UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

BRUCE D. KUNSMAN, et al.,

Plaintiffs,

v.

SALLY L. CONKRIGHT, et al.

Defendants.

C. A. No. 08-CV-6080(DGL)

MEMORANDUM OF PLAINTIFF JOSEPH MCNEIL IN OPPOSITION TO DEFENDANTS CROSS-MOTION FOR SUMMARY JUDGMENT AND IN FURTHER SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT AND FOR EQUITABLE RELIEF

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I. PRELIMINARY STATEMENT

It has been more than a decade since the Second Circuit ruled in *Frommert v. Conkright*, 433 F.3d 254, 263 (2d Cir. 2006) ("*Frommert 2006*") that Defendants may not apply the phantom account offset to Plan participants who received a lump sum distribution from the Xerox Retirement Income Guarantee Plan (the "Plan") when they first left Xerox and were re-hired by Xerox prior to the issuance of the summary plan description in September, 1998 ("1998 SPD") (collectively, the "Similarly Situated Plan Participants"). Despite the Second Court's clear directives and Defendants' commitment to follow them, Defendants still use the phantom account offset to calculate benefits for all Similarly Situated Plan Participants who were not plaintiffs in *Frommert*. In their Opposition to Plaintiff Joseph McNeil's Motion for Summary Judgment and Equitable Relief (ECF Doc. No. 89-8) ("Opposition" or "Opp."), Defendants reveal that they do not intend to comply with their pledge to apply the court-ordered remedy in *Frommert* to the Similarly Situated Plan Participants, and oppose an injunction that would order them to do what they promised the Court they would do.

Over the course of nearly ten years of this litigation, Defendants, who have a fiduciary duty to act in the best interests of Plan participants, continually conjure up reasons to deny Xerox employees retirement benefits they earned. Defendants make four hollow arguments about why this Court should deprive McNeil and the Similarly Situated Plan Participants of the requested relief.

First, Defendants argue that this Court does not have authority to enter an injunction which would benefit Similarly Situated Plan Participants who are not plaintiffs in this case. Not so. This Court has broad authority under ERISA to fashion appropriate equitable relief to redress ERISA violations and protect the rights of Plan participants including those who are not plaintiffs here.

Second, Defendants argue that the injunction would deprive them of their right to assert individualized defenses. While this Court never intended to bar Defendants from asserting a valid defense, such as a release, Defendants' statute of limitations defense is specious. Defendants never

informed the Similarly Situated Plan Participants about the *Frommert* rulings, despite their fiduciary obligation to do so. In fact, they actively concealed that information in Plan communications. Thus, the statute of limitations does not begin to run until the Similarly Situated Plan Participants have actual knowledge that Defendants did not comply with the directives in *Frommert* in computing their benefits. Defendants do not claim that Similarly Situated Plan Participants have such knowledge.

Third, Defendants propose that any Similarly Situated Plan Participant who believes he has a valid claim should submit an administrative claim to the Plan committee. It also would be absurd to require Similarly Situated Plan Participants to go through the administrative process, when doing so would be an exercise in utter futility.

Finally, in support of their cross-motion for summary judgment, Defendants reiterate arguments that were rejected by this Court in *Testa v. Becker*, 2017 U.S. Dist. LEXIS 70984 (W.D.N.Y. May 9, 2017) ("*Testa 2017*"). There is no reason for this Court to deviate from that decision, which operates as collateral estoppel here.

It is time for these never-ending litigations, which have deprived McNeil and other Similarly Situated Plan Participants of the retirement benefits to which they are entitled under ERISA to come to an end. This Court should grant McNeil's motion for summary judgment and equitable relief, and should re-visit its decision denying class certification.

II. ARGUMENT

A. This Court Should Enter the Injunction and Revisit Its Class Certification Decision Since Defendants Continue to Defy the Courts' Directives in *Frommert* With Impunity.

In opposing McNeil's class certification motion, Defendants represented to this Court that there was no need to certify the putative class[1] because:

[1] The putative class consists of Similarly Situated Plan Participants who received a lump sum distribution from the Plan when they first left Xerox, were re-hired prior to the issuance of the 1998 SPD and did not sign a release ("Putative Class").

- "the Plan Administrator is bound by law, and his fiduciary duty, to apply the court-ordered benefits calculation in *Frommert* to all similarly-situated plaintiffs,"

- "[t]he 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," and

- "[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."

ECF Doc. No. 68 (Supplemental Appendix Ex. 1) at 16.

This Court expressly relied upon those representations in denying McNeil's motion for class certification. The Court stated that "in opposing McNeil's motions … 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." *Kunsman v. Conkright,* C.A. No. 08-CV-6080(DGL), Decision and Order, at 14 (W.D.N.Y. July 5, 2017), (ECF Doc. No. 83) ("*Kunsman 2017*").

The Court assumed "that defendants mean it when they say that the *Frommert* decision and remedy will apply to the entire putative class here," and in reliance on that representation denied class certification largely on the grounds that it was unnecessary. *Id.* at 15. The Court then cautioned Defendants that

> if they fail to follow through on their protestations pledging uniform treatment to all proposed class members, the Court will revisit the issue of whether this case should be converted to a class action. After all that has transpired in this and the related actions, the directives of this Court and of the Second Circuit should be clear. Those directives cannot be ignored with impunity.

Id. at 16.

