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-6080 (DGL)

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF MCNEIL'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

This Memorandum of Law is submitted by Defendants Sally Conkright, Patricia M. Nazemetz and Lawrence M. Becker, as former Plan Administrators of the Xerox Retirement Income Guarantee Plan ("RIGP") and as individuals,[1] in opposition to Plaintiff Joseph McNeil's motion for summary judgment and the motion for summary judgment filed by the other Plaintiffs in this action and in support of Defendants' cross-motion for summary judgment dismissing the sole remaining claim in the Complaint on the grounds that (i) forty-three Plaintiffs signed valid and enforceable releases waiving any and all claims, including the claims interposed in this case; and (ii) Defendants did not breach their fiduciary duty in denying Plaintiffs' claim for benefits following the issuance of the 2006 Decision and Order by the Second Circuit in *Frommert v. Conkright* because there were applicable defenses to Plaintiffs' claim that the offset provision contained in the RIGP should not be applied to them, that were not intended to be precluded by the Second Circuit's directive in that case.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Claims Asserted by Plaintiffs

This case was filed as a multi-plaintiff action filed by eighty-three individual plaintiffs, seeking to be paid additional pension benefits under the Employee Retirement Security Act (ERISA"), 29 U.S.C. § 1001 *et seq*., 29 U.S.C. § 1001 *et seq*. The crux of Plaintiffs' claim is that they are a group of "Xerox rehires" that were all participants in the Xerox Retirement Income Guarantee Plan (the "Plan" or "RIGP"), were separated from employment and received a distribution from the Plan, and then were rehired by Xerox prior to the publication and

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[1] The claims as against the Hewitt Defendants and Xerox Corporation were dismissed by the Court in its 2013 Decision and Order. (*See* Dkt. No. 53).

distribution of the September 1998 SPD. (Compl. ¶ 14).[2] Plaintiffs further claim that they are entitled to the benefit of the Second Circuit's ruling in *Frommert v. Conkright*, 433 F.3d 254 (2d Cir. 2006)("*Frommert I*") and this Court's Decision and Order in *Frommert v. Conkright*, 472 F. Supp.2d 452 (W.D.N.Y. 2007), to the effect that the Decision in *Frommert I* does "seem applicable to all Xerox employees who are similarly situated to the named plaintiffs." (Compl. ¶ 15). Plaintiffs interposed four separate claims for alleged statutory violations, entitling them to the payment of additional benefits and/or equitable relief under ERISA, 29 U.S.C. § 1132(a)(1)(B) and/or § 1132(a)(3). (*See generally* Compl.).

B. Defendants' 2008 Motion to Dismiss and This Court's Decision

As this Court is fully aware, Defendants filed a motion to dismiss the action, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, approximately ten years ago, on June 10, 2008, on numerous grounds, including that it was untimely commenced.

On or about October 16, 2013, this Court issued a Decision and Order in this case, granting in part and denying in part, Defendants' initial motion to dismiss. (Dkt. No. 53).[3] Three of the four claims for benefits asserted by Plaintiffs under Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B) were properly dismissed by this Court in its 2013 Decision and Order, reported at *Kunsman v. Conkright*, 977 F. Supp. 2d 250 (W.D.N.Y. 2013) ("*Kunsman 2013*") on the grounds that they were time-barred.

As properly explained by this Court, this action was filed in 2008, and those claims arose no later than 1998, when the Plan was amended to fully explain the phantom account offset that is at the root of this case and the other related cases. Thus, even under the most generous six

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[2] References to the Amended Complaint filed by the Plaintiffs on April 8, 2008 are designated "Compl." [paragraph number].

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

year limitations period, this Court held that most of Plaintiffs' claims were time-barred. *Kunsman 2013*, 977 F. Supp. 2d at 259. This Court, however, refused to dismiss Plaintiffs' breach of fiduciary duty claim under ERISA § 502 (a)(3), 29 U.S.C. 1132(a)(3), which the Court found sought equitable relief for Defendants' alleged failure to comply with a directive of the Second Circuit in *Frommert I.* Since the allegations of alleged wrongdoing as contained in the Complaint would have arisen with the issuance of the Second Circuit's Decision and Order in 2006, the Court held that such claim would not be time-barred and could proceed as against Defendants. *See Kunsman 2013,* 977 F. Supp. 2d at 26

C. Defendants' Answer and Plaintiffs' Subsequent Motion for Class Certification

Defendants filed an Answer to the Amended Complaint, asserting various defenses, including among others, that the vast majority of the Plaintiffs had signed releases and released their claims against Defendants. (Dkt. No. 58).

As the Court may also recall, at the time the action was commenced, Plaintiffs were represented by Robert A. Jaffe. On or about August 2009, Attorney Jaffe passed away. The Law Offices of John A. Strain entered a Notice of Appearance, indicating that he had been retained to represent 27 of the individual Plaintiffs in this action. (Dkt. No. 36). On March 31, 2014, Plaintiff McNeil, who had changed counsel on February 3, 2009, filed a motion to file a second amended complaint (which would include sufficient allegations to proceed as a class action allegation), and a motion for class certification. (Dkt. No. 64 and 66). On that same date, Attorney Shaun Martin filed a Notice of Appearance for the remaining unrepresented Plaintiffs in this matter. (Dkt. No. 65).

Defendants opposed Plaintiff McNeil's motion to amend the complaint a second time and opposed the motion for class certification on the basis that, among other things, that Plaintiff

McNeil's efforts to seek class certification was untimely according to the Local Rules of this Court in that it was filed six years after the Complaint was filed and because the action did not meet the requirements for a class action under Fed. R. Civ. P. 23 and Local Rule 23 of the Local Rules of the Western District of New York. (Dkt. No. 68).

On July 7, 2017, this Court issued a Decision and Order denying Plaintiff McNeil's motion to amend the complaint yet again and his motion for class certification ("2017 Decision and Order"). (Dkt. No. 83). The Court stated that converting this case to a class action is unnecessary and inappropriate. (*Id.* at 12-13). In the 2017 Decision and Order, the Court stated that relief can be ordered without certifying a class and also recognized that Defendants may have "valid, individualized defenses" that may preclude such relief. (*Id.* at 14).

D. The Current Motions Before this Court

Plaintiffs now move for summary judgment on behalf of all Plaintiffs, despite the fact that it is undisputed that forty-three of them have signed releases (the "Releases") and were paid severance or salary continuance, pursuant to the terms of such Releases.

The terms of the Releases are virtually identical to the releases that the Second Circuit upheld as valid and enforceable in the *Frommert v. Conkright* and the *Anderson v. Becker* actions, discussed below. Plaintiffs also seek to revisit the issue of class certification, and request, without providing any authority for such an order to do so, that the Court issue injunctive relief, applicable to non-parties to this suit, without any consideration as to whether there are defenses to a non-party claim.

For the reasons discussed below, Defendants oppose the grant of summary judgment in Plaintiffs' favor and cross-move for summary judgment. Forty-three Plaintiffs signed valid and enforceable Releases, and the totality of the circumstances here warrant their enforcement. The

claims asserted by these forty-three Plaintiffs must be dismissed for the reasons discussed in POINT I, *infra*.

Plaintiffs' renewed motion for class certification should be denied for the reasons discussed in POINT II, *infra*.

