17-1826(L),
17-1985(CON)

United States Court of Appeals

for the

Second Circuit

ROBERT TESTA, an individual,

Plaintiff-Appellee-Cross-Appellant,

– v. –

LAWRENCE BECKER, as plan administrator of the Xerox Corporation Retirement Income Guarantee Plan, XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN, an Employee Pension Benefit Plan,

Defendants-Appellants-Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR DEFENDANTS-APPELLANTS-CROSS-APPELLEES

LITTLER MENDELSON, P.C.
Margaret A. Clemens, Esq.
Pamela S.C. Reynolds, Esq.
Attorneys for Defendants-Appellants-Cross-Appellees
375 Woodcliff Drive, 2nd Floor
Fairport, New York 14450
(585) 203-3400

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JURISDICTIONAL STATEMENT

The United States District Court for the Western District of New York ("District Court"), pursuant to 28 U.S.C. § 1331 and § 1367, exercised subject matter jurisdiction over the claims of Plaintiff-Appellee Robert Testa ("Plaintiff") against Defendants-Appellants Lawrence Becker as Plan Administrator for the Xerox Corporation Retirement Income Guarantee Plan (the "Plan Administrator") and the Xerox Corporation Retirement Income Guarantee Plan (the "RIGP" or "Plan") (collectively "Defendants") on the basis that the claims asserted in the Complaint under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq*., (A-14-32),[1] presented a federal question, as defined by 28 U.S.C. § 1331.

This Court has jurisdiction over this appeal, pursuant to 28 U.S.C. § 1291, as an appeal of right of a final order and judgment of a United States District Court. On May 9, 2017, a Decision and Order was entered by the District Court: (i) granting a motion for summary judgment filed by Plaintiff, and awarding Plaintiff a remedy based on the remedy awarded by the District Court in a related action, *Frommert v. Becker*, 153 F. Supp. 3d 599, 614-15 (W.D.N.Y. 2016); and (ii) denying Defendants' cross-motion for summary judgment dismissing the

[1] Reference to the Joint Appendix are designated "A-[page number]."

remaining claim in the Complaint. (SPA-1-11).[2] A judgment in favor of Plaintiff on liability and a remedy was entered on May 10, 2017. (SPA-12).

On June 2, 2017, Plaintiff filed a motion for attorneys' fees, which is pending below. (A-11-12, Dkt. 59). The motion for fees does not stay the entry of the final judgment or extend the time for this appeal, pursuant to Rule 58(e) of the Federal Rules of Civil Procedure, because it was not filed under Rule 54(d)(2), that is, within 14 days of the entry of the judgment.

On June 8, 2017, Defendants appealed from the Decision and Order entered in this action on May 9, 2017 (SPA-1), and the judgment entered in favor of Plaintiff on May 10, 2017 (SPA-12), by filing of a Notice of Appeal. (A-527). Accordingly, the appeal is timely made, pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure.

In the Notice of Appeal (A-527), Defendants also appealed to the United States Circuit Court for the Second Circuit from that portion of a Decision and Order of the District Court, entered in this action on October 30, 2013, (A-277-284), and reported at 979 F. Supp. 2d 379 (W.D.N.Y. 2013) (the "2013 Order"), to the extent it denied Defendants' motion to dismiss Plaintiff's Complaint, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, on the basis that Plaintiff's third cause of action set forth a claim for relief under 29 U.S.C. §

[2] References to the Special Appendix are designated "SPA-[page number]."

1132(a)(3). An appeal from the 2013 Order is timely because the final Order and Judgment in this case was not entered until May 9, 2017 and May 10, 2017 respectively.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in failing to dismiss as untimely a plan participant's breach of fiduciary duty claim under an ERISA-governed pension plan, a claim based on the alleged failure by the plan to provide appropriate notice of the plan's offset provision for prior distribution of pension benefits where the plan participant failed to commence an action for benefits for twelve years after receiving adequate notice of the offset provision.