Notwithstanding these assurances, in their Opposition, Defendants seek to re-litigate the applicability of the phantom account offset participant by participant. Defendants make it abundantly clear that they have no intention of complying with their pledge to apply the court-ordered remedy in *Frommert* to the Putative Class. Indeed, Defendants oppose entry of an injunction that would simply order them to do exactly what they promised this Court they would do – obey the

Second Circuit's directive in *Frommert 2006* that "the phantom account may not be applied to employees rehired prior to the issuance of the 1998 SPD." 433 F.3d at 263.

While it is shocking, it is unfortunately not at all a surprise, that Defendants so blatantly break their promises to this Court. They are, as this Court observed, parties who have yielded legal ground "only when compelled to do so by court order" and even then "grudgingly, block by metaphorical block." *Frommert v. Becker*, 153 F. Supp. 3d 599, 609-610 (W.D.N.Y. 2016). Enough is enough. The situation cries out for clarion action. Defendants will continue to ignore clear directives of the Second Circuit and this Court "with impunity," *Kunsman 2017*, at 16, and will not apply the court ordered remedy in *Frommert* to any plan participant who was not a plaintiff in *Frommert* unless this Court orders them to do so, and that order is backed by this Court's contempt power.

This Court should enter the injunctive and declaratory relief requested in the Proposed Order. ECF Doc. No. 84-1. McNeil also respectfully submits that it would be appropriate to "revisit the issue of whether this case should be converted to a class action," as this Court said it would do if Defendants did not follow through on their pledge to follow the Second Circuit's directives in *Frommert* with respect to the Putative Class. *Kunsman 2017*, at 16.

B. <u>This Court Has Broad Latitude to Fashion An Equitable Remedy to Redress Defendants' Fiduciary Violations and Protect the Interests of Plan Participants.</u>

"Plaintiffs' claim is that by refusing to follow the Second Circuit's directive, defendants breached their fiduciary duty under §1104 to act 'solely in the interest of the participants and beneficiaries.'" *Kunsman v. Conkright*, 977 F. Supp. 2d 250, 267-268 (W.D.N.Y. 2013) ("*Kunsman 2013*"). In *Testa*, this Court has concluded that the "refusal, by the plan fiduciary, to follow controlling court decisions … was unjustified and constituted a breach of the administrator's fiduciary duty to plaintiff." *Testa 2017*, 2017 U.S. Dist. LEXIS 70984, at *13-15.

As set forth in the cases cited McNeil's Memorandum in Support of His Motion for Summary Judgment and Equitable Relief (ECF Doc. No. 84-2) ("Memorandum" or "Mem."), at 13-14, which Defendants address nowhere in their Opposition, ERISA grants the Court with broad and

flexible authority to fashion appropriate equitable relief to protect the rights of pension plan recipients and to redress and prevent ERISA violations.

"The legislative history underlying section 502 indicates that Congress intended that the enforcement provisions should have teeth: the provisions should be liberally construed 'to provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of the Act.'" *Laborers Fringe Ben. Funds-Detroit & Vicinity v. Northwest Concrete & Constr., Inc.*, 640 F.2d 1350, 1352 (6th Cir. 1981). Congress also "intended to grant both private parties and the Secretary equal standing" to redress and prevent ERISA violations. *Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 303 (7th Cir. 1985). Thus, there can be no question that McNeil can pursue equitable remedies to redress ERISA violations and to prevent future ERISA violations, which may benefit Plan participants who are not a party to this case. Under ERISA §502(a)(3) this Court has authority to enjoin Defendants from continuing to apply the phantom account offset to any Plan participant who was re-hired prior to the issuance of the 1998 SPD – an act which this Court has already ruled violated ERISA. *Testa 2017,* 2017 U.S. Dist. LEXIS 70984, at *13-15.

The entry of injunctive relief is particularly appropriate here since Defendants have shown constant disregard for the legal rulings of this Court and the Second Circuit. Thus, in *Laborers*, the Sixth Circuit upheld an injunction because defendants had "shown persistent contempt for the judicial process" and would likely continue to "withhold employee benefit contributions from the Fund" unless ordered to do so. 640 F.2d at 1353. *See also Boards of Trustees of Ohio Laborers' Fringe Benefit Programs v. Sandusky Bay Constr. Co.*, 2010 U.S. Dist. LEXIS 124005, at *4 (S.D. Ohio Nov. 4, 2010) ("pattern of non-compliance and the multitude of suits filed against the defendant convince the Court that this is a case where forcing the funds to resort continually to the judicial process in order to secure…compliance…is simply not an adequate remedy").

Time and again, Defendants have demonstrated their unwillingness to comply with the clear directives of the Second Circuit in *Frommert*. In its ruling on Defendants' motion to dismiss in this case, this Court stated:

> 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 interest of plan participants.

Kunsman 2013, 977 F. Supp. 2d at 263.

More recently in *Testa*, this Court observed that one might reasonably have thought that this issue of whether Defendants could apply the phantom account offset to plan participants similarly situated to the successful *Frommert* plaintiffs was "dead and buried" in light of "[t]he Second Circuit's statement that 'the phantom account may not be applied to employees rehired prior to the issuance of the 1998 SPD'" which "hardly sounds like *dictum*" but "like a clear directive." *Testa 2017*, 2017 U.S. Dist. LEXIS 70984, at *11, *13. Defendants' intransigence must be ordered to stop. This Court should enter the injunctive relief set forth in the Proposed Order in light of the "persistent contempt of the judicial process," *Laborers*, 640 F.2d at 1353, shown by Defendants.

