. No. 85-1 at 5, 7).

The Second Circuit also rejected Testa's argument that the Plan Administrator failed to disclose that he would refuse to comply with *Frommert I*, stating that "even if Becker had failed to comply with [*Frommert I*], this would not make the 1998 SPD any less of a clear repudiation of benefits." *Testa*, 910 F.3d at 683. The Second Circuit further held that Testa was not "similarly situated" to the *Frommert* plaintiffs because "they sued before their limitations periods expired." *Id.* Thus, it was not a violation of ERISA for the Plan Administrator to apply the offset to Testa after *Frommert I*.

The Second Circuit refused to hold that Testa's claim for benefits was equitably tolled based on the commencement of the *Frommert* action, reasoning that such a position was a "radical argument" that had not been held by any other court. *Id.* at 683-84. The Second Circuit stated that "even if equitable tolling did apply, Testa would almost certainly not qualify for it" because "[l]itigants may benefit from equitably tolling only if they were 'diligent in pursuit of their

claims.'" *Id.* at 684 (quoting *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1808 (2018)). Testa was not diligent because he "sat on his rights from 1998 to 2010." *Id*. The same reasoning applies here. Plaintiffs did nothing to join in the *Frommert* action until 2006 (and then the request was made by only 24 of the *Kunsman* plaintiffs who filed a motion to amend the Complaint, but withdrew that motion before it was ruled on by the Court) or file their own action until 2008, years after their ERISA claims had expired. (*See* Dkt. Nos. 49, 88 and 89).

Opining that "penalizing Becker for not trawling through [*Frommert I*] for sentences that future litigants might quote out of context would make it difficult for plan administrators to judge the scope of potential liability," the Second Circuit found that the Plan Administrator did not breach his fiduciary duty by applying the offset to Testa and remanded the case to this Court with direction to enter judgment for the Plan Administrator and the Plan. *Id.* at 685-86. That same relief—judgment in favor of Defendants-- is required in this case.

In their Reply Memorandum, certain *Kunsman* Plaintiffs also urge the Court to grant them summary judgment despite the fact that they signed releases. The *Testa* Court held that *Frommert I* "did not foreclose Becker from raising legitimate affirmative defenses against rehired employees." *Id.* at 685. This would include the defense of having signed a release. Indeed, in *Frommert,* the Second Circuit in 2008 reversed a decision and order of this Court denying Defendants' summary judgment and entered an Order granting summary judgment in favor of Defendants dismissing the claims of eighteen *Frommert* plaintiffs who had signed waivers during the course of the litigation. *Frommert v. Conkright*, 535 F.3d 122 (2d Cir. 2008) ("*Frommert II*"). *See Testa,* 910 F.3d at 685 (referencing *Frommert II*). *Accord Anderson v. Xerox*, No. 06-6202, and *Clouthier v. Becker*, No. 08-cv-6441.

The *Testa* Court reasoned that the defenses of timeliness and waiver of rights are legitimate affirmative defenses and that the Plan Administrator is entitled to raise them. 910 F.3d at 685. The Second Circuit further stated that Testa's breach of fiduciary duty claim that was based on *Frommert I* was "no more than his untimely denial-of-benefits claim under another name." *Id.* This reasoning, too, applies here and is another basis for dismissal of the *Kunsman* Plaintiffs' claim.

II. *TESTA* ALSO REQUIRES DENIAL OF PLAINTIFFS' REQUEST FOR INJUNCTIVE RELIEF

In their respective motions for summary judgment, Plaintiffs seek to enjoin the Defendants and Xerox from applying the phantom account offset to "Similarly Situated Plan Participants." (Dkt. No. 84-2 at 19-21; Dkt. No. 85-1 at 8-10). The basis for this request is that the Plaintiffs' claim that Defendants will fail to follow any court directive to not apply the phantom account offset, in the same manner as they have failed to follow the alleged directive in *Frommert I*. (*Id.*). Because the *Testa* Opinion holds that Becker "has not failed to comply with *Frommert I*" and was not in breach of fiduciary duty in applying the offset provision for prior distribution when calculating Testa's pension benefits (910 F.3d at 683-86), Plaintiffs' request for an injunction lacks any legal or factual merit and must be dismissed. *Frommert I* does not bar the Plan Administrator from applying the offset "to Testa or others like him." *Testa*, 910 F.3d at 683.

CONCLUSION

For all of the foregoing reasons, and the reasons discussed in Defendants' opposition to Plaintiffs' motions for summary judgment and in Defendants' cross-motion for summary judgment (Dkt. Nos. 88 and 89), Defendants respectfully request that this Court deny Plaintiffs' respective motions for summary judgment, and grant Defendants' cross-motion for summary judgment dismissing the remaining claim in the Complaint, together with such other and further relief as the

Court deems just and proper.

Date: May 3, 2019
Fairport, New York

/s/ Margaret A. Clemens

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