2. Whether the District Court improperly created a breach of fiduciary duty claim for a plan participant under ERISA by relying on the alleged failure to comply with *Frommert v. Conkright*, 433 F.3d 254 (2d Cir. 2006) ("*Frommert I*"), thereby reviving an expired claim for benefits of a non-party to that action.

3. Whether the District Court improperly granted summary judgment to an ERISA-governed plan participant based on a judicially-created breach of fiduciary duty claim for an alleged failure to comply with the terms of a circuit court's decision and order in a case in which that plan participant was *not* a party, had *no* direct interest, and was *not* similarly-situated to the plaintiffs.

STANDARD OF REVIEW

The standard of review of a district court's decision on a motion to dismiss a complaint, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, accepting all facts as true and drawing all reasonable inference in plaintiff's favor, is *de novo*. *CBF Industria de Gusa S/A v. AMCI Holdings, Inc*., 846 F.3d 35, 55 (2d Cir. 2017); *Crawford v. Cuomo*, 796 F.3d 252, 256 (2d Cir. 2005).

The standard of review of a district court's ruling on cross-motions for summary judgment, in each case construing the facts in the light most favorable to the non-moving party, is *de novo*. *Novella v. Westchester Cty*., 661 F.3d 128, 143 (2d. Cir. 2011).

Where, as in this case, an employee benefit plan grants a plan fiduciary the discretionary authority to construe the terms of the plan governed by ERISA, a district court must review deferentially the denial of the application for benefits and this Court reviews the district court's legal conclusions *de novo*, but reviews the underlying decision of the plan administrator under the "arbitrary and capricious standard" for an abuse of discretion. *Ocampo v. Bldg. Serv. 32b-J Pension Fund*, 787 F.3d 683, 689-90 (2d Cir. 2015); *Pagan v. NYNEX Pension Plan*, 52 F.3d 438, 441 (2d Cir. 1995).

STATEMENT OF THE CASE

As explained more fully below, Plaintiff filed a Complaint on January 28, 2010, which set forth claims seeking additional pension benefits under ERISA. Defendants now appeal from the Decision and Order entered by the District Court on May 9, 2017 and the District Court's 2013 Order, both of which were issued by the Honorable David G. Larimer, United States District Judge for the Western District of New York. The May 9, 2017 Decision and Order Decision and Order: (i) granted a motion for summary judgment filed by Plaintiff, and awarding Plaintiff a remedy based on the remedy awarded by the District Court in a related action, *Frommert*, 153 F. Supp. 3d at 614-15; and (ii) denied Defendants' cross-motion for summary judgment dismissing the remaining claim in the Complaint. (SPA-1-11). The May 9, 2017 Decision and Order is reported at 2017 U.S. Dist. LEXIS 70984 (W.D.N.Y. May 9, 2017). The 2013 Order granted in part and denied in part Defendants' motion to dismiss the Complaint, which was filed on May 21, 2010. (A-37). The 2013 Order is reported at *Testa v. Becker*, 979 F. Supp. 2d 379 (W.D.N.Y. 2013). Defendants appeal the 2013 Order to the extent it denied Defendants' motion to dismiss Plaintiff's Complaint, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, on the basis that Plaintiff's third cause of action set forth a claim for relief under 29 U.S.C. § 1132(a)(3). (A-527).

A. Plaintiff's Employment at Xerox and Participation in its Pension Plan

Plaintiff worked for Xerox Corporation ("Xerox") intermittently, commencing in 1972 until his retirement on or about August 30, 2008. (A-23). His periods of employment with Xerox were from approximately 1972 to May 1977; October 1977 to 1983; and 1985 to 2008. (A-23, ¶¶ 51-53). During his employment, Plaintiff was a participant in Xerox's pension plan for salaried employees, known as the RIGP. (A-16, ¶ 12). Upon the termination of his employment in 1983, Plaintiff took a lump sum distribution of the present value of his pension benefit from the Plan. (A-23, ¶ 54).