With regard to the grant of summary judgment on the merits as to the remaining Plaintiffs, Defendants are respectful and aware that this Court has already denied Defendants' motion for summary judgment and granted summary judgment in favor of a plaintiff in a related case in *Testa v. Becker*, No. 10-cv-62291, 2017 WL 1857384 at 3 (W.D.N.Y. May 9, 2017) ("*Testa*"). In doing so, the Court rejected Defendants' argument that had Testa made a claim that he was entitled to additional benefits based on an inadequate SPD within the applicable statutory time period, (that is, within six years of the issuance of the 1998 SPD or by 2004), the Plan Administrator would have had an obligation to comply with the Second Circuit's 2006 directive in *Frommert v. Conkright*, but that it is not a breach of fiduciary duty to deny a time-barred claim. The Second Circuit's subsequent decisions in the Frommert case dismissing the claims of those plaintiffs who signed releases demonstrated that its 2006 directive was not intended to preclude valid defenses to a plan participant's claim. As this Court is also aware, Defendants have filed an appeal of this Court's Decision and Order in *Testa*, and have already filed their Brief in that matter.

While not intending any disrespect to the Court, Defendants are preserving their rights in this action, pending the outcome of the appeal of the above issues in *Testa,* by opposing Plaintiffs' motion for summary judgment on the issues raised in the *Testa* matter with regard to the Plaintiffs' breach of fiduciary duty claim and by cross-moving for summary judgment on those issues in this action. (*See* POINT III, *infra*).

Accordingly, Plaintiffs' motion for summary judgment and injunctive relief should be denied and Defendants' cross-motion for summary judgment should be granted and the remaining claim in the Amended Complaint dismissed in its entirety.

ARGUMENT

POINT I

THE CLAIMS OF FORTY-THREE PLAINTIFFS MUST BE DISMISSED BECAUSE THEY SIGNED VALID, ENFORCEABLE RELEASES

The Supreme Court has unequivocally upheld the right of a participant in an ERISA-governed benefit plan to enter into an agreement in which the participant releases claims for benefits under ERISA in exchange for valid consideration. *See Lockheed Corp. v. Spink*, 517 U.S. 882, 892-94 (1996). It is settled law in the Second Circuit that in determining whether an employee has released his ERISA claims, courts consider whether, under the totality of the circumstances, the individual knowingly and voluntarily waived his rights according to a number of factors. *Frommert v. Conkright*, 535 F.3d 111, 121 (2d Cir. 2008) ("*Frommert II*"); *Finz v. Schlesinger*, 957 F.2d 78, 82 (2d Cir. 1992). *See also Chaplin v. Nationscredit Corp.*, 307 F.3d 368, 373 (5th Cir. 2002).

As the Second Circuit explained in *Frommert II*, to determine if a plaintiff has released his claims under ERISA, the courts must consider whether the individual's waiver of his or her rights was knowing and voluntary under the "totality of the circumstances." *Frommert II*, 535 F.3d at 121; *Finz*, 957 F.2d at 82. The Court identified the following non-exhaustive list of factors as relevant to the determination of whether a waiver is knowing and voluntary:

> 1) the plaintiff's education and business experience, 2) the amount of time the plaintiff had possession of or access to the agreement before signing it, 3) the role of plaintiff in deciding the terms of the agreement, 4) the clarity of the agreement, 5) whether the plaintiff was represented by or consulted with an attorney, [as well as whether an employer encouraged the employee to consult an

> attorney and whether the employee had a fair opportunity to do so] and 6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.

Frommert II, 535 F.3d at 121 (citing *Finz*, 957 F.2d at 82). *See also Linder v. BYK-Chemie USA, Inc.*, No. 3:02 CV 1956, 2006 U.S. Dist. LEXIS 13823, *24-*25 (D. Conn. Mar. 10, 2006).

A proper application of the above factors here warrants a conclusion that Plaintiffs knowingly and voluntarily waived any disputed ERISA claim that they have in this case. *Frommert II*, 535 F.3d at 121 (citing *Finz*, 957 F.2d at 82).

A. Plaintiffs' Education and Business Experience Support a Valid Waiver

With regard to the first factor, their education and business experience, all forty-three of these individuals worked for Xerox for two separate periods of employment and thus had some education and business experience. It is undisputed that to be a plan participants in the Xerox RIGP, Plaintiffs had to be in exempt or salaried, non-exempt positions. (Cone Decl., Ex. A).[4] It is also undisputed that Plaintiffs were not low level or non-exempt hourly workers at the time that they signed their Releases. As such, this factor is met.

B. The Access to the Agreement and Time to Review It Also Support a Waiver

With regard to the next factor, (Plaintiffs' access to the agreement and time to review it), a review of the releases shows that 41 of the 43 had access to and were provided with 45 days to review the release and 2 were provided with 21 days. Specifically, forty-one releases advise that that the individuals signing the release "**HAVE 45 DAYS FROM THE DATE OF THIS RELEASE IS PROVIDED TO ME TO CONSIDER IT BEFORE I SIGN AND RETURN**

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[4] References to the Declaration of Will Cone, sworn to on October 25, 2017, are cited as "(Cone Decl., ¶ [paragraph number], Ex. [exhibit letter])."

IT TO XEROX." (Cone Decl., Exs. C-R and T-X and Z-RR; Formisano Decl., Ex. A[5]) (emphasis in original of most releases).

The Releases signed by Plaintiff Jenkins and Plaintiff Luppino advise that they have "**21 DAYS FROM THE DATE THIS RELEASE IS PROVIDED**" to consider the release before signing and returning it. (Cone Decl., Ex. R and X) (emphasis in original).

Moreover, the signed Releases, attached as Exhibit to the Cone Declaration, show that:

- Ann Adams was provided a "General Release" on January 23, 2002 and signed and returned the release on or about March 14, 2002. Ms. Adams received 36 weeks of salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. C) (emphasis in original).

- Coralyn Burns was provided a "General Release" on April 30, 2008 and signed and returned the release on or about July 28, 2008. By signing the release Ms. Burns requested to participate in a Voluntary Reduction in Force Program being offered at that time. Ms. Burns received salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. D).

- Richard O. Carville was provided a "General Release" on April 30, 2008 and signed and returned the release on or about May 9, 2008. By signing the release Mr. Carville requested to participate in a Voluntary Reduction in Force Program being offered at that time. Mr. Carville received 52 weeks of salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. E).

- Kevin Cass was provided a "General Release" on September 28, 2006 and signed and returned the release on or about October 25, 2006. Mr. Cass received salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. F).

- Charles J. Chodak was provided a "General Release" on December 31, 2001, and signed and returned the release on or about February 21, 2002. Mr. Chodak received 36 weeks of salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. G).

- Richard J. Cutri was provided a copy of a "General Release" on December 3, 2003, and signed and returned the release on or about December 16, 2003. Mr. Cutri received 52 weeks of salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. H).

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[5] References to the Declaration of Ralph Formisano in Support of Plaintiffs' Brief in Support of Motion for Summary Judgment, filed on September 20, 2017 (Dkt. No. 85-4) are designated as "(Formisano Decl., ¶ [paragraph number], Ex. [exhibit letter])."

- Nicholas J. DeSario was provided a copy of a "General Release" on January 23, 2013 and signed and returned the release on or about January 31, 2013. Mr. DeSario received salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. I).

- Robert G. Didas was provided a copy of a "General Release" on October 23, 2008 and signed and returned the release on or about December 5, 2008. By signing the release Mr. Didas requested to participate in a Voluntary Reduction in Force Program being offered at that time. Mr. Didas received salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. J).

- David M. Donahue was provided a copy of a "General Release" on February 12, 2001, and signed and returned the release on or about March 14, 2001. Mr. Donahue received 52 weeks of salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. K).

- Monica Dutcher was provided a copy of a "General Release" on November 15, 2000, and signed and returned the release on or about January 1, 2001. Ms. Dutcher received 52 weeks of salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. L).

