UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROBERT TESTA Plaintiff, V. LAWRENCE BECKER, as Plan Administrator of the Xerox Corporation Retirement Income Guarantee Plan, an employee Pension Benefit Plan, et al. Defendants.		Civil Action No. 10-06229(L)

PLAINTIFF'S REPLY MEMORANDUMIN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN OPPOSITION TO DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT

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I. THIS COURT HAS ALREADY RULED THAT TESTA'S CLAIMS UNDER SECTION 502(A)(3) OF ERISA ARE NOT TIME-BARRED.

Defendants' Opposition concludes: ". . . the sole remaining issue in this case, is whether the Plan Administrator breached his fiduciary duty by failing to pay a time-barred claim." Defs.' Mem. of Law in Opp'n to Pl.'s Mot. for Summ. J. at 12, Doc. 52 (Sept. 27, 2016). This acknowledgment reflects just how easy it should be to decide this current motion.

Defendants have simply ignored that this "sole remaining issue" has already been resolved by this Court. *Testa v. Becker*, 979 F. Supp. 2d 379, 384 (W.D.N.Y. 2013). (*"Testa 2013"*).

This single participant case is running in parallel with a larger case, *Kunsman v. Conkright*, 977 F. Supp. 2d 250 (W.D.N.Y. 2013). Defendants filed a Motion to Dismiss *Kunsman* on statute of limitations grounds. This Court granted that motion in part and denied that motion in part. The Defendants did not file a motion to reconsider.

This Court clearly called Defendants out in that *Kunsman* decision:

> Notably, the Court of Appeals in *Frommert* did not state that "the phantom account may not be applied to plaintiffs rehired prior to the issuance of the 1998 SPD," or that it may not be applied to employees who timely filed suit. The court stated that "[it] may not be applied to *employees* rehired prior to the issuance of the 1998 SPD." 433 F.3d at 263 (emphasis added). This language was not ambiguous. It could not be any clearer: the phantom account may not be used. It is hard to imagine how anyone could read the Second Circuit's directive [in its decision dated January 6, 2006] and still persist in using the phantom account. This is especially so for a fiduciary.

Id. at 263. Accordingly, while holding that various claims in *Kunsman* were time-barred, this Court determined that the plaintiffs' claim under ERISA § 502(a)(3) (29 U.S.C. § 1132(a)(3)) for fiduciary breach was not time-barred.

A few days after that *Kunsman* decision, this Court issued a decision in this case: "In my view, then, plaintiff has stated a facially valid claim for breach of fiduciary duty based on

defendant's alleged refusal to follow either *Frommert* or *Miller* with respect to his benefit." *Testa 2013*, 979 F. Supp. 2d at 384. Thus, in this case, this Court has already concluded "that the record as it stands now does not warrant dismissal of plaintiff's claims under 502(a)(3) as time barred." *Id.*

Defendants' Opposition includes a string cite to cases that have found various ERISA claims to be time-barred. Such cases do not support ignoring this Court's statute of limitation decision in *Testa 2013* to the extent such decision does not favor the Plan Administrator.

If Defendants' had a problem with *Testa 2013* they should have sought reconsideration. Instead Defendants, without showing any fact or legal authority that would undermine this Court's prior determination, have simply decided to ignore that decision. While any timely motion for reconsideration would have likely been denied, the time for making such a motion expired 28 days after the entry of the challenged judgment or order:

> Rules 54(b), 59(e) and 60(b) provide for relief from a prior judgment, but all such motions are subject to a strict standard, and will be denied "unless the moving party can point to controlling decisions or data that the court overlooked." *Greenwood Group, LLC v. Brooklands, Inc.*, __ F.Supp. 3d __, 2016 WL 4224008, at *1 (W.D.N.Y. 2016) (quoting *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995)). *See also Johnson v. County of Nassau*, 82 F. Supp. 3d 533, 536 (E.D.N.Y. 2015 (standard for granting reconsideration is "strict" and will rarely be granted absent a showing of "clear error or to prevent manifest injustice.")

Frommert v. Becker, Decision and Order, Doc. 312 (September 16, 2016).

II. DEFENDANTS CANNOT SERIOUSLY BE ASKING THIS COURT TO RELITIGATE MATTERS THAT HAVE BEEN DECIDED DURING THE LAST 16 YEARS OF LITIGATION.

Defendants assert that decisions in *Frommert* and *Miller v. Xerox Retirement. Income Guarantee Plan*, 464 F.3d 871 (9th Cir. 2006) were "dicta" and not binding in this case; however, both the Second Circuit and this Court have said otherwise. This is yet another

indication of how vehemently these fiduciaries are fighting to prevent the beneficiaries of their trust from receiving amounts that were promised to them. This recalcitrance must be brought to an end.