When he was rehired by Xerox in 1985, Plaintiff again became a participant in the Plan. (A-23, ¶ 52). Pursuant to the terms of the RIGP, a rehired plan participant's retirement benefits are offset by the appreciated value of his or her prior lump sum distribution. (A-39, ¶ 3; A-94-97). It is a lack of notice of this offset provision of the RIGP, at times referred to as "phantom accounting," which is the principal focus of Plaintiff's claims. (*See* A-25-27, ¶¶ 68, 69, 71-79).

Plaintiff alleges that the Plan Administrator had a statutory obligation, under Section 105 of ERISA, 29 U.S.C. § 1025, to reasonably apprise each plan participant of his rights under the Plan in a manner calculated to be understood by the average plan participant in a Summary Plan Description ("SPD"). (A-26, ¶ 71). Plaintiff further alleges that "*before 1998,*" the SPDs and other notices

provided to him contained inadequate notice that his actual benefit may be substantially less than the amount showed on his annual Value Added Statement due to the offset provision for prior distributions. (A-27, ¶ 75) (emphasis added). Stated otherwise, Plaintiff alleges that any notice to him as to how his pension would be calculated was inadequate *before 1998*. (*See* A-26, ¶ 75).

B. Plaintiff's Exhaustion of His Administrative Remedies Under the Plan

When he retired from Xerox for a second time in 2008, Plaintiff's pension benefits were calculated utilizing the offset provision in the Plan for his prior distribution when he left Xerox's employment in 1983 to avoid duplicate payments. (A-397, Plan § 9.6 Non-Duplication of Benefits; A-483, ¶ 8; A-484, ¶ 10; A-502). Plaintiff claims that after he retired, his pension benefit was lower than it should have been because of the application of the offset provision to his benefit calculation for his prior distribution from the Plan in 1983. (A-25, ¶¶ 65, 67-68).

Plaintiff alleges that he exhausted his administrative remedies by submitting a letter, dated May 26, 2009, addressed to the Plan Administrator in which he claimed that he was "appealing the denial" of a claim for benefits under the Plan, submitted on January 30, 2009. (A-80, ¶ 80; A-339*;* A-483, ¶ 9). In response to that letter, Arlyn Kaster, Manager Pension and Life Insurance Benefits, sent a letter dated June 2, 2009 to Plaintiff's counsel, explaining that the January 30, 2009

letter had been received by the Xerox Benefits Center, with its Enclosed Election Authorization Form, requesting a lump sum distribution of Plaintiff's vested RIGP benefit, and that a payment of $309,842.45 was processed on February 4, 2009, pursuant to the terms of the RIGP. (A-496-497). The Kaster letter further explained that the Claims Procedure, which was set out in the SPD, was not followed by Plaintiff when he mailed his January 30, 2009 letter, and as a result, his letter had not come to the attention of the Plan Administrator. However, given the intent of the January 30, 2009 letter, the Plan Administrator was now treating that letter as a claim for benefits under the Plan. The claim, however, was denied for the reasons set out in detail in the Kaster letter. (A-484, ¶ 10, A-496-497).

Plaintiff filed an appeal of that denial by letter addressed to the Plan Administrator, dated July 28, 2009. (A-484, ¶ 11; A-28, ¶ 82). The appeal was denied by the Plan Administrator by letter dated August 4, 2009. (A-484-485, ¶ 12; A-502). As explained by the Plan Administrator, Plaintiff was not entitled to any additional benefits under the Plan for several reasons, including that: (i) the SPD had fully described the Plan's offset provision for prior distributions to all plan participants beginning 1998, and Plaintiff had received adequate notice of the offset provision since that time; (ii) ERISA requires that the RIGP be administered strictly in accordance with its terms; and (iii) with regard to the two court decisions referred to in Plaintiff's letter, no final judgments had been rendered in those cases,

Plaintiff was not a party in either case, nor was he a plaintiff in any other litigation related to the offset provision, and his claim was untimely. (A-502).

