UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BRUCE D. KUNSMAN, et al.,
Plaintiff,

v.

SALLY L. CONKRIGHT, et al.,

Defendants.

C.A. No. 6:08-CV-06080-DGL

BRIEF IN RESPONSE TO COURT ORDER

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I. INTRODUCTION

By Order dated April 19, 2019, this Court directed the parties to file memoranda answering how this Court should proceed "in light of the Court of Appeals' decision in *Testa v. Becker*, and other recent case authority." (Kunsman Dkt. No. 97). Defendants' Memorandum of Law filed on May 3, 2019, asks this Court now to give *stare decisis* effect to the Second Circuit's recent decision in *Testa v Becker*. But the *Kunsman* case is materially different than *Testa* because plaintiffs in *Kunsman* (unlike Testa) expressly moved to be joined as plaintiffs in *Frommert*, which was indisputably timely filed. This Court stated in response that it was unnecessary, since Defendants would be compelled to grant the *Frommert* remedy to the *Kunsman* Plaintiffs in any event. The *Kunsman* lawsuit thus relates back to the timely-filed *Frommert* lawsuit, and would obtain equitable tolling in any event, both of which make the present case different than *Testa*, which involved no such facts or arguments.

The Second Circuit's decision in *Testa v. Becker* held that Robert Testa's claim was time-barred, but that court neither had before it nor did it resolve the particular (and unique) factual history of the Kunsman Plaintiffs. Also, it did not address the status or resolution of a key factual issue that was expressly remanded to this Court by *Frommert v. Conkright*, 433 F.3d 254 (2d Cir. 2006) ("*Frommert 2006*") and that has never been answered in this litigation. For reasons discussed in this memorandum, the claims of the Kunsman Plaintiffs should be allowed to proceed.

II. KUNSMAN PLAINTIFFS WOULD HAVE BEEN INCLUDED IN THE FROMMERT CASE BUT FOR REPRESENTATIONS THAT SUCH FORMAL INCLUSION WAS NOT NECESSARY.

Robert Jaffe, Esq. was the initial lawyer for the plaintiffs in both the *Frommert v. Conkright* and *Kunsman v. Conkright* cases. On or about December 28, 2004, several of the Kunsman plaintiffs filed a motion for leave to intervene in the appeal of the 2004 decision and order in

Frommert. (Frommert Second Circuit Dkt. No. 04-4609). By Order dated March 2, 2005, the Second Circuit denied such request on the grounds that the individuals "failed to show that their interest are not adequately protected by the existing plaintiffs-appellants." (Frommert Dkt. No. 112). On November 6, 2006, Jaffe sought leave of the court to amend the Frommert complaint to add those Kunsman Plaintiffs to the pending *Frommert* action. (Frommert Dkt. No. 132). Defendants' did not respond to the motion as the parties were simultaneously in the middle of cross-motions for summary judgment and the briefing schedule regarding such motion was not ordered until Judge Larimer issued that summary judgment decision. *Frommert v. Conkright*, 472 F. Supp. 2d, 467-68 (W.D.N.Y. 2007) ("2007 Decision"); (Frommert Dkt. Nos. 132-137). That 2007 Decision nonetheless addressed the pending motion to amend, holding that this amendment would not be necessary (for any participant who had not yet retired) and specifically stated:

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

2007 Decision, 472 F. Supp. 2d at 467. [1]

As a result of this Court's holding, Jaffe sent this Court a letter on January 30, 2007, that withdrew the motion based expressly on the contents of that 2007 Decision. This Court accepted the withdrawal and denied the motion as moot on February 6, 2007. (Frommert Dkt. No. 139).

[1] The Court's decision was not rash or short lived. This Court continued to hold the belief that extraneous motions were unnecessary to grant pre-1998 rehires the relief set forth in *Frommert 2006*. *See, e.g., Kunsman v. Conkright*, No. 08-cv-6080, Decision and Order, ECF n. 83 at 14 (July 7, 2017) (denying Mr. McNeil's Motion for Class Certification on the ground that "class status is unnecessary" given that the court can order relief to be applied to the applicable persons without the need for such Motion).