- George J. Edwards was provided a copy of a "General Release" on June 27, 2006, and signed and returned the release on or about June 28, 2006. By signing the release, Mr. Edwards requested to participate in a Voluntary Reduction in Force Program being offered at that time. Mr. Edwards received 52 weeks of salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. M).

- Ralph Formisano signed a "General Release" on or about January 23, 2009. By signing the release, Mr. Formisano requested to participate in a Voluntary Reduction in Force Program being offered at that time. Mr. Formisano received salary continuance and other valuable compensation for signing the release. (Formisano Decl., ¶ 6, Ex. A).

- Nancy Garrett was provided a copy of a "General Release" on November 15, 2000, and signed and returned the release on or about December 28, 2000. Ms. Garrett received 39 weeks of salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. N).

- Edward C. Hanzlik was provided a copy of a "General Release" on October 24, 2005, and signed and returned the release on or about November 7, 2005. By signing the release, Mr. Hanzlik requested to participate in a Voluntary Reduction in Force Program being offered at that time. Mr. Hanzlik received salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. O).

- Gordon E. Herod was provided a copy of a “General Release” on October 23, 2008, and signed and returned the release on or about December 2, 2008. By signing the release, Mr. Herod requested to participate in a Voluntary Reduction in Force Program being offered at that time. Mr. Edwards received salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. P).

- Robert R. Hunt was provided a copy of a “General Release” on June 18, 2003, and signed and returned the release that same month. By signing the release, Mr. Hunt requested to participate in a Voluntary Reduction in Force Program being offered at that time. Mr. Hunt received 52 weeks of salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. Q).

- Lane E. Jenkins was provided a copy of a “General Release” on March 28, 2002, and signed and returned the release on that same date. Ms. Jenkins received 52 weeks of salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. R).

- Bruce Kossuth was provided a copy of a “General Release” on September 15, 2006, and signed and returned the release on or about October 27, 2006. By signing the release, Mr. Kossuth requested to participate in a Voluntary Reduction in Force Program being offered at that time. Mr. Kossuth received salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. S).

- Eric C. Kullberg was provided a copy of a “General Release” on April 10, 2000, and signed and returned the release on or about May 21, 2000. By signing the release, Mr. Kullberg requested to participate in a Voluntary Reduction in Force Program being offered at that time. Mr. Kullberg received salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. T).

- Bruce D. Kunsman was provided a “General Release” on November 19, 2002, and signed and returned the release on that same date. Mr. Kunsman received 52 weeks of salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. U).

- John D. Light was provided a “General Release” on February 6, 2001, and signed and returned the release on or about February 11, 2001. By signing the release, Mr. Light requested to participate in a Voluntary Reduction in Force Program being offered at that time. Mr. Light received salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. V).

- Patricia M. Lippold was provided a “General Release” on October 24, 2005, and signed and returned the release on or about November 30, 2005. By signing the release, Ms. Lippold requested to participate in a Voluntary Reduction in Force Program being offered at that time. Ms. Lippold received salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. W).

- Concetta R. Luppino was provided a copy of a "General Release" on November 20, 2007, and signed and returned the release on or about November 26, 2007. Ms. Luppino received 43.5 weeks of salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. X).

- Robert E. Lutz was provided a copy of a "General Release" on August 30, 2006, and signed and returned the release on or about September 8, 2006. By signing the release, Mr. Lutz requested to participate in a Voluntary Reduction in Force Program being offered at that time. Mr. Lutz received salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. Y).

- Ellen M. MacLeod was provided a "General Release" on October 24, 2005, and signed and returned the release on or about December 6, 2005. By signing the release, Ms. MacLeod requested to participate in a Voluntary Reduction in Force Program being offered at that time. Ms. MacLeod received salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. Z).

- Robert C. Meyers was provided a "General Release" on December 11, 2003, and signed and returned the release on or about January 8, 2004. Mr. Meyers received 52 weeks of salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. AA).

- Elden Morrison was provided a "General Release" on December 17, 2003, and signed and returned the release on or about December 18, 2003. Mr. Morrison received 19.5 weeks of salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. BB).

- Frank R. Mosey was provided a "General Release" on September 15, 2006, and signed and returned the release on or about September 20, 2006. By signing the release, Mr. Mosey requested to participate in a Voluntary Reduction in Force Program being offered at that time. Mr. Mosey received salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. CC).

- Louis N. Nost was provided a "General Release" on August 25, 2005, and signed and returned the release on or about September 20, 2005. By signing the release, Mr. Nost requested to participate in a Voluntary Reduction in Force Program being offered at that time. Mr. Nost received salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. DD).

- Arnold C. Palmer was provided a "General Release" on February 28, 2001, and signed and returned the release on or about March 1, 2001. Mr. Palmer received 30 weeks of salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. EE).

- Donald R. Philips III (whose last name is misspelled "Phillips" in the caption of this case) was provided a "General Release" on November 20, 2002, and signed and returned the release on that same date. Mr. Philips received 43.5 weeks of

salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. FF).

- Thomas W. Pike was provided a "General Release" on October 23, 2008, and signed and returned the release on or about December 8, 2008. By signing the release, Mr. Pike requested to participate in a Voluntary Reduction in Force Program being offered at that time. Mr. Pike received salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. GG).

- William D. Robinson was provided a "General Release" on July 18, 2006, and signed and returned the release on or about August 21, 2006. Mr. Robinson signed the release as part of an involuntary reduction in force at that time. Mr. Robinson received salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. HH).

- Kathleen Santelli signed a "General Release" in or about 2008. Ms. Santelli received salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. II).

- Arthur C. Streb signed a "General Release" on or about October 12, 2004. By signing the release, Mr. Streb requested to participate in a Voluntary Reduction in Force Program being offered at that time. Mr. Streb received 52 weeks of salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. JJ).

- Mary Ellen Sullivan was provided a "General Release" on January 4, 2011, and signed and returned the release on January 7, 2011. By signing the release, Ms. Sullivan requested to participate in a Voluntary Reduction in Force Program being offered at that time. Ms. Sullivan received 37 weeks of salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. KK).

- Barbara M. Taylor was provided a "General Release" as part of an Involuntary Reduction in Force on February 17, 2011, and signed and returned the release on or about February 23, 2011. Ms. Taylor received salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. LL).

- Thomas J. Trieskey was provided a "General Release" on August 25, 2005, and signed and returned the release on or about August 30, 2005. By signing the release, Mr. Trieskey requested to participate in a Voluntary Reduction in Force Program being offered at that time. Mr. Trieskey received salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. MM).

- Anne M. Trocano was provided a "General Release" on June 28, 2012, as part of an Involuntary Reduction In Force, and signed and returned the release on August 3, 2012. Ms. Trocano received salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. NN).

- Timothy D. Turner was provided a "General Release" on January 23, 2009, as part of an Involuntary Reduction In Force, and signed and returned the release that same date. Mr. Turner received salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. OO).

- Peter Ventress was provided a "General Release" on September 15, 2006, and signed and returned the release on or about October 10, 2006. By signing the release, Mr. Ventress requested to participate in a Voluntary Reduction in Force Program being offered at that time. Mr. Ventross received salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. PP).

- John W. Whipple was provided a "General Release" on October 24, 2005, and signed and returned the release on or about December 6, 2005. By signing the release, Mr. Whipple requested to participate in a Voluntary Reduction in Force Program being offered at that time. Mr. Whipple received salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. QQ).

- John M. Wysocky was provided a "General Release" on August 25, 2005, and signed and returned the release on or about August 26, 2005. By signing the release, Mr. Wysocky requested to participate in a Voluntary Reduction in Force Program being offered at that time. Mr. Wysocky received salary continuance and other valuable compensation for signing the release. (Cone Decl., Ex. RR).