This Court also has authority to remove Defendants as Plan fiduciaries, and replace them with independent fiduciaries unaffiliated with Xerox. Mem. at 17-19. In their Opposition, Defendants do not dispute that this Court has such authority. Given Defendants' continued failure to abide by the directives of the Second Circuit in *Frommert*, it would also be appropriate to remove the Defendants as Plan fiduciaries and replace them with an independent fiduciary. Doing so would place responsibility for compliance with the injunction sought herein in the hands of a fiduciary who would abide by the procedural and substantive commands of the injunction responsibly and in good faith, and remove that responsibility from Defendants who have ignored the commands of the judiciary with impunity. It would also put the responsibility for the administration of the Plan in the

hands of a fiduciary who, unlike the Defendants, understands what Congress meant when it provided in ERISA that a plan fiduciary must "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." 29 U.S.C. §1104(a)(1).

C. Defendants' Arguments Against the Issuance of the Injunction Have No Merit.

Defendants argue that McNeil's request for equitable relief is unjustified for three reasons. First, Defendants argue that this Court does not have jurisdiction or authority to issue an injunction in favor of Plan participants who are not parties to this action. Opp. at 23-24. Second, Defendants argue that the injunction is inappropriate because they are entitled to assert individualized defenses. Opp. at 24-27. Finally, Defendants suggest that each Plan participant can file an administrative claim as an alternative to an injunction. Opp. at 24. None of these arguments have any merit.

1. This Court Has Authority to Enter an Injunction in Favor of the Similarly Situated Plan Participants in the Putative Class.

Defendants assert that the Court does not have jurisdiction to enter an injunction for the benefit of non-parties. Opp. at 23. Defendants do not explain why the issuance of the injunction would be outside the Court's jurisdiction, and the sole case Defendants cite, *Alliance Bond Fund v. Grupo Mexicano de Desarrollo, S.A.*, 143 F.3d 688, 693 (2d Cir. 1998), does not support their assertion. In *Alliance*, the question was whether the court could enter an injunction against property located outside the jurisdiction. *Id.* The Second Circuit held that "use of the court's injunctive power is appropriate" if "the court has personal jurisdiction over the defendant." *Id.* There is no dispute that this Court has personal jurisdiction over Defendants. Thus, the issuance of the requested injunction is fully within this Court's jurisdiction.[2]

Defendants next argue that this Court lacks authority to enter injunctive relief that would benefit Plan participants who are non-parties. Opp. at 23-24. That is not true. This Court recognized

[2] Defendants' argument that this Court does not have jurisdiction to enter an injunction is astonishing in light of the forum selection clause in the Plan that requires that all litigation concerning the Plan be brought in the Western District of New York. Defendants have successfully transferred cases to this District based on the forum selection clause. *See Testa v. Becker*, 2010 U.S. Dist. LEXIS 47130, *23-24 (C.D. Cal. Apr. 22, 2010).

that it has such authority in *Kunsman 2017*, when it held that "converting this to a class action is unnecessary" because "[t]he Court can simply order appropriate declaratory relief." *Id.* at 12-13. In so holding, this Court relied on *Galvan v. Levine*, which held that even in absence of class certification "the *judgment* [could] run to the benefit not only of the named plaintiffs but of all others similarly situated." *Galvan v. Levine* 490 F.2d 1255, 1261 (2d Cir. 1973) (emphasis in original).

Defendants' argument is grounded on the faulty premise that McNeil is asserting a claim for denial of benefits, and not a claim for breach of fiduciary duty. However, the "one claim remaining in this action" is "plaintiffs' claim for breach of fiduciary duty under ERISA §502(a)(3), 29 U.S.C. §1132(a)(3)." *Kunsman 2017*, at 3. McNeil challenges the methodology Defendants used for calculating benefits as being inconsistent with the *Frommert* rulings. He does not seek to enforce the plan as written which includes the phantom account offset. Rather, he seeks to enforce the Plan as modified by the Second Circuit's directives in *Frommert*, which held that "the phantom account may not be applied to employees rehired prior to the issuance of the 1998 SPD," *Frommert 2006*, 433 F.3d at 263, and that any methodology that "makes the rehired employees worse off under the Plan in terms of actual benefits received" than "newly hired Xerox employees" may not be used. *Frommert v. Conkright*, 738 F.3d 522, 530 (2d Cir. 2013) ("*Frommert 2013*"). This is a paradigm case for equitable relief under ERISA §502(a)(3). *See CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1876-80 (2011).[3]

[3] In *CIGNA*, the Supreme Court explained the difference between a claim for benefits under ERISA §502(a)(1)(B) and a claim for breach of fiduciary under ERISA §502(a)(3) as follows: ERISA §502(a)(1)(B), may provide relief when a participant seeks to "enforce" the "terms of the plan," but will not provide relief when a participant seeks to change those terms, which must be brought under ERISA §502(a)(3). *Cigna*, 131 S. Ct. at 1876-77. Even when a court's "injunctions require[d] the plan administrator to pay to already retired beneficiaries money owed them under the plan as reformed ... the fact that this relief takes the form of a money payment does not remove it from the category of traditionally equitable relief." *Id.* at 1880. *See also New York State Psychiatric Ass'n v. UnitedHealth Group*, 798 F.3d 125, 134 (2d Cir. 2015) ("where … a plan participant brings suit against a 'plan fiduciary (whom ERISA typically treats as a trustee)' for breach of fiduciary duty relating to the terms of a plan, any resulting injunction coupled with … 'monetary compensation' for a loss resulting from a [fiduciary's] breach of duty … constitutes equitable relief under §502(a)(3)"); *Ross v. Rail Car Am. Grp. Disability Income Plan*, 285 F.3d 735, 741 (8th Cir. 2002) (plaintiff's claim arose under ERISA §502(a)(3) although plaintiff "ultimately seeks a restoration of full benefits," because "the vehicle for that requested relief is invalidation of [plan] amendments" enacted without complying with amendment procedure set out in plan); *Pender v. Bank of Am. Corp.*, 788 F.3d 354, 362 (4th Cir. 2015)

