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
ROBERT TESTA, an individual Plaintiff, v. LAWRENCE BECKER, et al. Defendants.	C.A. No. 10-06229-DGL

RESPONSE OF ROBERT TESTA AND VARIOUS KUNSMAN PLAINTIFFS TO ORDER DATED DECEMBER 1, 2011 REQUESTING MORE INFORMATION

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Table of Contents

TABLE OF AUTHORITIES

CASES

RESPONSE OF ROBERT TESTA AND VARIOUS KUNSMAN PLAINTIFFS TO ORDER DATED DECEMBER 1, 2011, REQUESTING MORE INFORMATION

I. Introductory Comments.

The Court's December 1 Order Requesting More Information is directed to *Kunsman v. Conkright*, 08-CV-6080L, and to various other cases related to the Xerox Retirement Income Guarantee Plan (the "RIGP" or the "Plan"). This Response is filed on behalf of the one Plaintiff in *Testa v. Becker*, 10-CV-6229L, and many of the Plaintiffs in *Kunsman*.

The United States Supreme Court commented on the proper role of statutes of limitation in drawn out cases like this one:

> *Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them. Here, while the litigation shows no evidence of reckless haste on the part of either party, it cannot be said that the claims were not timely pursued . . .*
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> *. . . Regrettable as the long delay has been it has been caused by the exigencies of the contest, not by the neglect to proceed.*

R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 348-49 (1944).

Circumstances of the individual Plaintiffs vary. Few, if any, slumbered on this matter and there is no suggestion here that Defendants were prejudiced by any delay. To the extent any Plaintiff had knowledge of the elements of the claim to be made, such Plaintiff reasonably believed that any disputes would be resolved through ongoing litigation before his benefits became due and that the Plan Administrator, as the fiduciary guarding the Plaintiff's interests, would not defy the determinations of the Second and Ninth Circuits.

This Court specifically suggested that Plan Members should hold off on litigation until the Plan Administrator actually calculated their benefits at their retirement date:

> *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," 433 F.3d at 263, would certainly seem to foreclose defendants from utilizing the phantom account in calculating "new" retirees' pension benefits.*

Frommert v. Conkright, 472 F. Supp. 452, 467 (W.D.N.Y. 2007) ("*Frommert 2007*").

The complaint in *Kunsman* was filed in February of 2008 and amended in April of 2008 (the "Complaint"). Defendants filed a Motion to Dismiss based on statute of limitations grounds. That Motion was briefed and oral argument took place on February 4, 2009, shortly before the death of counsel Robert Jaffe. The undersigned now represents nearly all of those in *Kunsman* who have sought continuing representation. Once this Court reaches a decision on Defendant's Motion to Dismiss, the undersigned will seek leave to amend the Complaint in *Kunsman*. The claims raised in such an amendment clearly would "relate back." Fed. R. Civ. Pro. 15(c).

In January of 2010, the *Testa* complaint was filed in the Central District of California, within one year of Defendant's denial of Testa's claim for retirement benefits. After removal to this Court in May of 2010, Xerox filed a Motion to Dismiss on statute of limitations grounds. The briefs filed at that time should be considered in connection with the current motion.

II. Broad Fiduciary Obligations.

The Court's current questions appear to relate principally to claims for breach of fiduciary duty.[1] To evaluate whether the Plan Administrator has breached his fiduciary duties

[1] In *Frommert 2007*, this Court separately addressed those plaintiffs' claim for breach of fiduciary duty and determined that it was unnecessary to address it since (as the situation then stood) all of the relief the Frommert plaintiffs were seeking was provided under the benefits cut-back claim. *Frommert 2007*, 472 F. Supp. 2d at 466. Of course, that situation has changed due to the Supreme Court ruling on Plan-interpretation claims and this Court's subsequent Order.

(and over what time period), it is important to identify those duties. Above all, the Plan Administrator must "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A). ERISA fiduciary obligations are based on the common law applying to trusts but such fiduciaries are "bound by 'the highest' duty 'known to the law'." *LaScala v. Scrufari*, 479 F.3d 213, 220 (2d Cir. 2007). Here, the principal duties breached by Defendants are 1) the duty to make full and open disclosure, 2) the duty to apply the valid terms of the plan, and 3) the duty to accurately and clearly inform Members about their particular benefits.