The Second Circuit has consistently held that a period of forty-five days is ample time to review a release in *Frommert II*. *See also Yablon v. Strook & Strook & Lavan Ret. Plan and Trust*, No. 01 Civ 452, 2002 U.S. Dist. LEXIS 10528 (S.D.N.Y. June 12, 2002), *aff'd*, 98 F. App'x LEXIS 6338 (2d Cir. 2004) (also finding that 45 days was ample time to review a release when determining if the release was knowing and voluntary). Indeed, courts in this circuit have held that that as few as eleven days to be sufficient time to review a release to be enforceable. *See, e.g., Farrell v. Title Assocs.*, No. 03 Civ. 4608, 2004 U.S. Dist. LEXIS 2508, *14 (S.D.N.Y. Feb. 19, 2004) (11-day review period sufficient). Thus, having been given twenty-one days to review and consider signing their respective releases, Plaintiffs Jenkins and Luppino had ample time for a knowing and voluntary release.

Plaintiff Kunsman has attempted to avoid outright dismissal of his breach of fiduciary duty claim, (and obtain summary judgment in his own favor), by contending that he was

"forced" to sign his release on the day that it was presented. A review of the Release Plaintiff Kunsman signed, expressly states otherwise, which he acknowledged when he signed the Release itself. His Declaration does not set forth sufficient circumstances of any force, coercion or duress that Kunsman was under that would void his Release. Under well-established law, duress or coercion requires proof of a wrongful threat that induces the person to enter a transaction under the influence of such fear as precludes him from exercising free will or judgment. *See e.g., Figueroa v. MRM Worldwide*, 2014 U.S. Dist. LEXIS 30012 (S.D.N.Y. Mar. 4, 2014) (rejecting plaintiff's claim that duress was sufficient to warrant the non-enforcement of a release he signed waiving his employment-related claims); *Accord Nat. Bank. of Cincinnati v. Pepper*, 454 F.2d 626, 632 (2d Cir. 1972); *805 Third Avenue Co. v. M.W. Realty Associates*, 58 N.Y.2d 447 (1983). Economic difficulty alone, such as that an individual really needs the severance money being offered, does not constitute coercion or duress; there must be evidence of an unjustified demand accompanied by an improper threat. *See Figueroa v. MRM Worldwide*, 2014 U.S. Dist. LEXIS 30012 * 27; *Joseph v. Chase Manhattan Bank N.A*., 751 F. Supp. 31, 34 (E.D.N.Y. (1990); *Kilpatrick v. Germainia Life Ins. Co*., 183 N.Y. 163 (1905).

There is yet another reason why Kunsman's claim that he was forced to sign the Release the same day he first received it does not operate to negate its enforceability here. While a contract is voidable under New York law if it is induced by economic duress, the person raising that defense must act promptly to repudiate the contract or release or he will be deemed to have waived his right to do so. *VKK Corp. v. NFL* , 244 F.3d 114, 122 (2d Cir. 2001) (delays as short as six months have been held to constitute a waiver of an economic duress claim). *Accord Rockmore v. Antell*, 353 F. App'x. 517 (2d Cir. 2009) (affirming the dismissal on a Rule 12(b)(6) motion of plaintiff's complaint where plaintiff had signed a release, claimed the release was

voidable on economic duress grounds, but failed to make the necessary efforts to void the contract for three years, and thus had ratified the contract).

Stated otherwise, in matters where a release is voidable on the grounds of economic duress, once the employee is cognizant of the alleged defect, the employee's subsequent decision to keep the consideration despite the defect operates to ratify the release. *Davis v. Eastman Kodak Co*., 2007 U.S. Dist. LEXIS 23193 (W.D.N.Y. 2007); *Livingston v. Bev-Pak, Inc*., 112 F. Supp. 2d 242, 249 (N.D.N.Y. 2000) ("Numerous federal courts hold that by accepting and retaining the benefits of a voidable release, a party ratifies the release and cannot avoid its obligations"); *Reid v. IBM* , 1997 U.S. Dist. LEXIS 8905, at * 6 (S.D.N.Y. June 26, 1997) (by accepting and keeping the severance benefits after the duress, incapacitation, and undue influence was removed, the employee-plaintiff ratified the release); *Najib v. Arnold*, 2008 U.S. Dist. LEXIS 46326 (S.D.N.Y. June 12, 2008) (finding that defendants had ratified the contract by waiting for nearly a year to raise the duress defense).

In sum, a review of the Releases show that all forty-three Plaintiffs, including Kunsman, were provided with ample time to review their Releases before they decided to sign them and that individuals took varying amounts of time to review, sign and return the release from as little as one day to more than a month. (*See* Cone Decl., Exs. C-RR; Formisano Decl., Ex. A). Plaintiff Kunsman has failed to raise any material issue with regard to his being forced to sign the Release at the time it was provided to him, and he ratified the Release in any event. This factor warrants a finding of a knowing and voluntary waiver.

C. The Third and Fourth Factors Favor the Enforcement of the Release

As to the third and fourth factors considered by courts, (the role of the plaintiff in signing the agreement and its clarity), while the Plaintiffs did not have a role in preparing the Releases, the Releases' terms are specific and clear. The Releases provide that each individual is agreeing

to release Xerox and its benefit plans and their administrators (among others) "from any and all claims of any kind, known or unknown, which I now have. . . includ[ing] . . . any claims under . . . the Employee Retirement Income Security Act of 1974. . .." (Cone Decl., Exs. C-RR; Formisano Decl., Ex. A).

The language in the releases at issue here is virtually identical to the language contained in releases which have been upheld and enforced by the Second Circuit in *Frommert II,* as well as the releases which have been upheld as enforceable in other related actions. *See Anderson v. Xerox*, 614 F. App'x 38 (2d Cir. 2015); *Clouthier v. Becker*, No. 08-cv-6441L, 2016 U.S. Dist. LEXIS 7196 (W.D.N.Y. Jan. 21, 2016). This Court has explicitly acknowledged that if a Plaintiff in this matter "knowingly and voluntarily released his or her claims, those claims are barred." (Dkt. No. 83 at 16). The Court further noted that "all the parties here seem to agree that plaintiffs or putative class members who signed valid releases are not entitled to relief." (*Id.*).

These circumstances weigh in favor of finding that the Release Plaintiffs knowingly and voluntarily released any and all claims against Defendants when they signed their releases. Indeed, courts in this Circuit have routinely held that similar Xerox releases are enforceable. *Anderson*, 614 F. App'x at 39; *Clouthier*, 2016 U.S. Dist. LEXIS 7196, at *5-6; *see also Hakim v. Accenture United States Pension Plan*, 718 F.3d 675, 683 (7th Cir. 2013) (holding release was valid where plaintiff "did not negotiate the terms of the [r]elease [but] there [was] no evidence that a rational person could not have deemed the amount of that payment adequate compensation for the rights he was giving up").

D. Plaintiffs Were Expressly Advised to Consult With An Attorney

The fifth factor (whether the plaintiff was represented by or consulted with an attorney, [as well as whether an employer encouraged the employee to consult an attorney and whether the employee had a fair opportunity to do so]) heavily weighs in favor of a finding of a knowing and

voluntary waiver. This conclusion is particularly true with regard to those Plaintiffs who signed releases after they retained counsel to represent them during the administrative claims process, which began for some Plaintiffs in 2006 or 2007. According to the terms of the releases, each of the forty-three Plaintiffs explicitly acknowledged by signing the release, among other things, that they were each advised "**TO CONSULT WITH AN ATTORNEY OF MY CHOOSING TO COUNSEL ME AS TO MY RIGHTS BEFORE I SIGN THIS RELEASE" and "TO TAKE SUFFICIENT TIME TO DECIDE WHETHER TO SIGN THIS RELEASE**."