To support their argument that this Court cannot issue injunctive relief in favor of Similarly Situated Plan participants who are non-parties, Defendants rely exclusively on benefits cases brought under ERISA §502(a)(1)(B), 29 U.S.C. §1132(a)(1)(B). Opp. at 23-24. The courts denied injunctions that would benefit plan participants who were not named plaintiffs because such an injunction was not available under ERISA §502(a)(1)(B). *See Mullin v. Scottsdale Healthcare Corp. Long Term Disability Plan*, 2016 U.S. Dist. LEXIS 2927, at *7 (D. Ariz. Jan. 11, 2016) (injunctive relief is not available under § 1132(a)(1)(B)); *Brady v. United of Omaha Life Ins. Co.*, 902 F. Supp. 2d 1274, 1283 (N.D. Cal. 2012) (refusing to enter plan-wide injunction on plaintiff's claim under § 1132(a)(1)(B) of ERISA); *Bandak v. Eli Lilly & Co. Ret. Plan*, 2009 U.S. Dist. LEXIS 10885, at *5-6 (S.D. Ind. Feb. 10, 2009) (refusing to enter injunction on plaintiff's claim for benefits having dismissed plaintiff's claims for breach of fiduciary duty).[4] Defendants' cases have no relevance to the question of whether this Court can issue an injunction under ERISA §502(a)(3), and therefore are inapposite. As set forth in Section II(B), *supra*, ERISA §502(a)(3), gives this Court wide latitude to fashion an appropriate injunction to remedy and prevent ERISA violations by a fiduciary.

2. <u>Defendants Do Not Have Any Valid Statute of Limitation Defense Against the Similarly Situated Plan Participants in the Putative Class.</u>

Defendants argue that an injunction in favor of Similarly Situated Plan Participants in the Putative Class is not appropriate because it would prevent them from asserting individual statute of

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(where "plaintiffs' requested remedy would require the court to do more than simply enforce a contract as written" but to "alter those terms," claim is properly brought under ERISA §502(a)(3)). Where a plan participant challenges the methodology used a calculation benefits as violating ERISA, the claim is properly brought under ERISA §502(a)(3). *Id. See also Hill v. Blue Cross & Blue Shield*, 409 F.3d 710, 718 (6th Cir. 2005) (sustaining claim for breach of fiduciary duty under ERISA §502(a)(3), which challenged "methodology for handling all of the Program's emergency-medical-treatment claims."); *Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 419-20 (6th Cir. 1998) (claim seeking to alter the methodology used to calculated benefits is properly brought under ERISA §502 (a)(3)).

[4] *Mullin* and *Brady* also suggested that injunctive relief benefiting non-party plan participants was not available because the plaintiffs had not sought class action status. *Mullin*, 2016 U.S. Dist. LEXIS 2927, at *10; *Brady*, 902 F. Supp. 2d at 1284. Of course, Defendants argued and this Court held that class certification was not necessary here. *Kunsman 2017*, at 15. Should Defendants press this point further, this Court could of course re-visit the class certification decision.

limitations defenses. Opp. at 24-27, 30-31. While this Court never intended to bar Defendants from asserting a "valid defense (such as a signed release"),[5] *Kunsman 2017*, at 11, their baseless statute of limitations defense should be rejected.

This Court has already ruled that McNeil's claim for breach of fiduciary duty based on Defendants' failure to comply with the *Frommert* rulings are not time-barred. *See Kunsman 2013,* 977 F. Supp. 2d at 264. *See also* Section II(D)(2) *infra*. In addition, Defendants have no valid statute of limitations defense against the Similarly Situated Plan Participants in the Putative Class because Defendants hid their breaches of fiduciary duty from them through affirmative acts of concealment.[6]

ERISA §413 provides "in the case of fraud or concealment," an action must be commenced no later than six years after the date the plan participant discovers the breach or violation. 29 U.S.C. §1113. "'Fraud or concealment' is read disjunctively, such that the exception applies in cases of fraud *or* concealment." *Osberg v. Foot Locker, Inc.*, 862 F.3d 198, 209 (2d Cir. 2017) (emphasis in original); *Caputo v. Pfizer, Inc.*, 267 F.3d 181, 190 (2d Cir. 2001). The "fraud or concealment" limitations period applies when the plaintiff alleges a breach of fiduciary duty and "the defendant committed either: (1) a 'self-concealing act' – an act committed during the course of the breach that has the effect of concealing the breach from the plaintiff; or (2) 'active concealment' – an act distinct from and subsequent to the breach intended to conceal it." *Osberg*, 862 F.3d at 210-12; *Caputo*, 267 F.3d at 189.

Here, Defendants have applied the phantom account offset to calculate benefits for every Plan participant re-hired prior to the issuance of the 1998 SPD other than plaintiffs in the *Frommert* and *Layou* litigation. *See* Letter from Kaster to Strain, dated June 2, 2009 (Supplemental Appendix

[5] The injunction sought does not include Plan participants who signed releases. ECF Doc. No. 84-1.