A. The Duty to Make Full and Open Disclosure. The plan administrator has an affirmative duty to inform beneficiaries of all material facts that the beneficiary would want to know. *Bixler v. Cent. Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993) (explaining that the "duty to inform is a constant thread in the relationship between beneficiary and trustee; it entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful"); *see also Globe Woolen Co. v. Utica Gas & Elec. Co*. 121 N.E. 378, 380 (N.Y. 1918) ("A beneficiary about to plunge into a ruinous course of dealing may be betrayed by silence as well as by the spoken word.").

The duty to inform is based on the common law of trusts that requires a fiduciary to communicate "all material facts in connection with the transaction which the trustee knows or should know." *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747, 751 (D.C. Cir. 1990) (quoting Restatement (Second) of Trusts section 173, comment (d) 1959). "A fiduciary has a duty not only to inform a beneficiary of new and relevant information as it arises, but also to advise him of circumstances that threaten interests relevant to the relationship." *Id.* at 750. In *Eddy*, the

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Conkright v. Frommert, 130 S. Ct. 1640 (2010) *remanded to* 2011 WL 5599524 (W.D.N.Y. November 17, 2011).

fiduciary insurance-provider was obligated to convey correct and complete information material to the beneficiary's circumstance and that it breached that duty when it did not fully disclose information about both conversion rights and continuation rights, even though the beneficiary might have only asked about one. *Id*. The Third Circuit also found a breach of fiduciary duty where the fiduciary "affirmatively and systematically represented to its employees that once they retired, their medical benefits would continue for life-even though . . . the plans clearly permitted the company to terminate benefits." *In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig*., 57 F.3d 1255, 1264 (3d Cir. 1995).

This affirmative duty to inform beneficiaries is also the law of the Second Circuit. *Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 77 (2d Cir. 2001); *Estate of Becker v. Eastman Kodak Co*., 120 F.3d 5 (2d Cir. 1997); *In re Polaroid ERISA Litig.*, 362 F. Supp. 2d 461 (S.D.N.Y. 2005). In *Becker*, the court found that Kodak had an obligation to make the consequences of an employee's death after making the election to retire but before the effective date of retirement clear and non-misleading. As a result of its failure to properly inform the employee, her heirs received 70% less than they would have had she known enough about that consequence to make a different choice. *Id*. at 7.

The Plan Administrator has breached repeatedly and continuously breached this duty.

B. The Duty to Apply the Valid Terms of the Plan.

i. *The Second Circuit's Remand on this Point*. The Plan Administrator has an explicit fiduciary obligation to determine benefits "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with [ERISA]." ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). Thus, anything that defines or clarifies Members' rights under the Plan also bears on claims for breach of fiduciary duty.

In 2006, two Court of Appeals decisions determined that certain Plan terms (as construed by the Plan Administrator) are not consistent with the provisions of ERISA. In *Frommert 2006*, the Second Circuit held that the phantom account is not a valid term of the Plan for employees rehired after 1998 because including such term would violate the benefit cutback limitations contained in ERISA § 204(g) and/or 204(h).

> *Employees hired after this amendment to the Plan occurred, unlike those rehired before then, became Plan participants under the terms of the amended Plan. As such, the phantom account may permissibly be applied to them. With full notice of the phantom account's existence, these rehired employees, unlike their predecessors who lacked such information, had the opportunity to make an informed decision about taking or leaving the terms of the deal offered to them under the Plan.*

Frommert v. Conkright, 433 F.3d 254, 269 (2d Cir. 2006) ("*Frommert 2006*").

Meanwhile, the Ninth Circuit also refused to allow the RIGP to apply the phantom account for the plaintiffs in that case and all similarly situated participants. *Miller v. Xerox Corp*., 464 F.3d 871, 878 (9th Cir. 2006). The Ninth Circuit held that the Plan Administrator could not offset a Member's retirement benefits by more than the accrued benefit "attributable to" prior distributions from the RIGP (regardless of when the Member was rehired). *Id.*; *see* 26 C.F.R. § 1.411(a)-7(d)(6).