C. Commencement of the Action and Nature of Plaintiff's Claims

Plaintiff commenced his action by filing a Summons and Complaint in the United States District Court for the Central District of California on January 28, 2010, approximately twelve years after he received the 1998 SPD notifying him of the offset provision for prior distributions. (A-14). The case was transferred to the Western District of New York. *Testa v. Becker*, No. CV 10-638-GHK (FMOx), 2010 U.S. Dist. LEXIS 47130 (C.D. Cal. Apr. 22, 2010). (A-4, Dkt. 4).

Plaintiff's first two claims, asserted pursuant to ERISA 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B), sought to recover benefits Plaintiff claims are due to him under the RIGP, enforcement of his purported rights under the terms of the RIGP, and clarification of his rights to future benefits under the RIGP. (A-29-30, ¶¶ 92-97).

In the Third Claim, Plaintiff alleged that he is entitled to an order, pursuant to 29 U.S.C. § 1132(a)(3), compelling Defendants to comply with the "direct order" of the Ninth Circuit in *Miller v. Xerox Corp. Ret. Income Guar. Plan ("Miller")*, 464 F.3d 871 (9th Cir. 2006). (A-31, ¶¶ 98-99).

In the Fourth Claim, Plaintiff purported to allege a breach of fiduciary duty claim against the Plan Administrator for failing to exercise his duties with respect

to the RIGP, and he sought an order, pursuant to ERISA 502(a)(3)(B), 29 U.S.C. §°1132(a)(3)(B), requiring the Plan Administrator to "exercise his fiduciary duties" with respect to Plaintiff's benefit claim in an independent and appropriate manner (or issuing an order appointing a substitute fiduciary if the Plan Administrator fails to do so). (A-31, ¶¶ 100-102).

D. Defendants' Motion to Dismiss, the Court's Decision and Order, and the Defendants' Appeal

Defendants filed a motion to dismiss the Complaint on May 21, 2010. (A-37-193). Plaintiff opposed the motion. (A-195-221). Prior to ruling on Defendants' motion to dismiss, the Court requested additional information from both parties regarding issues related to the accrual of a breach of fiduciary duty claim, actual knowledge, and fraud and concealment in this action as well as four other related actions. (A-239-243). Both parties filed respective responses to the Court's request. (A-244-276).

In the 2013 Order, the District Court granted, in part, and denied, in part, Defendants' motion to dismiss the Complaint (A-277-284). As stated above, the 2013 Order is reported at *Testa v. Becker*, 979 F. Supp. 2d 379 (W.D.N.Y. 2013). (A-277-284).

For purposes of the 2013 Order, the District Court assumed familiarity with two related cases presented to and addressed by the Ninth and Second Circuit Courts of Appeals and the United States Supreme Court: *Miller*, 464 F.3d at 871

and *Frommert I*, 433 F.3d at 254. (A-279). The Court noted that the *Frommert I* was of particular importance to the 2013 Order in the instant case. (A-279).

As the District Court explained, in *Frommert I*, the Second Circuit addressed issues related to the RIGP in connection with a lawsuit that had been brought by about 100 present and former Xerox rehired employees seeking to be paid additional pension benefits under the Plan. (A-279). In *Frommert I*, the Second Circuit had ruled that the RIGP's phantom account offset provision was not properly added to the Plan until the issuance of the 1998 SPD and that it would violate § 204 of ERISA for the Plan Administrator to apply the phantom account to employees rehired by Xerox prior to the issuance of the 1998 SPD. (A-279) (citing *Frommert I*, 433 F.3d at 263). The Court also briefly discussed the *Miller* case, which also was decided by the Ninth Circuit in 2006, to the effect that the phantom account methodology violates ERISA. (A-280).