[6] While McNeil does not believe that Defendants have a valid statute of limitations defense against any member of the Putative Class for the reasons stated herein, Defendants' argument would completely disappear if this Court were to reconsider class certification because the claims of the Putative Class would relate back to McNeil's filing, *see Empls. Committed For Justice v. Eastman Kodak Co.*, 407 F. Supp. 2d 423, 438-42 (W.D.N.Y. 2005) (addition of class claims related back to original filing), which this Court has already ruled was timely. *Kunsman 2013*, 977 F. Supp. 2d at 264.

Ex. 2) ("The only benefit distributions that have not been computed according to the RIGP's offset formula were paid to plaintiffs in the cases of *Layaou v. Xerox Corp.* and *Frommert v. Conkright*"); *see also* August 15, 2007 Letter from Kaster to Jaffe (Appendix Ex. 1, at Ex. I) ("This offset has been applied consistently to all participants who left the Company and received a distribution who were later rehired by the Company); August 23, 2007 Letter from Becker to Jaffe (Appendix Ex. 1, at Ex. K) (same); August 26, 2016 Letter from Kaster to McElwaney (Appendix Ex. 2, at Ex. C) (same).

There is no evidence that Defendants ever informed any of those Similarly Situated Plan Participants who have already retired, or the Similarly Situated Plan Participants who have not yet retired, about the decisions in *Frommert*, despite their fiduciary obligation to do so. *See Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 88 (2d Cir. 2001) ("When a plan administrator affirmatively misrepresents the terms of a plan or fails to provide information when it knows that its failure to do so might cause harm, the plan administrator has breached its fiduciary duty to individual plan participants and beneficiaries"); *Osberg v. Foot Locker, Inc.*, 138 F. Supp. 3d 517, 552 (S.D.N.Y. 2015) (same).

To the contrary, Kathy McElwaney[7], a current Xerox employee in the Putative Class, attests that she never received any communication from Xerox or the Plan which mentioned this Action, or the *Frommert* Action, or of the judicial decisions in either case.[8] McElwaney Aff. (Appendix Ex. 2) at ¶9. Furthermore, Defendants issued a summary plan description ("SPD") in August 2008 (Supplemental Appendix Ex. 3), which contained no information about the *Frommert* rulings. The

[7] Defendants suggest that McElwaney is improperly seeking relief in this action and her own individual action. Not so. McNeil cites McElwaney's Affidavit as evidence that (a) Defendants continue to apply to phantom account offset to Xerox employees re-hired prior to the issuance of the 1998 SPD, (b) Defendants failed to inform Plan Participants about the *Frommert* case, and the decisions in the *Frommert* case, and (c) Defendants concealed their breaches. McElwaney seeks relief in her own action, not in this lawsuit. Of course, if this Court grants injunctive relief in this action which inures to her benefit, she would not seek a duplicative recovery in her individual action.

[8] Defendants do not dispute the accuracy of this statement but only its relevance to the pending motion. *See* Defendants' Response to Statement of Undisputed Fact (ECF Doc. No. 89-9) at ¶34.

August 2008 SPD also misrepresented that the phantom account offset applied to all Plan participants "who received a prior distribution," and were "rehired before 2007," *id.* at 5, 15-16, even though the Second Circuit expressly held that the phantom account offset may not be applied to Plan participants re-hired prior to the issuance of the 1998 SPD.[9] *Frommert 2006*, 433 F.2d at 263.

"ERISA 'contemplates that the summary [plan description] will be an employee's primary source of information regarding employment benefits, and employees are entitled to rely on the descriptions contained in the summary." *Frommert 2006*, 433 F.3d at 265. Since Defendants never informed the Plan participants about the *Frommert* rulings, and indeed provided false information in the August 2008 SPD about the applicability of the phantom account offset, the six-year "fraud or concealment" limitations period of ERISA §413 applies.

"The statute of limitations is an affirmative defense as to which defendants bear the burden of proof." *See Trustees of the N.Y. City Dist. Council of Carpenters Pension Fund v. Lee*, 2016 U.S. Dist. LEXIS 32468, at *29 (S.D.N.Y. Mar. 14, 2016) (citing *Harris v. City of N.Y.*, 186 F.3d 243, 251 (2d Cir. 1999)). Defendants have not met their burden of proving that the Similarly Situated Plan Participants in the Putative Class acquired knowledge of the breaches more than six years ago.

A plaintiff has actual knowledge of the breach or violation "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." *Frommert 2006*, 433 F.3d at 272. While the 1998 SPD (and subsequent SPDs) disclosed how the phantom account operated, "learning the manner in which the phantom account functions [is] not sufficient to provide 'actual knowledge' that a breach of fiduciary duty had occurred." *Id.* That actual knowledge is not acquired until a plan participant learned "that the

[9] In addition, in individual communications with McElwaney in August and September of 2015, Defendants falsely stated that the "offset has been applied consistently to all participants who left the Company and received a distribution who were later rehired by the Company," McElwaney Aff. (Appendix Ex. 2) at Ex. C, which simply was not true.

phantom account was being applied in contravention of the Plan's terms." *Id. See also Caputo*, 267 F.3d at 193 ("disclosure of a transaction that is not inherently a statutory breach of fiduciary duty...cannot communicate the existence of an underlying breach.").