The Kunsman Plaintiffs reasonably relied on the representations and holdings of this Court. Absent those events, the pending motion would have proceeded with the Court having sufficient grounds to grant leave to add such persons to the *Frommert* litigation. Under clear federal rules and precedent those persons' claims would thus have related back to the 1999 Frommert filing date. To deny relief to such persons on the ground that they should have intervened in the *Frommert* litigation (despite their request to do so) would be inequitable.[2]

Moreover, on August 10, 2007, Jaffe, sent a letter to the RIGP Plan administrator on behalf of the Kunsman Plaintiffs, requesting that their pension benefits upon retirement be calculated consistent with the formula set forth in this Court's 2007 Decision. *See* Declaration of Joseph McNeil ("McNeil Decl.) (Kunsman Dkt. No. 50-1) at ¶ 7 and Ex. H (Kunsman Dkt. No. 50-9). The Plan Administrator responded by letter dated August 15, 2007. McNeil Decl. at ¶ 8 and Ex. I (Kunsman Dkt. No. 50-10). In her August 15, 2007 letter, the Plan Administrator wrote that the use of the so-called phantom account offset was part of the Plan's design, and that benefits had been "calculated correctly and according to the terms of the Plan." The Administrator further stated that because the Court's 2007 Decision was on appeal that "until final resolution to the contrary, the plan provisions govern." She further stated that "ERISA requires that RIGP be administered strictly in accordance with its terms and further requires that RIGP be administered consistently to all plan participants – without exception." *Id.*

On August 20, 2007, Jaffe sent a second letter on behalf of the Kunsman Plaintiffs appealing from the Plan Administrator's August 15, 2007 decision stating that the continued use of the phantom account offset for plan participants rehired prior to the issuance of September 1,

[2] The Complaint in the present case was filed February 21, 2008. (Kunsman Dkt. No. 1) An Amended Complaint was filed April 30, 2008 (Kunsman Dkt. No. 2).

1998 SPD was in contravention of the Second Circuit's decision in *Frommert 2006*. McNeil Decl. ¶ 9 and Ex. J (Kunsman Dkt. No. 50-11). The Plan Administrator responded by letter dated August 23, 2007. McNeil Decl. ¶ 10 and Ex. K (Kunsman Dkt. No. 50-12). In his letter denying the Kunsman Plaintiffs' appeal, the Plan Administrator wrote:

> [Y]ou refer to the *Frommert v. Conkright* decision rendered by the United States Court of Appeals for the Second Circuit. In view of the appeal of this case, ***until final resolution to the contrary, the plan provisions govern***.
> Accordingly, I have concluded that your clients' RIGP benefits are being calculated correctly and according to the terms of the Plan document. ERISA requires that the RIGP be administered strictly in accordance with its terms and ***further requires that the RIGP be administered consistently to all plan participants – without exception***. (emphasis added).

The Administrator concluded the letter by stating: "This represents a final and binding decision under the Plan and you have no further appeal rights under ERISA. . . . Based on this adverse determination, you have the right under ERISA to bring civil action."

Based upon this Court's Frommert *2007 Decision*, and the Plan Administrator's August 15, 2007 and August 23, 2007 letters, the Kunsman Plaintiffs reasonably believed that their RIGP benefits would be calculated in the same manner as the RIGP benefits of plaintiffs in the *Frommert* case and that all employees re-hired prior to September 1, 1998 would be treated the same.

III. EQUITABLE TOLLING IS PROPER HERE.

The Kunsman Plaintiffs would have been added to *Frommert* and their claims would have related back if the 2006 motion proceeded to decision instead of being mooted by this Court's holding in 2007 that such an amendment was unnecessary since Defendant would be required to apply the Frommert decision to the Kunsman plaintiffs in any event. Judicial statements that there was no basis for such amendment because the phantom account could not be applied to employees rehired before the 1998 SPD was the only reason that motion was not granted in 2007. *See Frommert 2006*, 433 F. 3d at 263; *2007 Decision*, 472 F. Supp. 2d at 467. Had it proceeded there

would be no statute of limitations issue for the Kunsman Plaintiffs. In a case where a fiduciary has refused to disclose to its participants that certain plan provisions were adopted without proper notice and are illegally cutting back benefits under ERISA, participants deserve to rely on Court statements as to the ability of such persons to obtain relief without extraneous motions.