The absence of the phantom account as a valid plan term also implicated the Plan Administrator's fiduciary obligations. Accordingly, the Second Circuit specifically rejected this Court's finding that the fiduciary breach claim in *Frommert* was barred by the statute of limitations. The Second Circuit remanded with guidance on this point:

> *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. . . . Such knowledge of an actual breach could*

> *only come with disclosure of the fact that the defendants misrepresented the terms of the Plan in justifying the usage of the phantom account."*

Frommert 2006, 433 F.2d at 272-73 (emphasis added).

Despite those two decisions (and this Court's admonition), the Plan Administrator continues to apply the phantom account, and even insists that the plan requires him to do so.[2] This is clearly a continuing breach of his obligations specifically identified in ERISA § 404, 29 U.S.C. § 1104. Even if the phantom account is technically written in the Plan, the Plan Administrator cannot be insulated from liability by applying an illegal plan term. *See In re Polaroid ERISA Litigation*, 362 F. Supp. 2d at 474. Moreover, at least one Court of Appeal has also found a breach of a fiduciary's duty when that fiduciary continued to apply an illegal plan term after that same Court of Appeal held that such term was unlawful in a case brought by different plaintiffs against the same plan. *Meagher v. Int'l Assoc. of Machinists and Aerospace Workers Pension Plan*, 856 F.2d 1418, 1421, 1423 (9th Cir. 1988).

ii. *The Obligation to Inform Members of Legal Developments*. This Court recognized the Plan Administrator's obligation to abide by the determinations in these cases:

> *It would seem to be beyond dispute, though, that use of a "phantom account" in the manner found unlawful by the Second Circuit decision violates ERISA and cannot be used by any plan. It is presumed that no plan administrator would knowingly violate ERISA.*

Frommert 2007, 472 F. Supp. 2d at 467 n. 9.

At the very least if the Plan Administrator planned to ignore courts' rulings regarding the RIGP he had the obligation to inform Members that he was taking such a position. Indeed, the

[2] In benefit denial letters issued after *Frommert 2006* and *Miller*, Defendant specifically stated that the calculation of pension benefits with the phantom account was lawful and was required by ERISA. This was not only failing to give the Members information they certainly would have wanted to know (i.e., information that two Courts of Appeal had found the phantom account unlawful). It was just false.

only reason the plaintiff in *Meagher* knew that his benefits were being miscalculated was because the plan sent him (and other beneficiaries) a letter informing them of the applicable previous judgment and stating that they were only going to apply that judgment to the particular plaintiffs in that case. *Meagher*, 856 F.2d. at 1421. Without that notice, the beneficiary would assume that the plan administrator would have calculated his benefits without the illegal term.

Here, the Plan Administrator wants this Court to conclude that the beneficiaries should have assumed their fiduciary was going to continue to apply illegal plan terms without providing them notice of his intent to do so. This was especially damaging for the participants who were offered RIF severance packages. Given the fiduciary context, Members could naturally and properly assume that the Plan Administrator had not withheld critically important information.

C. Duty to Inform Members About Their Particular Benefits. In addition to his general obligation to treat Members fairly and to inform them of facts they would want to know, the Plan Administrator has specific statutory obligations to notify Members about plan terms through an understandable Summary Plan Description (ERISA § 102, 29 U.S.C. § 1022) and to inform Members about their particular benefits (ERISA § 105, 29 U.S.C. § 1025). In *Layaou v. Xerox*, 238 F.3d 205 (2d Cir. 2001), the Second Circuit held, as a matter law, that Plan Members were misled by the SPD and annual benefit statements (in violation of those statutory disclosure rules). That court held that this established a cause of action for benefits under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). As a result, that court did not address whether those facts constituted a fiduciary breach. *Id.* at 212, n, 11. However, misleading beneficiaries is clearly a breach of a fiduciary's duty to "deal fairly and honestly with its beneficiaries." *Devlin*, 274 F.3d at 88 (citing *Ballone v. Eastman Kodak Co.*, 109 F.3d 117, 124 (2d Cir. 1997).

Nothing in the more recent *Frommert* and *Miller* cases suggests that the Plan Administrator overcame the Section 102 and 105 disclosure problems considered in *Layaou*.[3] Those two appellate decisions simply did not deal with the *Layaou* misrepresentation claim.