In this Court's January 5, 2016 decision, this Court showed the exasperation we all feel:

> Those initial denials would prove to be harbingers of Xerox's dogged defense against plaintiffs' claims for additional benefits. Like any defendant, Xerox is of course entitled to mount a defense to the claims against it, within certain boundaries. But it is fair to say that while Xerox has yielded some legal ground over the years—generally only when compelled to do so by court decisions—it has done so grudgingly, block by metaphorical block. While its actions may not have been "wrongful," then, that is not the test for determining whether Xerox's actions have been inequitable for purposes of reformation. Xerox's longstanding insistence that the application of the phantom account was justified, even though some plaintiffs had not been given sufficient notice of the existence or operation of that formula, can fairly be deemed "inequitable" as to the affected plaintiffs.

Frommert v. Becker, 153 F. Supp. 3d. 599, 609-10 (W.D.N.Y. 2016) ("*Frommert 2016*").

Of course, it is true that neither *Frommert* nor *Miller* was a class action. Accordingly, at least under traditional principles, the decisions in those cases are not "*res judicata*" for other Members of the RIGP Plan. Nevertheless, there are three reasons why those cases define the outcome in this case (and in *Kunsman*).

The first is the doctrine of *stare decisis*. To be more specific, this Court and the Second Circuit (along with the Supreme Court) have examined phantom account issues under the Xerox RIGP for 16 years or more. Bit by little bit, those decisions led to where we are today. The same principles and facts continue to apply. There is only one possible reason to suggest that this should all start again from square one—the Plan Administrator's stubborn obsession with making sure RIGP Members get paid as little RIGP benefit as possible and as late as possible.

Second, offensive collateral estoppel should be applied here. *See Parklane Hosiery, Inc. v. Shore*, 439 U.S. 322, 323 (1979). To say the least, the Plan Administrator has had ample time

and opportunity to present his arguments. The Defendants cannot honestly argue that they would have presented a more vociferous case if only they had known that Testa would also make a similar claim.

Third, the remedies that are available to a Plan participant under ERISA include not only a determination of individual benefits, but also injunctive relief and declaratory relief. ERISA § 502(a)(3)(A) (29 U.S.C. § 1132(a)(3)(A)). Those additional remedies were specifically sought in *Frommert* and *Miller*. For example, the Ninth Circuit in *Miller* meant what it said when it concluded:

> The Employees and *all other plan participants* subject to similar benefit adjustments—are entitled to a calculation of benefits that subtracts from their final Income Guarantee Plan benefit only the benefit actually attributable to the Profit Sharing Plan distributions.

Miller, 464 F.3d at 878 (emphasis added).

Class certification is not required to enjoin a trustee from breaking the law. Indeed, 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) (stating that "[e]ach check issued to him . . . reduced under the inoperative amendment constitutes a fresh breach by the trutees of their duty to administer the pension plan in accordance with the documents and instruments of the Plan that are not inconsistent with ERISA.").[1]

[1] This Court in not allowing certain Kunsman plaintiffs to join the Frommert action stated, "[t]o 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. 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

At the very least if the Plan Administrator planned to ignore court rulings regarding the RIGP, he had the obligation to inform beneficiaries that he was taking such a position. *See Kenseth v. Dean Health Plan, Inc.*, 610 F.3d 452, 466 (7th Cir. 2010) (stating, "[t]his duty exists when a beneficiary asks fiduciaries for information and even when he or she does not."); *Bixler v. Cent. Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993) (explaining that the "duty to inform . . . 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"). Without that notice, a beneficiary would assume that the plan administrator would have calculated his benefits without relying on an illegal term. In Testa's denial letter dated June 2, 2009, Defendant specifically stated that the calculation of pension benefits with the phantom account was lawful and was required by ERISA adding "there can be no exception or deviation." Decl. of Lawrence M. Becker at Ex. D. This was not only failing to give Testa information he certainly would have wanted to know (i.e., information that two Courts of Appeal had found the phantom account unlawful). It was just false.

Defendants also cite several RIGP decisions which have denied recovery based on the plaintiffs' execution of certain release documents. Those cases have nothing to do with the manner in which prior RIGP decisions bear on Testa's claims. Ironically, in those cases, Defendants argued that plaintiffs who were not part of the *Frommert* litigation were nonetheless bound by Second Circuit determinations reached in *Frommert*. Is it Defendants' position that plaintiffs in *Kunsman* should now relitigate all issues addressed in the *Frommert* decisions? If so, the *Kunsman* plaintiffs will dispute, for example, the conclusion that they were given notice

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foreclose defendants from utilizing the phantom account in calculating "new" retirees' pension benefits. *Frommert v. Conkright*, 472 F. Supp. 2d 452, 467 n. 9 (W.D.N.Y. 2007), *aff'd in part, vacated in part by* 535 F.3d 111 (2d. Cir. 2008), *rev'd* 130 S. Ct. 1640 (2010) ("*Frommert 2007*") (internal citations omitted).

of the phantom account by 1998. After all, none of the *Kunsman* plaintiffs were parties to the *Frommert* case.

Testa originally filed his action in the Central District of California, the place where Testa worked for Xerox. However, seeking a uniform administration of its plans, the Plan Administrator successfully argued to have this case transferred here.[2] This Court has already issued several decisions regarding the RIGP and the Plan Administrator's actions in *Frommert*, including a decision on an appropriate equitable remedy. The parties should not be forced to re-litigate issues that have already been decided in that case and Xerox should be estopped from taking a position that such decisions do not apply.