On this same basis, the Declaration of Plaintiff Formisano does not warrant a grant of summary judgment in his favor, nor does it raise a material issue of fact sufficient to warrant a denial of Defendants' cross-motion for summary judgment. (Dkt. No. 85-4). Formisano admits that he knew about the Second Circuit's decision in *Frommert I* at the time that he signed his release in 2009. (*Id.*). Formisano also acknowledges that he was a named Plaintiff in this matter at that time, which means he was aware: (i) that his claim for benefits based on the non-payment of benefits following the issuance of 2006 Decision and Order was in dispute and (ii) that he was represented by counsel.

It is undisputed that the Release that Formisano signed expressly advised him to **CONSULT WITH COUNSEL** before signing the release. Formisano cannot now raise an issue of fact warranting summary judgment in his favor by merely claiming that he was not expressly advised that he was waiving his claims in this case when: (i) the Release expressly states that he is "waiving any and all claims;" (ii) he was fully aware that he was a plaintiff in this case; (iii) the crux of his disputed claim is for benefits as the result of the non-payment of benefits following the issuance of the 2006 Decision and Order in *Frommert*; (iv) he was represented by counsel since before the suit was even commenced; and (v) the Release at issue expressly

advised him to **CONSULT WITH COUNSEL**. S*ee Hakim*, 718 F.3d at 683 (holding release barred plaintiff's claims where "he did not consult with an attorney [but] the [r]elease advised him to do so and he chose not to" do so); *Russell v. Harman International Industries, Inc.*, 945 F. Supp. 2d 68, 76-77 (D. D.C. 2013) (holding waiver was knowingly and voluntarily made where it "used clear language, [plaintiff] was given seven days…to consider the waiver, [and plaintiff] was advised to consult an attorney"); *Howell v. Motorola, Inc.*, No. 03 C 5044, 2005 U.S. Dist. LEXIS 22137, at *20-21 (N.D. Ill. Sept. 30, 2005) (holding release barred plaintiff's claim where "he declined to consult an attorney as the [r]elease recommended because he believed he understood the document himself").

E. Plaintiffs Received Adequate Consideration for the Release

Courts have consistently upheld the right of an employer to require an employee to sign a release in exchange for severance benefits or other valuable consideration. *Frommert II*, 535 F.3d at 122-23; *Chaplin*, 307 F.3d at 372-74; *Finz*, 957 F.2d at 81; *Smart v. The Gillette Co. Long-Term Disability Plan*, 70 F.3d 173 (1st Cir. 1995). *See also Petersen v. E.F. Johnson Co.*, 366 F.3d 676, 680 (8th Cir. 2002); *Aken v. Xerox Corp.*, No. 07-CV-6253, 2008 U.S. Dist. LEXIS 56187, *19 (W.D.N.Y. July 22, 2008). *See also Malcolm v. Honeoye Falls Lima Cent. Sch. Dist.*, 669 F. Supp. 2d 330, 332 (W.D.N.Y. 2009) (Larimer, J.) (citing *Janneh v. GAF Corp.*, 887 F.2d 432, 436 (2d Cir. 1989), *cert. denied,* 498 U.S. 865 (1990) and *Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459, 463 (2d Cir. 1997)) (upholding the right of an employer to require an employee to sign a release of claims in exchange for valuable consideration, including payment of a salary balance and "miscellaneous other compensation and the continuation of certain benefits for an extended period").

The forty-three Plaintiffs who signed Releases in this case acknowledged that "the consideration set forth in this Release is in addition to anything of value to which I am entitled

by law or Xerox policy." (Cone Decl., Exs. C-RR). The money that they received in the form of salary continuation (many received 52 weeks of salary continuance) in exchange for signing a release, and their signed acknowledgment that they were not otherwise entitled to that salary continuance, establishes that they received adequate consideration for the agreement. *See Farrell*, 2004 U.S. Dist. LEXIS 2508 at *15 (finding adequate consideration in exchange for release where, *inter alia*, "the language of the Release, which [the plaintiff] acknowledged and agreed to, states "that ABSENT THIS AGREEMENT, [the plaintiff] would not otherwise be entitled to the money specified" and "that [she is] not entitled to any payments and/or benefits that are not specifically listed in this Agreement"); *Nicholas v. NYNEX, Inc.*, 929 F. Supp. 727, 731 (S.D.N.Y. 1996) ("the release clearly states that as consideration for signing the release, plaintiff received $15,125.00 in addition to his separation pay. Plaintiff has acknowledged that he was not entitled to that sum if he did not sign the release").

The Second Circuit's opinion in *Frommert II* is instructive. Considering releases that are virtually identical to those at issue in the present case, the Second Circuit found that the *Frommert* plaintiffs' waiver of ERISA rights was knowing and voluntary because (1) the plaintiffs who signed the releases "had ample time (45 days) to decide whether to sign the release, [(2)] . . . Xerox encouraged such individuals to consult an attorney, and [(3)] . . . *the signatories received salary continuances in consideration of their releasing claims*." *Frommert II*, 535 F.3d at 122 (emphasis added).

Clouthier and *Anderson* are similarly persuasive. Clouthier, like Plaintiffs here, worked for Xerox for a period of time at the end of which he elected a lump-sum distribution of his then-accrued retirement benefits. Clouthier later returned to work for Xerox for a second period of time and again participated in the RIGP. At the end of this second period of employment,

Clouthier signed a release that was virtually identical to the Releases signed by Plaintiffs. Clouthier commenced his lawsuit in 2008, asserting claims substantially identical to those alleged by the *Frommert* plaintiffs. *Id.* at *3 - *5. This Court dismissed Clouthier's claims on the same basis that his release of claims was enforceable. *See Id.* The District Court made a similar ruling in *Anderson,* which was affirmed by the Second Circuit on appeal.

F. Other Circumstances Warrant Enforcement of the Releases

To the extent that those Plaintiffs who signed their Release before the 2006 *Frommert I* was entered by the Second Circuit may claim that their Releases should not be enforced because they were not aware of that Decision and Order when they signed their Releases, such claim does not raise a material issue of fact so as to warrant a denial of Defendants' motion. Plaintiffs were aware since 1998 of the offset provision under the Plan and they knew when they signed the Release that they were releasing "any and all claims" that they may have had under ERISA. Substantially similar claims were rejected in *Anderson*, 614 F. App'x at 39, and *Clouthier*, 2016 U.S. Dist. LEXIS 7196 at *6. As explained by the Second Circuit in *Frommert II*,

> At bottom, neither the uncertainty of such benefits at the time of release nor the fact that hindsight has revealed that such benefits are now worth more than the signing Plaintiffs-Appellees likely expected at that time can render these releases unenforceable. As the method used to calculate pension benefits for rehired employees was, and has continued to be, disputed throughout this litigation, the precise amount of benefits that an employee signing a release would have received in the absence of such a release was always indeterminate. Plaintiffs-Appellees who signed these releases did so before the District Court crafted its remedy for the ERISA violations we identified. The mere fact that the anticipated recovery associated with ongoing litigation is uncertain does not render an employee's release of claims asserted in that litigation unenforceable.

Frommert II, 535 F.3d at 122.