The District Court then considered whether to dismiss Plaintiff's claims on the grounds that they were not timely commenced. (A-281-284). Applying *Frommert I*, the District Court properly reasoned that Plaintiff had received adequate notice of the "phantom account" offset provision in 1998 when "'the details of the phantom account offset functions were set out in full in the 1998 Summary Plan Description.'" (A-282) (quoting *Frommert I*, 433 F.2d at 260). The District Court also reasoned that Plaintiff's six year statute of limitations under

29 U.S.C. § 1132(a)(1)(B) expired in 2004, some six years before Plaintiff started this lawsuit. (A-282). The District Court then properly dismissed Plaintiff's claims for benefits, pursuant to 29 U.S.C. § 1132(a)(1)(B), (the First and Second Claims respectively), based on the applicable statute of limitations. (A-284).

The District Court also properly dismissed Plaintiff's Fourth Claim, the breach of fiduciary duty claim, asserted under 29 U.S.C. § 1132(a)(3). (A-284). The District Court reasoned that Plaintiff's claim based on a breach of fiduciary duty was simply a recast of his claims for benefits under the Plan. (A-282-283). It further reasoned that Plaintiff could not simply replead his ERISA claim in such a manner because the gravamen of his claim was one for benefits, and that in any event, such claim would be time-barred given that there were no new allegations of fraud or concealment occurring after 1998. (A-277-284).

The District Court, however, incorrectly denied the motion to dismiss the Third Claim to the extent that Plaintiff alleged that he is entitled to an order compelling Defendants to comply with the Ninth Circuit's decision in *Miller*. (A-283-284). The District Court reasoned that allegations were akin, not to a claim for benefits, but to a breach of fiduciary duty claim arising out of the Plan Administrator's allegedly having ignored court rulings, particularly the Second Circuit's 2006 directive in *Frommert I* that "the phantom account offset may not be applied to employees rehired prior to the issuance of the 1998 SPD," because the

employees "have not been adequately notified that the phantom account offset would be used to calculate their benefit." (A-283). In deciding the motion, the District Court held that Plaintiff has sufficiently alleged a plausible breach of fiduciary duty claim to survive a motion to dismiss under Rule 12(b)(6). (A-283-284). The District Court did not decide when the breach of fiduciary duty claim arose or whether Plaintiff should prevail on the claim. (A-277-284).

E. Defendants' Answer and the Parties' Cross-Motions for Summary Judgment

On January 15, 2014, Defendants filed a timely Answer, denying any liability for the sole remaining claim in the Complaint and asserting a number of defenses, including that the Plaintiff's claims were time-barred. (A-285).

Plaintiff moved for summary judgment on the remaining claim, and Defendants cross-moved for summary judgment in their favor. (A-302, A-423). In his motion for summary judgment, Plaintiff claimed that the appropriate treatment of rehired RIGP members has been the subject of exhaustive litigation in this Court (and related appellate courts, including the U.S. Supreme Court) for over sixteen years and that *Testa* is a parallel case to *Frommert*, which might fairly be described as the lead case. (A-305-306). Plaintiff sought a "uniform administration" of the Plan's terms by requiring Defendants to pay benefits under the equitable remedy awarded to the *Frommert* plaintiffs by the District Court by Decision and Order, dated January 5, 2016, reported at *Frommert v. Becker*, 153 F. Supp. 3d 599

(W.D.N.Y. 2016) ("*Frommert 2016*"), or alternatively, Plaintiff's preferred method, an "actual annuity offset approach," which Plaintiff contended is more in line with the *Miller* decision following remand from the Ninth Circuit. (A-304-318).

Defendants cross-moved for summary judgment on several grounds, including that the undisputed facts showed that the Plan Administrator's determination was reasonable in that Plaintiff's claim for benefits was time-barred. (A-423-502).

F. The District Court's Decision and Order and Defendants' Appeal

On May 9, 2017, the District Court issued a Decision and Order which granted Plaintiff's motion for summary judgment and denied Defendants' cross-motion for summary judgment. (SPA-1-11). In its Decision and Order, the District Court reaffirmed that the Court had previously dismissed three of the four claims asserted in the Complaint because "plaintiff could not seek benefits directly under the terms of the plan itself or under the SPD, because Xerox's 1998 SPD had put plaintiff on notice of the existence and operation of the phantom account when the SPD was issued to him in 1998. (SPA-4-5). At the latest, then, Plaintiff's six-year limitations period under 29 U.S.C. § 1132(a)(1)(B) expired in 2004." (SPA-4). The Court added that the Plaintiff "could not simply recast his claim for

benefits in the guise of a catchall fiduciary-duty claim for 'other appropriate relief' under § 1132 (a)(3)." (SPA-5).