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. The failure to do so is clearly a breach of the Plan Administrator's fiduciary obligations.

III. AT A MINIMUM, TESTA IS ENTITLED TO THE SAME SORT OF EQUITABLE RELIEF (I.E., "NEW HIRE") AS RECENTLY APPLIED BY THIS COURT IN FROMMERT.

As previously stated, in *Testa 2013*, this Court concluded that: "plaintiff has stated a facially valid claim for breach of fiduciary duty based on defendant's alleged refusal to follow either *Frommert* or *Miller* with respect to his benefit." *Testa 2013*, 979 F. Supp. 2d at 384.

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[2] After the Ninth Circuit issued its decision in *Miller*, Xerox amended the Plan to change venue from the Central District of California to this Court in a transparent attempt to undo the effect of the *Miller* decision on plaintiffs like Testa.

The long line of decisions in *Frommert* has determined both that a breach took place and also what remedy is proper for that breach under ERISA § 502(a)(3) (29 U.S.C. § 1132(a)(3)). This Court's *Frommert 2016* decision addressed "equitable relief" as directed by the latest remand from the Second Circuit. Based on that remand and the Supreme Court's decision in *Cigna Corp. v. Amara*, 131 S. Ct. 1866, 1881 (2011)("*Amara*"), this Court found "that contract reformation is an appropriate equitable remedy in this case." *Frommert 2016*, 153 F. Supp. 3d at 607. It held that "the appropriate equitable remedy is to recalculate plaintiffs' benefits, treating plaintiffs upon their re-employment with Xerox as if they had been newly hired, with no offset whatsoever." *Id.* at 605. As this Court discussed in that opinion, reformation can be used as equitable relief for a trustee's breach without showing detrimental reliance. Indeed, a showing of actual harm or the loss of a right protected by ERISA may be all that is required. *Id.* at 607; *Amara* 131 S. Ct. at 1881. The Plan Administrator, by gutting Testa's retirement benefits using the illegal phantom account, clearly caused Testa actual harm and violated his rights under ERISA.

IV. IF BETTER THAN NEW HIRE (WHICH IT PROBABLY IS), TESTA IS ENTITLED TO A MONTHLY RIGP ACCRUED BENEFIT WITH AN OFFSET LIMITED TO THE RIGP ACCRUED BENEFIT HE HAD EARNED BEFORE HIS PRIOR PLAN DISTRIBUTION (AN "ACTUAL ANNUITY" OFFSET).

The Plan Administrator's blatant refusal to follow court orders justifies a determination of relief that will not unjustly enrich Defendants for their actions. The entire second half of Plaintiff's Motion for Summary Judgment discussed the application of *Miller* to this case. As discussed there, an "actual annuity" offset is an appropriate benefit in this case. Defendants have not rebutted that argument in any way. Accordingly, Plaintiff merely reincorporates those arguments by reference since they still stand and notes that "ERISA grants the court wide discretion in fashioning equitable relief to protect the rights of pension fund beneficiaries."

Frommert 2016, 153 F. Supp. 3d at 606 (quoting *Chao v. Merino,* 452 F.3d 174, 185 (2d Cir. 2006)).

V. THIS MOTION RAISES A LEGAL ISSUE AS TO WHETHER IGNORING COURT DECISIONS CONSTITUTES A BREACH OF A PLAN ADMINISTRATOR'S DUTIES AND DOES NOT REQUIRE EXAMINATION OF ANY NEW FACTS.

Defendants have included a lengthy Response to Testa's Statement of Undisputed Facts. Yet none of those raise any material issues and therefore none are discussed in Defendants' Memorandum of Points and Authorities. Instead, Defendants spend pages alleging that certain versions of Defendants' plan were not actually admitted as evidence in this case. Apparently, Defendants are asserting that the fact that such documents have already been reviewed and examined in this Court is insufficient for providing a brief background of the plan's history. That position ignores that this Court is all-too-familiar with the plan.

A key fact from their statement, however, is their admission that "there are no genuine facts for dispute." Indeed, this motion turns on the resolution of a legal issue. The facts on which that issue relies are not in dispute. Defendants allege that continuing to apply the phantom account to Testa, despite Court decisions holding that plan term illegal under ERISA, was proper and was not a breach of the plan administrator's duty to administer the plan "solely in the interest of the participants and beneficiaries." ERISA § 404(a)(1)(A); 29 U.S.C. § 1104(a)(1)(A). That position is unsupportable.

VI. CONCLUSION.

The undisputed facts are that two Courts of Appeal determined the phantom account could not legally be applied and the Plan Administrator ignored those decisions in calculating Testa's benefits in 2009. This is a clear violation of his duties under ERISA § 404(a)(1)(A); 29 U.S.C. § 1104(a)(1)(A). This Court can proceed to such summary judgment as it determines to

be appropriate. The precise computation of a "New Hire" benefit or an "Actual Annuity" benefit can be completed under this Court's supervision following a decision on this Motion.

October 11, 2016

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