Plaintiffs' reliance on *Berger v. Nazemetz*, No. 00-cv-0584, 2001 WL 936322 (S.D. Ill. June 26, 2001), does not create an issue of fact as to the enforceability of the Releases at issue here. In *Berger*, the Court primarily relied on *Lynn v. CSX Transportation, Inc.*, 84 F.3d 970 (7th Cir. 1996) to determine that the release did not bar the plaintiff's claim because it had not been signed during a contested proceeding. *Berger*, 2001 WL 936322 at *2. There is no Second Circuit law supporting the proposition set forth in *Lynn*—that a release is enforceable *only* when signed in the context of a "contested claim." Indeed, the overwhelming authority is to the contrary. *See e.g., Anderson*, 614 F. App'x at 39; *Clouthier*, 2016 U.S. Dist. LEXIS 7196 at *6; *Yablon v. Stroock & Stroock & Lavan Retirement Plan & Trust*, No. 01 CIV 542, 2002 WL 1300256, at *4 (S.D.N.Y. June 11, 2002) (holding plaintiff knowingly and voluntarily executed the release in his separation agreement and rejecting plaintiff's argument that he did not knowingly execute the release because he "did not consult an attorney before signing" the agreement).

There is yet another reason which supports the grant of summary judgment to Defendants on the issue of the release. All forty-three Plaintiffs are precluded from bringing this action as a result of their ratification of the releases. Even where the totality of the circumstances indicates that the release was not obtained as a result of a knowing and voluntary decision because of duress, coercion, or fraudulent misrepresentations by the employer – which is not the case here – the release is not void, but voidable. This distinction is key, as "[a] voidable waiver and release can still be enforced if it is ratified by the employee." *Wittorf v. Shell Oil Co.*, 37 F.3d 1151, 1154 (5th Cir. 1994). Retaining consideration after learning that a release is voidable operates to ratify that release. *Reid v. IBM Corp.*, No. 95-CV-1755, 1997 U.S. Dist. LEXIS 8905, *32

(S.D.N.Y. June 26, 1997); Restatement (Second) of Contracts § 380. Here, Plaintiffs ratified their Releases.

Courts in this and other circuits have routinely applied the ratification doctrine to enforce releases which waive employment-related claims. In *Wittorf*, the plaintiff employee, as part of a reduction in force, signed a release waiving all employment-related claims in exchange for $48,000 in enhanced severance benefits. The plaintiff later filed suit under several employment statutes, including ERISA. The Court of Appeals held that, even assuming that the release was defective, the plaintiff manifested his intent to be bound by choosing to retain the enhanced severance benefits. *Wittorf*, 37 F.3d at 1154.

In *Livingston v. Bev-Pak, Inc.*, 112 F. Supp. 2d 242 (N.D.N.Y. 2000), the defendant employer moved for summary judgment, contending that the plaintiff's discrimination claims had been released. The court held that the plaintiff had ratified the release by keeping the consideration the plaintiff received from the employer in exchange for the release:

> [E]ven if Plaintiff did not knowingly and voluntarily execute the release agreement, he has since ratified the agreement by his inaction. "Ratification is an act by which an otherwise voidable and, as a result, invalid contract is confirmed, and thereby made valid." . . . It occurs at the point that a party learns that his prior agreement not to sue is voidable but continues to accept the benefits of that agreement . . .

Id. at 249 (internal citations omitted) *accord Reid*, 1997 U.S. Dist. LEXIS, at *9 (rejecting plaintiff's argument that the release he signed was invalid by reason of duress, mental disability or intoxication because plaintiff accepted the benefits of the transaction even after those factors were removed); *Cheung v. New York Palace Hotel*, No. 03-CV-0091, 2005 U.S. Dist. LEXIS 34659, *12 (E.D.N.Y. Sept. 28, 2005) (failing to return consideration received for release ratified the release of Title VII claims).

The forty-three Plaintiffs ratified the Releases by retaining compensation and benefits, which was the consideration received in exchange for the releases. Their remaining claim for breach of fiduciary duty under ERISA must be dismissed.

POINT II

PLAINTIFFS' REQUEST FOR INJUNCTIVE OR DECLARATORY RELIEF FOR "SIMILARLY SITUATED PLAN PARTICIPANTS" IS INAPPROPRIATE AND NOT LEGALLY JUSTIFIED

In their respective motions for summary judgment, Plaintiff McNeil and the rest of the Plaintiffs in this matter 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). However, such an injunction is unwarranted and inappropriate because the effect would allow for recovery by individuals without any consideration of individualized defenses to such claims.

While a district court has discretion to determine the scope of an injunction, the Second Circuit also has noted that "injunctive relief seeking to prohibit conduct outside of the district court's jurisdiction should be 'exercised with great reluctance.'" *Alliance Bond Fund v. Grupo Mexicano de Desarrollo, S.A.*, 143 F.3d 688, 693 (2d Cir. 1998). The critical flaw in Plaintiffs' request for injunction and declaratory relief is that Plaintiffs seek relief for "similarly-situated plan participants" who are not parties to this action. As reasoned by other district courts in rejecting such a sweeping request, district courts lack such authority to issue injunctive relief to "all other situated claimants," even in an ERISA context. *See Mullin v. Scottsdale Healthcare Corp. Long Term Disability Plan*, 2016 U.S. Dist. LEXIS 2927 (D. Ariz. Jan. 11, 2016) (rejecting the plaintiff's request for injunctive relief on behalf of "other similarly situated claimants" where there was no authority for such relief); *Brady v. United of Omaha Life Ins. Co.*, 902 F. Supp. 2d 1274 (N.D. Cal. 2012) (same as *Mullin*); *Bandak v. Eli Lilly & Co. Ret. Plan*,

2009 U.S. Dist. LEXIS 10885 (S.D. Ind. Feb. 10, 2009) (concluding that "plan-wide injunctive relief" was not warranted).

Not every plan participant rehired before 1998 is entitled to benefits under the *Frommert* Remedy Order, as is evident by the Decisions and Orders in *Anderson v. Xerox*, No. 06-6202; *Clouthier v. Becker*, No. 08-cv-6441; *Frommert v. Conkright*, No. 00-cv-6311. Additionally, a plan participant who files a claim beyond the six year statute of limitations for a breach of fiduciary duty claim arising as the alleged result of the failure to comply with the 2006 Decision and Order in *Frommert I* is time-barred from bringing a claim. This Court has acknowledged this limitation defense in its 2017 Decision and Order, stating that "whether any, or how many, members of the proposed class might be subject to a limitations defense . . . is an additional factor counseling against allowing amendment of the complaint to add class allegations." (Dkt. No. 83 at 18).

In any event, individuals who believe that they may have a valid claim 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 through the administrative claim process, as is required under ERISA. Only in the event that such claim were denied, would it be necessary for that individual to pursue his or her remedies in court. *See Bandak v. Eli Lilly & Co. Ret. Plan*, 2009 U.S. Dist. LEXIS 10885 (S.D. Ind. Feb. 10, 2009) (denying a request for "plan-wide injunctive relief" and stating that individuals with claims similar to that of the plaintiff "are free to pursue claims under 29 U.S.C. § 1132(a)(1)(B)).

Plaintiff McNeil's reliance on Kathy McElwaney's Declaration as support for an injunction is misplaced. It is undisputed that Ms. McElwaney filed her own action against Defendants on August 19, 2016. *See McElwaney v. Becker et al.*, No. 16-cv-6578. Ms.

McElwaney is an example of a plan participant who may have had a claim for benefits based on the failure to provide insufficient notice of the SPD to her before 1998, or the alleged failure to comply with *Frommert I*, as against Defendants, but she did not interpose those claims until 2016 – *18 years* after the issuance of the 1998 SPD that provided notice to all Plan participants of the methodology by which their pension benefits would be offset by the prior pension distribution and *10 years* following the issuance of the 2006 Decision and Order in *Frommert I*. Her claims, when interposed, were untimely. Accordingly, Defendants filed a motion to dismiss in her individual action.