Defendants offer no evidence that any Similarly Situated Plan Participant in the Putative Class had actual knowledge that Defendants applied the phantom account offset in contravention of the *Frommert* rulings more than six years ago.[10] Nor is it likely given the lack of notice, concealment and deception. This Court should not rely on Defendants' idle speculation that they may have a valid statute of limitations defense without any evidence to support that claim.[11]

This Court held that "absent some valid defense (such as a signed release) as to an individual plaintiff, the plaintiffs in this action are entitled to relief in accordance with the new hire remedy set

[10] Defendants point to McElwaney as an example of a Plan participant whose claims are time-barred. Opp. at 25. Defendants rely on the same tired argument that this Court already rejected in this case and in *Testa* – that she did not interpose her claims for 18 years after the issuance of the 1998 SPD. *See Kunsman 2013,* 977 F. Supp. 2d at 264 (rejecting argument that fiduciary duty claim brought 10 years after issuance of 1998 SPD was time-barred); *Testa v. Becker*, 979 F. Supp. 2d 379, 384 (W.D.N.Y. 2013) ("*Testa 2013*") (rejecting argument that fiduciary duty claim brought 12 years after the issuance of 1998 SPD was time-barred). Defendants also note that McElwaney did not bring suit until 10 years after the *Frommert* decision. However, as this Court explained in *Testa 2013*, "it was not the decisions themselves, but defendants' alleged disregard of them, that gave rise to plaintiff's claim for breach of fiduciary duty." 979 F. Supp. 2d at 384. Defendants have presented no evidence that McElwaney knew of the breach more than three years (or six years) prior to bringing suit. The undisputed evidence is that McElwaney did not know about the *Frommert* rulings until after her claim was denied in September 2015. McElwaney Aff. ¶¶9-10. McElwaney's situation does not support Defendants' statute of limitations argument. *See* McElwaney's Memorandum in Opposition to Defendants' Motion to Dismiss and in Support of her Motion for Summary Judgment. *McElwaney* ECF Doc. No. 16, at 16-22.

[11] In the class certification context, courts have rejected the notion a speculative statute of limitations defense can defeat class certification. *See Schramm v. JPMorgan Chase Bank, N.A.*, 2011 U.S. Dist. LEXIS 122440, *31 (C.D. Cal. Oct. 19, 2011) ("speculation that some class members' claims may be barred on the basis of actual knowledge is not sufficient to defeat certification"); *Ramirez v. Palisades Collection LLC*, 250 F.R.D. 366, 371 (N.D. Ill. 2008) (certification should not be thwarted simply because defendants speculates that it may have unsupported statute of limitations defenses against different class members); *Allbaugh v. California Field Ironworkers Pension Trust*, 2014 U.S. Dist. LEXIS 106531, *20 (D. Nev. Aug. 4, 2014) ("The potential for a statute-of-limitations defense … based on speculation and not a developed argument is simply insufficient to defeat class certification"). The same principles should apply here.

forth in the *Frommert* Remedy Order." *Kunsman 2017*, at 11. Since Defendants have not asserted any valid defenses to the claims of the Similarly Situated Plan Participants in the Putative Class, they are entitled to at least that relief.[12]

3. <u>This Court Should Reject Defendants' Alternative to an Injunction Which Would Require Each Plan Participant to Engage in the Futile Process of Submitting Administrative Claims.</u>

Defendants suggest that there is no need for equitable relief because "individuals who believe they may have a valid claims based upon a Decision and Order rendered by the Court in this case, or the Decision and Order on appeal in *Testa*, can file a claim for benefits with the Plan Administrative [sic.] through the administrative claim process." Opp. at 24. Defendants further state that "[o]nly in the event that such claim were denied, would it be necessary for that individual to pursue his or her remedies in court." *Id.* Defendants' proposed alternative to an injunction lacks even a modicum of credibility.

As a preliminary matter, a statutory claim for breach of fiduciary duty under ERISA §502(a)(3), need not proceed through the administrative claim process. *See Kirkendall v. Halliburton, Inc.*, 2011 U.S. Dist. LEXIS 61906 (W.D.N.Y. June 8, 2011), *aff'd in part, vacated in part on other grounds*, 707 F.3d 173 (2d Cir. 2013); *Diamond v. Local 807 Labor Mgmt. Pension Fund*, 2014 U.S. Dist. LEXIS 15952, at *21 (E.D.N.Y. Feb. 7, 2014); *Uon Suk Park v. Trustees of 1199 SEIU Health Care Employees Pension Fund*, 418 F. Supp. 2d 343, 358 (S.D.N.Y. 2005).

In light of the history of these cases, it also would be absurd to require Plan participants to go through the administrative process, when doing so would be an exercise in futility. *See Davenport v. Harry N. Abrams, Inc.,* 249 F.3d 130, 133 (2d Cir. 2001); *Kirkendall v. Halliburton, Inc.*, 707 F.3d 173, 179 (2d Cir. 2013). Defendants make clear that in their view the claims of any Plan participant who has not yet brought suit are time-barred. Opp. at 24 (plaintiffs' claims for benefits were time-barred by 2004 at the latest). Thus, the Plan Administrator will inevitably deny all such claims.

[12] The issue of the appropriate remedy is currently on appeal in both *Frommert* and *Testa*, and McNeil reserves all rights should the Second Circuit reverse.