The District Court, however, reasoned that there was a "directive" from the Second Circuit that the offset provision, also referred to as the "phantom accounting," could not be applied to employees rehired before the issuance of the 1998 SPD and that the failure to comply with that directive gave rise to a new claim for breach of fiduciary duty. (SPA-7). The Court then granted Plaintiff's motion for summary judgment on that claim despite Defendants' assertion of valid defenses to such a claim. The District Court then awarded Plaintiff the same equitable remedy as the District Court has awarded in 2016 in the *Frommert* action.[3] (SPA-8; 10-11).

On June 8, 2017, Defendants filed a Notice of Appeal, appealing from both the denial of its motion to dismiss the Third Claim in 2013 and the denial of its cross-motion for summary judgment on the merits and the grant of Plaintiff's motion for summary judgment in his favor. (A-527). Plaintiff then filed a cross-appeal to the extent that the Decision and Order did not grant the relief requested by Plaintiff. (A-529).

[3] The *Frommert* Plaintiffs have filed an appeal with regard to the remedy awarded by the District Court in that case, which is currently pending before the Second Circuit. (*See Frommert v. Conkright*, Appeal No. 17-114-cv).

SUMMARY OF ARGUMENT

Plaintiff and the District Court incorrectly rely on the lead case of *Frommert v. Conkright* both for an imposition of liability and for the remedy to be imposed.

Plaintiff is not similarly-situated to the *Frommert* plaintiffs in all material respects. Unlike the *Frommert* plaintiffs, Plaintiff did not timely commence an action seeking benefits under the Plan upon receiving adequate notice of the Plan's offset provision for prior distributions in 1998. This undisputed fact led the District Court to dismiss Plaintiff's claim for benefits as untimely interposed, properly relying on well-established law that the statute of limitations for a claim for benefits under ERISA, in New York, is six years and that, in this Circuit, a plan participant's cause of action accrues "when a beneficiary knows or should know he has a cause of action." *See Novella*, 661 F.3d at 147.

The District Court's conclusion is supported by *Frommert I*. In that Decision and Order, the Second Circuit held that the language of the 1998 RIGP SPD was sufficient to put employees on notice of the details of how offset provision for prior distributions, sometimes referred to as phantom accounting, would be used in calculating pension benefits. *Frommert I*, 433 F.3d at 260. ("[T]he details of the phantom account offset functions were set out in full in the 1998 Summary Plan Description"). Plaintiff admits in his Complaint that he had adequate notice of the offset provision since 1998. (*See* A-27). In contrast to the

Frommert plaintiffs, however, Plaintiff sat on his rights and did not file an action for twelve years after he received adequate notice of the offset provision. Thus, the District Court properly held that Plaintiff's claim for benefits accrued in 1998 and is now time-barred.

The District Court erred, however, when it then denied Defendants' motion to dismiss the Third Claim in the Complaint in 2013, finding that Plaintiff had stated a plausible claim for relief for breach of fiduciary duty for an alleged failure to comply with the Court's directive in *Frommert I* - even though Plaintiff 1.) was not a party to that action, and 2.) his claim for benefits was already time-barred when the Second Circuit issued its Decision and Order. The District Court compounded its error when it later denied Defendants' cross-motion for summary judgment and granted Plaintiff's motion for summary judgment on the merits of that claim, finding that Defendants breached their fiduciary duty by failing to comply with the Second Circuit's directive in *Frommert I* that the offset provision could not be applied to employees rehired before the issuance of the 1998 SPD, and ordering that Plaintiff be awarded the same remedy as the *Frommert* plaintiffs.