While it has been determined that the Plan Administrator gave Members notice sufficient under Section 204(h) to amend the Plan to add the phantom account (for Members hired after 1998), the Plan Administrator is still providing Members information (for example, annual "Value Added" Statements) that mislead and confuse Members (just like they misled Mr. Layaou). Whether the appropriate remedy is for benefits under § 502(a)(1)(B) or for equitable relief under § 502(a)(3), the statute does not start to run until a Member receives adequate information to clear up the confusion.

III. Applicable Statute of Limitations Rules.

A. Claims Under § 502(a)(1)(B). *Frommert 2006* and *Miller* involved direct claims for benefits under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). There is no explicit ERISA statute of limitations for such benefit claims. Instead the applicable state statute of limitations that applies in this case is New York's six-year limitations period for contract actions. N.Y.C.P.L.R. § 213; *Burke v. PriceWaterHouseCoopers, LLP Long Term Disability Plan*, 572 F.3d 76, 78 (2d Cir. 2009).

The accrual of a claim under ERISA; however, is determined by federal law. *Smith v. Rochester Tele. Bus. Marketing Corp*., 786 F. Supp. 293, 306 (W.D.N.Y. 1992), *aff'd without opinion*, 40 F.3d 1236 (2d Cir. 1994). The statute of limitations on a cause of action for plan benefits starts to run when the Member's benefit claim is denied. *See, e.g., Patterson-Priori v.*

[3] In July 2004, this Court rejected the *Frommert* Plaintiffs' claims under § 204(h) of ERISA. *Frommert v. Conkright*, 328 F. Supp. 2d 420 (W.D.N.Y. 2004). Yet, in August 2004, this Court turned around and sided with the Plaintiff in *Layaou*. *Layaou v. Xerox Corp*., 330 F. Supp. 2d 297 (W.D.N.Y. 2004). Those opposite results are not inconsistent because the claims were directed to different points.

Unum Life Ins. Co. of America, 846 F. Supp. 1102, 1106 (E.D.N.Y. 1994); *Larsen v. NMU Pension Trust*, 902 F.2d 1069, 1073-74 (2d Cir. 1990), *remanded to*, 767 F. Supp. 554 (S.D.N.Y. 1991). In some cases, that statute may start to run at an earlier date, but only if the claimant has received a clear and unequivocal repudiation of the obligation to pay his benefit. *See Hakim v. Accenture U.S. Pension Plan, 656 F. Supp. 2d 801, 820 (N.D. Ill. 2009).*[4] That situation does not exist here. To the extent there is any doubt as to when a claim accrued, under common law trust principles that doubt is not properly resolved in favor of the fiduciary.

B. Fiduciary Breach and § 502(a)(3). Under ERISA, the statute of limitations on claims for breach of fiduciary duty brought under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) is governed by ERISA § 413, 29 U.S.C. § 1113. That Section, in relevant part, states that claims may not be brought "after the earlier of (1) six years after . . . the date of the last action which constituted a part of the breach or violation . . . or (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation." In the case of fraud or concealment the period expires six years after the breach or violation is discovered. ERISA § 413, 29 U.S.C. § 1113. As the Court noted in its Order, constructive knowledge is not sufficient to apply the shorter three year statute. *Caputo v. Pfizer, Inc*., 267 F.3d 181, 193 (2d Cir. 2001).

[4] The 1998 Summary Plan Description did not constitute a clear and unequivocal repudiation. *Frommert 2006* determined that the 1998 SPD provided sufficient notice to amend the plan under § 204(h). It did not determine that the 1998 SPD constituted an unequivocal repudiation of the obligation to apply the lawful (pre-1998) terms to those rehired before 1998 (nor did the record in that case develop facts necessary to reach that conclusion). An unequivocal repudiation requires the Plan Administrator to "disown or cash off publicly." *Hakim*, 656 F. Supp. 2d at 820. In these cases, that occurred only when the Plan Administrator rejected a particular participant's appeal of his claim for benefits.

The date when any individual Kunsman Plaintiff had specific knowledge required under the statute depends on that individual's particular situation. That information is not apparent on the face of the *Kunsman* Complaint.