Just as critically the Court needs to ask how would a Similarly Situated Plan Participant in the Putative Class even know that the Plan administrator could not apply the phantom account offset in calculating his benefits and that he has a claim for breach of fiduciary duty, when he has never been informed that the courts have barred the application of the phantom account offset to any plan participant who was re-hired prior to September 1998? They would not know, and Defendants know that. Indeed, Defendants, in breach of their fiduciary duty, have purposely kept those Similarly Situated Plan Participants in the dark about the *Frommert* rulings and have told them that the phantom account offset applies. *See Devlin*, 274 F.3d at 88; *Osberg*, 138 F. Supp. 3d at 552. That lack of notice would be remedied by the notice provisions in the Proposed Order.

Defendants' proposed alternative to the requested injunction, is a ruse, which should be summarily rejected by the Court.

D. Defendants' Arguments in Support of their Cross-Motion for Summary Judgment and in Opposition to McNeil's Motion for Summary Judgment Have Already Been Rejected By This Court.

As Defendants recognize in their Opposition, this Court has already rejected all of the arguments they make in support of its cross-motion for summary judgment and in opposition to McNeil's motion for summary judgment when it denied Defendants' motion for summary judgment and granted summary judgment in favor if a plaintiff plan participant in *Testa 2017*. Opp. at 5. There is no reason for this Court to deviate from its well-reasoned decision in *Testa 2017*. That decision, as McNeil points out in his Memorandum, operates as collateral estoppel in this case. Mem. at 11-12. Defendants do not argue otherwise in their Opposition.

1. Defendants Breached Their Fiduciary Duties to McNeil and Other Similarly Situated Plan Participants in the Putative Class.

McNeil asserts that Defendants breached their fiduciary duties when they failed to follow controlling decisions in *Frommert* which barred the use of the phantom account offset in calculating benefits to Xerox employees rehired prior to the issuance of the 1998 SPD, *Frommert 2006*, 433 F.3d

at 263, and required Defendants to treat such employees no worse than a newly hired Xerox employee. *Frommert 2013*, 738 F.3d at 530.

Defendants contend that the Second Circuit never resolved the question of whether the phantom account offset could be applied to Plan participants rehired prior to the issuance of the 1998 SPD who were not plaintiffs in *Frommert*. Opp. at 28-30. This Court rejected that argument in *Kunsman 2017*, when it held that Defendants "position that the Second Circuit's statement in *Frommert* that 'the phantom account may not be applied to employees rehired prior to the issuance of the 1998 SPD,' … is not the 'unswerving mandate' that it seems to be," shows a "remarkable combination of sophistry and chutzpah." *Id.* at 7.

In addition, when it served their strategic litigation purposes, Defendants argued there was no need to certify the Putative Class because "the Plan Administrator is bound by law, and his fiduciary duty, to apply the court-ordered benefits calculation in *Frommert* to all similarly-situated plaintiffs," and "[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." ECF Doc. No. 68, at 16 (Supplemental Appendix Ex. 1). Because this Court expressly adopted Defendant's position, *Kunsman 2017*, at 14-16, Defendants are judicially estopped from arguing that they are not required to calculate benefits for McNeil and the Putative Class in accordance with the *Frommert* rulings. *See Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 148 (2d Cir. 2005) (judicial estoppel applied "to situations where a party both takes a position that is inconsistent with one taken in a prior proceeding, and has had that earlier position adopted by the tribunal to which it was advanced.").

Such uniform and consistent treatment, in any event, is mandated of a fiduciary by ERISA. Under ERISA, a plan administrator has a fiduciary duty to "apply uniform standards," *Des Roches v. Cal. Physicians' Serv.*, 320 F.R.D. 486, 506 (N.D. Cal. 2017) and "to ensure that 'the plan provisions are 'applied consistently with respect to similarly situated claimants.'" *Stephan v. Unum Life Ins. Co. of*

Am., 697 F.3d 917, 936 (9th Cir. 2012). *See also Cannon v. UNUM Life Ins. Co. of Am.*, 219 F.R.D. 211, 216 (D. Me. 2004) (insurer has "fiduciary obligations" to insure that "plan provisions have been applied consistently with respect to similarly situated claimants.").

As the court held in *K.M. v. Regence BlueShield*, 2014 U.S. Dist. LEXIS 27685 (W.D.Wash. Feb. 27, 2014), "were this Court to find that the Plan requires Defendants to act in a certain fashion, ERISA would require [a fiduciary] to act in a similar fashion toward all beneficiaries." *Id.* at *49 (*quoting Z.D. v. Group Health Coop.*, 2012 U.S. Dist. LEXIS 76498, *17-18 (W.D. Wash. June 1, 2012)). Here, the Second Circuit in *Frommert* held that Defendants are required to treat Plan Participants re-hired prior to the issuance of 1998 SPD "in a certain fashion." Under ERISA, Defendants have a fiduciary obligation "to act in a similar fashion" toward McNeil and the Similarly Situated Plan Participants in the Putative Class. Defendants' refusal to do so "was unjustified and constituted a breach of the administrator's fiduciary duty." *Testa 2017*, 2017 U.S. Dist. LEXIS 70984, at *15.

2. <u>McNeil's Claim for Breach of Fiduciary Duty Is Timely.</u>

ERISA §413 provides that no action may be commenced concerning a fiduciary's breach of any responsibility, duty, or obligation under ERISA after the earlier of six years after the date of the last action which constituted a 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. 29 U.S.C. §1113.