Thus, not only is McElwaney improperly seeking the same relief in two separate actions, she is attempting in this action to circumvent this valid defense. As the Second Circuit has recognized, a plaintiff cannot take a "wait and see" approach where the plaintiff "could easily have joined in the earlier action." *See, e.g., Lloyd v. J.P. Morgan Chase & Co.*, 791 F.3d 265, 271 (2d Cir. 2015) (quoting *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979)). This is particularly true where, as here, the plan participant waited more than a decade to assert any claims.

As explained by the Supreme Court, "the length of a limitation period for instituting suit in federal court 'inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.'" *Carey v. International Brotherhood of Electrical Workers*, 201 F.3d 44, 47 (2d Cir. 1999) (quoting *Johnson v. Ry. Exp. Agency Inc.*, 421 U.S. 454, 463-64 (1975)). "Statutes of limitations serve several important policies, including rapid resolution of disputes, repose for those against whom a claim could be brought, and avoidance of litigation involving lost evidence or distorted testimony of witnesses." *Id*. (citing *Wilson v. Garcia*, 471 U.S. 261, 271 (1985)).

"For these reasons, statutes of limitations 'are not to be disregarded by courts out of a vague sympathy for particular litigants.'" *Id.* (quoting *Baldwin Cty. Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984). *Accord Winnett v. Caterpillar, Inc*., 609 F.3d 404, 414 (6th Cir. 2010) (refusing to grant a preliminary injunction in an ERISA case because the plaintiffs' claims were time-barred, reasoning that although "[e]nforcing a statute of limitations is never easy," such limitations periods are designed to promote fairness concerns of their own, including that "no one should be forced to defend stale claims").

As explained by the Second Circuit, statutes of limitation serve several important policies, including rapid resolution of disputes, repose for those against whom a claim is brought, and avoidance of litigation involving lost evidence or distorted testimony of witnesses. *Novella v. Westchester County, New York Carpenters' Pension Fund*, 661 F.3d 128, 147 (2d Cir. 2011); *Carey*, 201 F.3d at 47; *SEC v. Tandem Mgmt.*, No. 95 Civ. 8411, 2001 U.S. Dist. LEXIS 19109, at *16-*17 (S.D.N.Y. Nov. 13, 2001) (citing *Wilson,* 471 U.S. at 271). For these reasons, statutes of limitations "are not to be disregarded by courts out of a vague sympathy for particular litigants." *Baldwin Cty. Welcome Ctr. v. Brown,* 466 U.S. at 152. Strict adherence is the "best guarantee of evenhanded administration of the law." *Carey*, 201 F.3d at 47 *(*quoting *Mohasco Corp. v. Silver,* 447 U.S. 807, 826 (1980)).

This concern is particularly true in ERISA cases. One of the main purposes of ERISA is the promotion of predictability through which ERISA seeks to induce employers to offer benefits by assuring a predictable set of liabilities. *Conkright v. Frommert*, 559 U.S. 506, 517 (2010). Allowing beneficiaries to challenge alleged benefit claims on which the statute of limitations have already expired would undermine that predictability interest as well as an ERISA plan's reliance on the original plan's calculations and payments for actuarial purposes. *Riley v. Metro*

Life Ins. Co., 744 F.3d 241, 248 (1st Cir. 2014). *See also Muehlgay v. Citigroup Inc.*, 649 F. App'x 110, 111-12 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 583 (2016) (summary order) (affirming dismissing of breach of fiduciary duty claim under ERISA on statute of limitations grounds where the plaintiffs had actual knowledge of the alleged breach but failed to timely commence an action); *Novella v. Empire State Carpenters Pension Fund*, No. 05 Cv. 2079 (BSJ), 2009 U.S. Dist. LEXIS 25245, at *11-*13 (S.D.N.Y. Mar. 26, 2009), *aff'd*, 353 F. App'x 596 (2d Cir. 2009) (rejecting plaintiff's argument that the statute of limitations runs from the date on which his benefits were miscalculated and holding that otherwise "'plaintiffs would be free to file ERISA claims whenever they concocted novel legal theories, no matter how many years after benefits had been miscalculated and plaintiff's complaints about miscalculation had been repudiated'…such a rule would 'undermine the very principle of finality for which statutes of limitations are maintained'") (quoting *Miele v. Pension Plan of N.Y. State Teamsters Conf. Pension & Ret. Fund*, 72 F. Supp. 2d 88, 100 (E.D.N.Y. 1999)).

For the foregoing reasons, Plaintiffs' request for injunctive relief on behalf of "similarly situated plan participants" should be denied. A determination otherwise would be a violation of due process and is unsupported by the law.

POINT III

PLAINTIFFS' REMAINING CLAIM IS SUBJECT TO DISMISSAL BASED ON WELL-ESTABLISHED LAW

Three of four of Plaintiffs' claims for benefits under Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B) were properly dismissed by this Court in its Decision and Order in *Kunsman 2013* on the grounds that they were time-barred. As explained by this Court, this action was filed in 2008, and those claims arose no later than 1998, when the Plan was amended to fully explain the phantom account offset that is at the root of this case and the other related

cases, including *Frommert v. Conkright*. Thus, even under the most generous six year limitations period, this Court held that most of Plaintiffs' claims were time-barred. *Kunsman 2013*, 977 F. Supp. 2d at 259. This is consistent with the applicable law in this circuit. *See e.g.*, *Novella,* 661 F.3d at 143; *Burke v. PricewaterhouseCoopers LLP Long Term Disability Plan*, 572 F.3d 76, 78 (2d Cir. 2009). *Accord Moses v. Revlon Inc*., No. 16-2960-cv, 2017 U.S. App. LEXIS 9005, at *3-*4 (2d Cir. May 24, 2017) (summary order). This Court, however, did not dismiss as time-barred Plaintiffs' breach of fiduciary duty claim asserted under Section 502(a)(3).

Defendants now move for summary judgment dismissing this breach of fiduciary duty claim on its merits and they oppose the grant of summary judgment in Plaintiffs' favor. As these issues were raised and decided previously by this Court in the *Testa* matter, which is on appeal. Defendants do so to preserve their rights in this matter pending the outcome of the appeal in the *Testa* matter should the Second Circuit rule in their favor.

A. Plaintiffs' Breach of Fiduciary Duty Claim Must Be Dismissed

In their Amended Complaint, Plaintiffs pled a breach of fiduciary duty, based upon an alleged continuing violation theory in an attempt breathe new life into their time-barred claim benefits under the Plan. (*See* Compl., Count II). Such continuing violation theory was rejected by the Second Circuit. *See e.g., Novella,* 661 F.3d at 147-48; *Martin v. Pub. Serv. Elec. & Gas Co.*, 271 F. App'x 258, 260-61 (3d Cir. 2008) (affirming the grant of a Rule 12(b)(6) motion to dismiss a complaint as time-barred where the plaintiffs had notice that they were excluded from participating in a pension plan based upon a plan amendment; claim accrued upon the amendment of the plan itself and was not extended simply because defendants continued to enforce that amendment).

Plaintiffs' reliance on the Second Circuit's finding in *Frommert I*, 433 F.3d at 263, that "the phantom account offset may not be applied to employees rehired prior to the issuance of the 1998 SPD" to rule in favor of Plaintiffs on their breach of fiduciary duty claim is unwarranted. This is because, unlike the *Frommert* plaintiffs who had all filed timely claims for benefits, Plaintiffs' claims for benefits were already time-barred at the latest in 2004, before the issuance of the 2006 Decision and Order in the *Frommert* action. Because the *Frommert* action was never certified as a class action, Plaintiffs are not and were not parties to that case and their own statutes of limitations were not stayed merely by the filing of the *Frommert* suit.