C. Defendants' Purported Precedential Authority. Defendants would like this Court to conflate two entirely different notice requirements: the notice needed before certain plan amendments can be effective and the notice adequate to be an unequivocal repudiation to start the running of the statute of limitations. Defendants have previously cited *Hirt v. Equitable Ret. Plan for Employees, Managers and Agents*, 285 Fed. Appx. 802 (2d Cir. 2008) but without telling the Court that *Hirt* was a Summary Order. Def. Reply in Support of Motion to Dismiss, Kunsman 08-CV-6080L. Under Second Circuit Local Rule 32.1.1(a), such rulings have no precedential effect. On the particular facts of that case, that Summary Order determined that the SPD in that case was both an adequate amendment and also an unequivocal repudiation. If the Second Circuit intended this finding to have precedential application beyond the narrow facts of *Hirt*, it would have discussed that issue in its concurrent published decision in that case. *Cf. Hirt v. Equitable Ret. Plan for Employees, Managers and Agents*, 533 F.3d 102 (2d Cir. 2008).

The fact-specific holding in *Hirt* cannot be imputed to the Plaintiffs in the current cases. The *Hirt* SPD described the plan's change from a defined benefit plan to a cash balance plan and included detailed calculations and formulas to enable each participant to determine their pre- and post-amendment benefits. *Hirt*, 285 Fed. Appx. at 804. On those facts, the Summary Order determined that distribution of that detailed SPD, "constituted a clear repudiation of any pre-amendment benefits that plaintiffs could possibly claim." *Id.*

A more recent (and published) decision analyzed the *Hirt* decision and determined that simply publishing a SPD, even if it plainly communicates plan terms, is not enough to constitute

a repudiation. *See Hakim*, 656 F. Supp. 2d at 801 (N.D. Ill. 2009). In *Hakim* case, defendants claimed that the statute of limitations ran upon release of an SPD that did not provide any specific distinctions of the benefits participants would receive before or after the applicable amendment. That court held:

> *The failure of the 1997 SPD to identify the differences between the pre- and post-amendment Plans precludes the Court from finding that the 1997 SPD unequivocally repudiated Plaintiff's entitlement to pre-amendment benefits. "Repudiate" means "to refuse to have anything to do with; to disown or cast off publicly." By not highlighting the distinctions between the old and new versions of the Plan, the SPD cannot be said to have cast off publicly the provisions o fthe old pre-amendment Plan.*

Id. at 820 (emphasis in original) (internal citations omitted). "Receipt of an SPD cannot, by itself, be considered sufficient to put an individual on notice of the accrual of his ERISA cause of action." *Morien v. Munich Reinsurance America, Inc.*, 270 F.R.D. 65, *68 (D. Conn. 2010).

Defendants' prior reliance on *Carey v. IBEW Local 363 Pension Plan*, 201 F.3d 44 (2d Cir. 1999) to support their claim that the statute of limitations has expired is also inapposite. The *Carey* court found repudiation in the denial of his written request challenging the plan administrator's conclusion on certain terms of his benefits. *Id*. at 46. While this was not a formal claim for retirement benefits it was a specific presentation of his claims to the administrator. A rejection of a specific claim obviously provides full notice of both sides' contentions and thus is very different from Defendants' attempts to use a plan amendment as a clear repudiation of individual participant's claims for accrued retirement benefits.

IV. Further Responses to the Court's Specific Questions. The facts and circumstances relevant to each Plaintiff in that case, as well as those pertaining to *Testa, Anderson*, and *Clouthier*, may have some similarities but they also have their individual facts (and particular

procedural histories). The existence of those different facts must be taken into account and makes dismissal at this stage inappropriate**.**

A. From the face of the Complaint can the point at which Plaintiffs had actual knowledge of the Defendants' alleged breach of fiduciary duty be determined?