Kunsman 2013 held that the claims asserted by McNeil and the other plaintiffs in this action for breach of fiduciary duty were timely under ERISA §413 because:

> [P]laintiffs could not have foreseen … that defendants would ignore the directives of the Second Circuit, and continue to apply the phantom account to Xerox retirees, after the issuance of the *Frommert* decision in 2006. In my view, that provides a sufficient basis for a claim for breach of fiduciary duty, based on defendants' alleged breach of their duty to discharge their duties "solely in the interests of the participants and beneficiaries" of the Plan. Such a claim could not have arisen prior to the issuance of the Second Circuit's decision on January 6, 2006. As to that claim, then, this action, which was filed on February 21, 2008, is timely, under either the three- or six-year statute of limitations for breach of fiduciary duty claims.

977 F. Supp. 2d at 264. *See also Testa 2013*, 979 F. Supp. 2d at 384.

With respect to McNeil, the last act which constituted the breach occurred when McNeil retired in March, 2008 and Defendants' applied the phantom account offset, in contravention of the *Frommert* rulings. McNeil Aff. (Appendix Ex. 1) at ¶13. *See Testa 2017*, 2017 U.S. Dist. LEXIS 70984, at *12-13 (last act which constituted the breach occurred when "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"). In addition, there is no evidence that McNeil "was made aware, more than three years before he filed suit" in January 2008 "that defendants would refuse to abide by the 2006 directives of the Second and Ninth Circuits." *Id.* at *14. Finally, for the reasons set forth in Section II(C)(2) *supra*, the six year "fraud or concealment" limitations period applies. Thus, McNeil's claim is not time-barred under ERISA §413.

3. <u>McNeil's Claim For Breach of Fiduciary Duty Is Separate and Distinct From His Claim for Benefits.</u>

Because this Court's conclusion in *Kunsman 2013* is unassailable, Defendants "attempt to find a way around this Court's 2013 decision" and take "a new tack," like they did in *Testa 2017*. 2017 U.S. Dist. LEXIS 70984, *9. Defendants no longer "argue that the plaintiff's sole remaining claim is time-barred, but that the Plan administrator correctly denied it as time barred." *Id.* Defendants repackaged argument makes a "fine distinction" that is "meritless." *Id.* at *10.

Defendants claim that since they properly determined that McNeil's claim for benefits under ERISA §502(a)(1)(b) was time-barred, his claim for breach of fiduciary duty under ERISA §502(a)(3) must be dismissed on the merits. Opp. at 31-33. Once again Defendants conflate a claim for benefits with a claim for breach of fiduciary duty. However, the Second Circuit has long held that claims for benefits under ERISA §502(a)(1)(b) and for breach of fiduciary duty under ERISA §502(a)(3) are distinct claims, and that the assertion of a claim for benefits does not preclude a plan participant from asserting a claim for breach of fiduciary duty, although there cannot be a duplicate recovery.

See Devlin, 274 F.3d at 89-90; *Frommert 2006*, 433 F.3d at 272. When both a claim for benefits and a claim for breach of fiduciary duty are asserted, the district court has the "responsibility for determining 'appropriate equitable relief" and that "determination must be based on ERISA policy and the 'special nature and purpose of employee benefits plans' as well as consideration of the relief afforded the plaintiffs under their §502(a)(1)(B) claim." *Frommert 2006*, 433 F.2d at 272.

This Court rejected Defendants' effort to conflate a claim for benefits (which this Court has held was barred) with the separate claims for breach of fiduciary duty (which this Court has held was timely) in *Kunsman 2017*. The Court explained:

> In 2006, the Second Circuit held that the phantom account *may not be applied* to an employee rehired prior to 1998…The plan administrator's refusal to follow that "clear directive," *id.* is what forms the basis for this claim, and that claim therefore could not have arisen prior to the Second Circuit's 2006 decision. Thus, this Court's dismissal of plaintiffs' *judicial* claims for benefits under the Plan, as untimely, has no bearing on the merits of plaintiffs' claim that the plan administrator breached his fiduciary duty by willfully ignoring the dictates of *Frommert*, in the context of plaintiffs' administrative claims. In arguing otherwise, defendants are unreasonably conflating completely separate issues.

Id. at 9-10 (emphasis in original).

After judging Plaintiffs' breach of fiduciary duty claim, independently and on its own merits, this Court determined:

> I see no reason why plaintiffs in this action who have not validly released their claims should be barred from seeking relief under §502(a)(3), based on defendants' continued refusal to abide by the Second Circuit's directive in *Frommert*-which, despite defendants' protestations to the contrary, does not contain any limitations on its general prohibition against applying the phantom account to employees rehired prior to the issuance of the 1998 SPD.

Id. at 9.

The Court then found that "absent some valid defense (such as a signed release) as to an individual plaintiff, the plaintiffs in this action are entitled to relief in accordance with the new hire remedy set forth in the *Frommert* Remedy Order." *Id.* at 11.

Because McNeil's breach of fiduciary duty claim is meritorious and timely, this Court should enter summary judgment in his favor and deny Defendants' cross motion for summary judgment.

III. CONCLUSION

For all the reasons set forth herein and McNeil's Memorandum, this Court should grant McNeil's motion for summary judgment and should deny Defendants' cross-motion for summary judgment. As a remedy for Defendants' breaches of fiduciary duty in violation of ERISA §§404 and 502(a)(3), this Court should enter the injunctive and other equitable relief set forth in the Proposed Order (ECF Doc. No. 84-1). McNeil also respectfully suggests that this is any appropriate time to revisit the denial of class certification.

Dated: November 28, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Edward F. Haber, hereby certify that on November 28, 2017, I caused a copy of the foregoing to be served by email via the ECF system on all counsel of record in the above-captioned action.

/s/ Edward F. Haber