A. The Motion to Amend Would Have Been Granted and Related-Back to the Originally Filed Frommert Complaint.

The law concerning amended pleadings is well-established and favors a liberal approach. Under Federal Rule of Civil Procedure 15 leave to amend should be given freely. *Foman v. Davis,* 371 U.S. 178, 181 (1962). Moreover, when the claims are common to the existing plaintiffs the claims relate back to the date of the original complaint. F.R.C.P. 15(c)(1)(B) (stating that relation back is applicable if "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading."). Under the relation back doctrine, a court treats an untimely amendment as if it had been included in the timely-filed original complaint. *See Krupski v. Costa Crociere*, S.p.A., 130 S. Ct. 2485, 2489 (2010) ("[A]n amended pleading 'relates back' to the date of a timely filed original pleading and is thus itself timely even though it was filed outside an applicable statute of limitations."). Applying "a statute of limitations, when, as here, the respondent has had notice from the beginning that the petitioner was trying to enforce a claim against it" is unjust and can be remedied by equitable tolling. *See Tiller v. Atlantic Coast Line R.R.*, 323 U.S. 574, 581 (1945).

Here, there is no question that the Kunsman Plaintiffs' claims arise out of the same conduct, transaction or occurrences alleged in the original Frommert complaint. This is not in dispute. The issue is whether the Plan Administrator can apply the phantom account to gut the retirement benefits of individuals who worked for a few years and then left taking a lump sum retirement payout and later returned to Xerox's employ before 1998. Defendants cannot claim to be

prejudiced in defending these claims nor have they been unaware of the existence and number of such claims. Moreover, while this litigation has dragged on beyond the life of its original attorney, it is plausible that information about one or more of the Kunsman Plaintiffs' was directly communicated to Xerox's counsel months or years before the 2006 motion to amend.

B. Equitable Tolling is Appropriate Here.

The Second Circuit denied equitable tolling for Testa on the grounds that he was not diligent in pursuit of his claims. By contrast, the Kunsman Plaintiffs do not have this defect. As described above, such plaintiffs filed a motion to amend as an attempt to join the *Frommert* litigation. (Frommert Dkt. No. 132). Additionally, some filed a motion to intervene in one of the early Frommert appeals as an attempt to preserve their rights. (Frommert Second Circuit Dkt. No. 04-4609). Tolling the statute here would not work an injustice on Defendants, it would help to remedy the injustice faced by these retirees who have spent decades holding out hope that they would one day get some scrap of the retirement promised to them by their fiduciary plan administrator.

Tolling derives from the power of the courts 'to apply the principles . . . of equity jurisprudence.'" *Young v. United States*, 535 U.S. 43, 50 (2002). Limitations periods are "customarily subject to 'equitable tolling.'" *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 195 (1990); *see, e.g., John Doe v. Blue Cross*, 112 F.3d 869, 876 (7th Cir. 1997); *Moyle v. Liberty Mutual Ret. Benefit Plan*, 263 F. Supp. 3d 999, 1024-25 (S.D. Cal. 2017). While this generally has been applied to situations in which a defendant misled a plaintiff by an affirmative statement, the equitable doctrine is far broader than that. *See, e.g., Austin, Nichols & Co., Inc. v. Cunard S. S. Ltd.*, 367 F. Supp. 947, 948 (S.D.N.Y. 1973):

> *Defendant's position is that nothing short of an express agreement by the parties can stop the running of the one-year statute of limitations and that the expiration*

> *of the limitation period automatically extinguishes the cause of action. The question, however, is not whether the running of the statute was tolled by defendants' actions but rather whether, as a matter of equity, defendant is estopped from asserting the time bar in defense to this action.*

A key consideration when evaluating equitable tolling is whether Defendant has any equitable defenses to prevent such tolling. *See Veltri v. Bldg. Serv. 32B-J Pension Fund*, 393 F.3d 318, 326-27 (2d Cir. 2004). The central focus is whether plaintiff showed an unreasonable lack of diligence and whether Defendant would be prejudiced by the delay. *Id*. Such factors do not exist here as Defendants have been well aware of the potential exposure caused by the fraudulent adoption of the phantom account.

Moreover, Defendants have known since at least 2006 that the Kunsman Plaintiffs had requested to formally join the *Frommert* suit, and that such joinder was (according to this Court) "unnecessary" because the result in *Frommert* would be applied to the Kunsman Plaintiffs in any event. Under such circumstances, equitable tolling is appropriate, and unlike Testa, the Kunsman Plaintiffs indisputably acted diligently.