No. The determination of actual knowledge of defendant's breaches is something that must be made on an individual basis (considering the exact terms of the remand on that issue). The *Kunsman* Complaint does not include the specific facts that would be necessary to make that determination for the 83 *Kunsman* Plaintiffs. The Complaint states that Defendants breached their fiduciary obligations by not particularly disclosing all material information related to the calculation of pension benefits (¶ 118), by continuing to apply the phantom account offset (¶ 119), and by not administering the RIGP solely in the interests of plan participants and their beneficiaries (¶ 122).[5] This Response more particularly identifies three fiduciary duties breached by Defendants: the duty to make full and open disclosure; the duty to apply the valid terms of the plan; and the duty to inform Members about their particular benefits. These breaches occurred at different times depending on Defendants' actions with respect to each particular Member. Such Members' knowledge of each such breach is fact-specific to that Member. Those facts are not available from the face of the Complaint.[6] In any event, both the Complaint and this Response allege that the wrongful conduct by Defendants is ongoing.

[5] As the Court aptly noted the Complaint also alleges (although under a different cause of action) that Defendants made false and misleading statements that the phantom account offset was part of the RIGP. Complt. at ¶ 130(e). Such misleading statements clearly violate Defendant's duty to make full and accurate disclosure and to apply the valid terms of the plan.

[6] Paragraph 82 of the Complaint does include some facts suggesting that some plaintiffs (that is, those in the "Carville group" and the "Falcon group") were aware of the Plan Administrator's breach of his obligation to apply the legal terms of the plan as of the date of such Plaintiffs' motion to file leave to amend the complaint in Frommert, November 6, 2006. The claims of

B. May Mr. Jaffe's actual knowledge of the alleged breach as documented in filings of a different but related case be imputed to the Plaintiffs in the current case?

This Court's December 1 Order references Jaffe's knowledge of Defendant's misrepresentations in filings from 2001 and 2003 in the *Frommert* case. Specifically, one of the many breaches alleged by the *Kunsman* Plaintiffs is the Plan Administrator's failure to inform each such Plaintiff that in calculating pension benefits that fiduciary would ignore court rulings that specifically outlawed the phantom account. As a result, that specific breach could not have occurred until after such rulings were made in 2006. As a result, the *Kunsman* Complaint is valid under either a three or six year limitations period measured from the date of those decisions. Many of the Plan Administrator's breaches are ongoing.

Even if Jaffe's knowledge gained from his representation of the *Frommert* plaintiffs could be imputed to the *Kunsman* Plaintiffs, the earliest date that such knowledge may be imputed to the plaintiffs is the date on which each such person became Jaffe's client. Those pre-filing attorney-client contacts are not apparent from the face of the Complaint.

Further, imputing Jaffe's knowledge to the *Kunsman* plaintiffs is not appropriate. As noted in *L.I. Head Start Child Dev. Services, Inc., v. Economic Opportunity Comm'n of Nassau County, Inc*., 558 F. Supp. 2d 378 (E.D.N.Y. 2008), cited in this Court's Order, imputation is normally appropriate "where there is a single attorney and a single known client in an ongoing relationship." *Id*. at 397 (quoting *Schwab v. Philip Morris USA*, No. 04 CV 1945 2005 WL 2467766 (E.D.N.Y. October 6, 2005), *reversed on other grounds sub nom. McLoughlin v. Am. Tobacco Co*., 522 F.3d 215 (2d Cir. 2008)). That is not the situation here. While not a class action, *Kunsman* was filed on behalf of 83 Plaintiffs, far more than the single-client scenario.

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those individuals constituting the "Carville group" and the "Falcon group" are timely if measured from three years of that date.

Moreover, in *L.I.*, the Court refused to impute the attorney's knowledge even though the attorney 1) admitted to having actual knowledge of the facts at issue, and 2) had obtained the knowledge in the course of his representation of the same plaintiffs in a different but related case. Here, any actual knowledge allegedly obtained by Jaffe arose in the course of his representation of a different group of plaintiffs before he had even met most (if not all) of the *Kunsman* Plaintiffs.

C. Can the Court determine, from the face of the Complaint, when the last alleged act constituting a part of the breach occurred?

This question is well directed, in that it stresses that the key point is the last act constituting a breach. Until that last act, the statute has not started to run. The date of such last act will vary depending on the facts unique to each Plaintiff.

As stated in both the Complaint and this Response, the Plan Administrator continues to breach his fiduciary duty. Most of these breaches continue today.