The Second Circuit in *Frommert I* did not order class-wide or injunctive relief. To the contrary, rather, the Court stated, in no uncertain terms, that the "gravamen of this action remains a claim for monetary damages," and that the relief plaintiffs seek, a recalculation of their benefits, "falls comfortably within the scope of § 502 (a)(1)(B) of the Plan." *Frommert I*, 433 F.3d at 270, which is a claim for benefits under the Plan. Under ERISA, a plan participant has to exhaust their administrative remedies and file a timely action.

Although the Second Circuit stated that the offset provision for the Plan could not be applied to plan participants rehired before the issuance of the 1998 SPD, the precise issue that is before this Court, as to what happens if a rehired employee's claim is already time-barred, was not before the Court in *Frommert I.* Hence, the Second Court did not also address or resolve the issue as to whether was intended to apply to plan participants whose claims were time-barred (or was subject to other defenses such as releases). *See McCord v. Agard (In re Bean),* 252 F.3d 113, 118 (2d Cir. 2001); *Merrimon v. Unum Life Ins. Co. of Am.*, 758 F.3d 46, 57 (1st Cir. 2014). As long-recognized by the courts, "[i]t is the general rule that issue preclusion attaches only 'when an issue of fact or law is actually litigated and determined by a valid and final judgment,

and the determination is essential to the judgment.'" *Cyan Contracting Corp. v. New York State Dormitory Authority*, No. 09 Civ. 603 (LAK) (HBP), 2011 U.S. Dist. LEXIS 119371, at *27 (S.D.N.Y. July 11, 2011) (citations omitted). *Accord Roe v. City of Waterbury*, 542 F.3d 31, 41 (2d Cir. 2008).

B. The Court of Appeals Never Intended to Preclude Valid Defenses to Claims

Subsequent decisions by the Court in *Frommert* have made it abundantly clear that the Court of Appeals never intended its directive to be an unswerving mandate that the Plan Administrator could not apply the offset provision to all plan participants rehired before the issuance of the 1998 SPD, regardless of any defenses the Plan may have to such benefit claims.

Significantly, the Second Circuit itself permitted the Plan Administrator *to apply the offset provision* of the Plan to eighteen of the *Frommert* plaintiffs, who were rehired prior to the issuance of the 1998 SPD, because they had waived their ERISA claims by signing enforceable releases, and there was no breach of fiduciary duty in doing so. *Frommert II*, 535 F.3d at 122.

The Second Circuit and this Court in other related cases applied similar reasoning to bar the claims of employees rehired before the issuance of the 1998 SPD in *Anderson v. Xerox Corp.*, 614 F. App'x 38 and *Clouthier v. Becker*, 2016 U.S. Dist. LEXIS 7196.

In fact, this Court dismissed the claims asserted by another employee in *Clouthier*. Clouthier, like Anderson and the *Frommert* plaintiffs, worked for Xerox for a period of time at the end of which he elected a lump-sum distribution of his then-accrued retirement benefits. *Clouthier,* at *1-*3. Clouthier later returned to work for Xerox for a second period of time and again participated in the RIGP. *Id.* At the end of this second period of employment, Clouthier signed a release that was substantially similar to the release signed by the plaintiffs in *Anderson* and *Frommert*. *Id.* at *3. Clouthier commenced his lawsuit in 2008, asserting claims substantially identical to those alleged by Anderson and in *Frommert*. *Id.* at *3-*5. This Court

dismissed Clouthier's claims on the same bases as those in *Anderson*. *Id.* at *3-*7. More specifically, his claims, which accrued in 1998, were barred by the statute of limitations, and his release of claims was enforceable. *See Id*.

Defendants never waived the statute of limitation defense, and filed a motion to dismiss on that basis. Defendants are now also filing a motion for summary judgment based on the Releases that forty-three Plaintiffs signed. The Court should consider the applicability of these defenses in determining whether the Plan Administrator had a duty to comply with the Second Circuit's directive and paid out benefits to individuals whose claims were otherwise time-barred and/or released.

C. The Plan Administrator Properly Denied Time-Barred Claims

Here, Plaintiffs exhausted their administrative remedies during the 2007 and 2008 time period. (*See* Cone Aff.). Plaintiffs, however, were not similarly-situated to the *Frommert* plaintiffs in that they had filed timely claims for benefits under the Plan based on the lack of adequate notice of the Plan's offset provision, and had forty-three of them not signed releases. Accordingly, the claim for benefits was denied.

In *Firestone Tire & Rubber Co., v. Bruch*, 489 U.S. 101 (1989), the Supreme Court held that the proper standard for reviewing a plan administrator's determination on a denial of benefit claim is a deferential one where, as here, the plan gives the plan administrator the authority to construe its terms. *Firestone*, 489 U.S. at 111. The Plan Administrator's decision to deny Plaintiffs' benefits, whether viewed under an arbitrary or capricious standard or *de novo*, was a reasonable one because, as found by this Court, Plaintiffs' claims for benefits was a time-barred claim. There is nothing in ERISA, or the Plan, that requires the Plan Administrator pay benefits on a time-barred claim.

As this Court determined in *Kunsman 2013*, Plaintiffs did not have a timely claim for benefits under the Plan because they had admittedly received notice of the 1998 SPD which informed them of the phantom account offset.

The Supreme Court in *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 134 S.Ct. 604 (2013) upheld the denial of benefits by a plan administrator based upon a plan's contractual limitations period, reasoning, among other things, that the administrator was fulfilling its duty under ERISA in denying the claim. *Heimeshoff*, 134 S. Ct. at 612. This is because a plan administrator is required by ERISA to discharge his duties "in accordance with the documents and instruments governing the plan." *See* 29 U.S.C. § 1104(a)(1)(D). Similar reasoning applies here. *See Moses*, 2017 U.S. App. Lexis 9005 at *3-*4 (summary order) (affirming the grant of a motion to dismiss a claim for additional pension benefits as time-barred under New York's six year statute of limitations); *Reches v. Morgan Stanley & Co*., No. 16-3294-cv, 2017 U.S. App. Lexis 6490, at *1-*3 (2d Cir. Apr. 14, 2017) (summary order) (affirming the dismissal of plaintiff's claim for pension and stock benefits based on timeliness grounds because the complaint was filed well outside the six-year statute of limitations and no extraordinary circumstances existed to consider equitable tolling); *Mazur v. UNUM Ins. Co.,* 590 F. App'x 518, 522-23 (6th Cir. 2014) (affirming the dismissal of a claim for ERISA benefits as time-barred); *Christian v. Honeywell Ret. Ben. Plan*, 582 F. App'x 103, 104-05 (3d Cir. 2014) (affirming the granting of judgment dismissing time-barred ERISA claim, and reasoning that plaintiff failed to exercise reasonable diligence in pursuing claim); *Miller v. Fortis Benefits Ins. Co*., 475 F.3d 516, 523-24 (3d Cir. 2007) (affirming as reasonable a plan administrator's decision not to pay a time-barred claim).

Because the decision to deny Plaintiffs' claims was a reasonable one, grounded in the Plan and the law, this Court should reconsider it prior ruling in *Testa*. The Decision and Order in

Frommert I did not state that the Plan Administrator had to pay out benefits regardless as to whether the individuals had signed a release waiving their claims, nor, respectfully, did the Second Circuit's Decision and Order require the payment of untimely interposed benefit claims.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that this Court deny Plaintiffs' respective motion 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: October 27, 2017
Rochester, New York

/s/Margaret A. Clemens

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