C. Xerox Concealed and Misrepresented the Benefits the Kunsman Plaintiffs Would Receive Upon Retirement.

While the Kunsman Plaintiffs have not yet had the opportunity to conduct discovery, there is evidence from one of the Plaintiffs, Joseph McNeil, that subsequent to the issuance of the 1998 RIGP Summary Plan Description ("1998 RIGP SPD), Xerox took affirmative steps to conceal their breach from the Kunsman Plaintiffs, which would toll the statute of limitations. In each year from 1999 until 2007, Mr. McNeil received a "You & Xerox" Value Added Account Statement (the "Value-Added Statements"). McNeil Decl. ¶¶ 6-7 and Exs. A-G (Kunsman Dkt. No. 50-2 to 50-8).[3] The Value-Added Statements disclosed that Mr. McNeil's benefit at retirement would be the

[3] As Mr. McNeil states in his declaration, he was unable to locate his Value-Added Statements for the years 2004-2005, but believes that they were in substantially same form as Exs. A-G.

greater of the following three components: the RIGP formula, the Cash Balance Retirement Account (CBRA), or the Transitional Retirement Account (TRA).[4]

Year	RIGP Formula Monthly Benefit	Current Value of CBRA (Lump Sum)	Current Value of TRA (Lump Sum)
1999	$769 per month	$2,478	$0
2000	$696 per month	$5,576	$0
2001	$1,067 per month	$11,378	$0
2002	$1,300 per month	$17,755	$0
2003	$1,364 per month	$22,566	$0
2006	$1,974 per month	$36,724	$0
2007	$2,241 per month	$43,198	$0

Plaintiffs expect that discovery would show that similar Value Added Statements were sent to the other Kunsman Plaintiffs and that the plan fiduciary made similar misleading disclosures to them. It would be premature to dismiss Plaintiffs claims based upon a statute of limitations defense without the benefit of such discovery.

IV. THE CENTRAL STATUTE-OF-LIMITATIONS FACTUAL QUESTION REMANDED TO THIS COURT IN FROMMERT 2006 SHOULD BE ADDRESSED.

The decision in *Frommert 2006* remanded a specific statute-of-limitations factual question to this Court. 433 F. 3d at 273. Until that question is answered, the application of the statute of limitations to this case cannot be resolved.

Frommert 2006 is replete with references to Sections 204(g) and 204(h) of ERISA, which prohibit cutting back accrued benefits or reducing the rate of accrual of benefits without proper notice. *Id*. at 264, 269. The application of these substantive terms requires knowing when plan amendments became effective. Accordingly, the substantive discussion in *Frommert 2006*

[4] According to the Value Added Statements these amounts were also already reduced by any offset based on prior distributions. *Id.*

decision starts with a discussion of the "Origins of the Phantom Account." Later, the critical conclusion stated:

> The flaw with the district court's conclusion is that the plaintiffs' claim for breach of fiduciary duty is not premised solely on the defendants' adoption of the phantom account; rather, it is based on allegations that the defendants made ongoing misrepresentations about the origins of the phantom account in an effort to justify its usage. As a result, learning the manner in which the phantom account functions was not sufficient to provide "actual knowledge" that a breach of fiduciary duty had occurred.
>
> . . .
>
> . . . On remand, the district court is directed to determine when the plaintiffs had actual knowledge of the alleged breach of the defendants' fiduciary duties.

Id. at 273 (emphasis added).

Given this remand order, no one can contend that *Frommert 2006* put to rest statute of limitations questions. Moreover, nothing in the recent *Testa* decision nor in any other recent decision addresses when the Plaintiffs had "actual knowledge" of the alleged fact that RIGP amendments had been surreptitiously grafted onto the Plan in violation of those ERISA terms discussed at length in *Frommert 2006*. *Stare decisis* does not cause that decision to resolve an issue it did not address.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court allow the claims of the Kunsman Plaintiffs to proceed.

(signature page follows)

Dated: May 31, 2019

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CERTIFICATE OF SERVICE

I, Amber Ziegler, hereby certify that on May 31, 2019, 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/Amber Ziegler