D. Have Plaintiffs sufficiently pleaded fraud or concealment to warrant the application of a six-year period from the date of discovery.

Yes and no. The current Kunsman Complaint alleges state law claims for conspiracy to defraud. Kunsman Complt. ¶¶ 126-141. While the undersigned intends to file an amended complaint to remove that cause of action (and to plead additional facts alleging fraud and concealment), the Complaint does provide sufficient information on the Defendant's repeated acts of concealment to inform the Court that additional factual discovery is required. For example, the Complaint alleges that Defendant presented the general release form to Members without informing them that Defendant intended to use that release as a bar to such Member's ability to obtain lawfully calculated benefits. Kunsman Complt. ¶ 130(d). As a fiduciary, Defendant had an obligation to inform its Member that signing such release could have a detrimental impact on that Member's retirement benefits. Defendant also continued to hoodwink

Members by stating that the phantom account was part of the RIGP even though two Courts of Appeal had held that the phantom account could not legally be applied. Kunsman Complt. ¶¶ 130(e); 140. While the fraud committed on each individual Plaintiff will need to be determined, the actions alleged in the Complaint demonstrate that acts of concealment occurred.

E. Questions Related to Some Kunsman Plaintiffs' Attempt to Join Frommert.

The Court asked four questions related to Jaffe's Motion to file a Second Amended Complaint on November 6, 2006 in *Frommert* to add certain individuals who are now Kunsman Plaintiffs. These questions are closely related so we will answer them together.

This Court's prior statements reflected an accurate understanding of the law as applied to the facts of this case. This Court's *Frommert 2007* decision stated there was "no basis for adding [new plaintiffs who have not yet retired] to this lawsuit." *Frommert 2007*, 472 F. Supp. 2d at 467. Such statement was based on two pertinent rationales. First, a claim for benefits brought under ERISA 502(a)(1)(B) was not ripe until the Member's claim for benefits was denied. Second, the Plan Administrator had an obligation (based on the Second Circuit's 2006 decision) to calculate benefits for individuals rehired before 1998 without the phantom account.

These are both good reasons to determine that the persons who attempted to join the *Frommert* case in 2006 had no need to do so. Like the Court, those individuals could reasonably expect that the fiduciary representing their interests would not defy directly applicable court decisions, particularly after being told by this Court that the Defendants could not rightfully do so. Moreover, the earliest those persons would have known that the Defendants were going to ignore such decisions was some day after such decisions were entered, when the Plan Administrator miscalculated benefits by applying the phantom account. That breach occurred within three years of the date of the Complaint.

Defendant may contend that the 2006 Motion to Amend bears on whether a particular Plaintiff had knowledge relevant to potential claims (and thus, may bear on treating those that were part of the Motion and those that were not differently). Even if this contention were to be accepted, that would only raise factual questions relevant to each individual. While that could lead to (or not lead to) a determination that individual facts are relevant, the effect of such facts cannot be resolved on this motion to dismiss.

A significant point here is that such individuals relied on this Court in deciding to withdraw the *Frommert* Motion to Amend. There would obviously be some unfairness in holding that Plaintiffs had to proceed with joining in *Frommert* in the face of the contrary statement by this Court.[7] No litigator wants to do what a judge has told him is unnecessary. Where equity requires, the running of a statute of limitations should be tolled. The principles underlying FRCP 15(c) suggest the relevance of equitable considerations.

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

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

While this generally has been applied to situations in which a defendant misled a plaintiff by an affirmative statement, an equitable doctrine should not be applied so narrowly. *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*

[7] That same unfairness would apply if the Court were to deem significant the fifteen month period between the date of that Motion and the filing of the Kunsman Complaint. As stated several times in this Response, Defendant's fiduciary breaches are numerous and have continued well after the date the Complaint was filed.

defendants' actions but rather whether, as a matter of equity, defendant is estopped from asserting the time bar in defense to this action.

V. Conclusion.

The Kunsman case involves 83 souls with 83 different histories. While some may have engaged the services of Robert Jaffe well before the 2008 filing in Kunsman, that fact does not appear in the Complaint. In any event, the Plan Administrator's fiduciary breaches continue, particularly since he continues to exact disproportionate offsets based on phantom account terms that have now been established as unlawful.

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