First and foremost, the District Court improperly determined that the Circuit Court in *Frommert I* intended to bind Defendants to pay benefits under the RIGP to all employees who were rehired before the issuance of the 1998 SPD *without regard to the assertion of the defense* by the Plan or its Plan Administrator that

some employees, like Plaintiff, sat on their rights for years and let the statute of limitations expire. The District Court's determination undermines the very purpose of statutes of limitations, which "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." *Novella*, 661 F.3d at 147 (quoting *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944)).

The Second Circuit's decision in *Frommert* in 2008, reported at *Frommert v. Conkright*, 535 F.3d 111 (2d Cir. 2008) ("*Frommert II*") is instructive in this regard. Among other things, the Second Circuit reversed the District Court's Decision and Order which had denied Defendants' motion for summary judgment dismissing the claims of eighteen of the *Frommert* plaintiffs, rehired before the issuance of the 1998 SPD, on the grounds that they had signed valid releases. *Id.* at 122-23. Thus, *Frommert II* supports the conclusion that the Second Circuit never intended that *Frommert I* be a directive that all employees rehired before the issuance of the 1998 SPD be paid benefits without the application of the offset provision *despite applicable individualized defenses*.

Next, the District Court did not properly consider that the *Frommert I* Second Circuit decision never ordered any class-wide, injunctive or declaratory relief applicable to non-parties to the action. Nor could the Second Circuit have

ordered such widespread relief without allowing a consideration of the applicable defenses to such ERISA claims. As recognized by the Supreme Court, ERISA induces employers to offer benefits in the first place by assuring a predictable set of liabilities under uniform standards of primary conduct and a uniform regime of remedial orders and awards when a violation has occurred. *Conkright v. Frommert*, 559 U.S. 506, 517 (2010). That careful balancing and predictability would be severely jeopardized if courts were permitted to impose liability on ERISA-governed plans by expanding liability to non-parties to a suit without any consideration of potential defenses. *Id*. at 517.

Third, the District Court failed to even consider the fact that Defendants never waived the statute of limitations defense and asserted that defense consistently, including in their motion to dismiss the Complaint, as a defense in their Answer, and in their motion for summary judgment.

Fourth, the District Court contradicted its own reasoning that the gravamen of Plaintiff's claim was one for benefits when it refused to dismiss the Third Claim by finding that it stated a plausible claim for a breach of fiduciary duty. This reasoning was inconsistent with the District Court's reasoning when it dismissed the Fourth Claim for breach of fiduciary duty, and it is inconsistent with the reasoning in *Frommert I* that the gravamen of the *Frommert* plaintiffs' claims is one for a denial of benefits under 29 U.S.C. § 1132(a)(1)(B).

In *Firestone*, the Supreme Court held that the proper standard for reviewing a plan administrator's determination on a benefit claim is a deferential one where, as here, the plan gives the plan administrator the authority to construe its terms.[4] *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989). There is nothing in ERISA, or the Plan, that requires the Plan Administrator pay benefits on a time-barred claim. *See e.g.*, *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 612 (2013) (affirming 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); *Carey v. International Brotherhood of Electrical Workers ("Carey")*, 201 F.3d 44, 49 (2d Cir. 1999) (upholding a plan administrator decision to deny pension benefits as the claim was untimely reasoning that "we decline to construe § 1132(a)(1)(B) in a way that would render the limitation period a limit in name only").

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). *See also Novella*, 661 F.3d at 147-48 (denying class certification in an ERISA case on a failure to provide notice of the case reasoning that it is necessary for a determination to be made, on a claimant by

[4] That the Plan at issue provided the Plan Administrator with such discretion has previously been determined in *Frommert*. *See* e.g., *Conkright*, 559 U.S. at 506.

claimant basis, as to when the claimant's cause of action had accrued and whether his or her statute of limitations had expired).

The District Court's role was to review whether the Plan Administrator's decision was arbitrary and capricious. The District Court did not review the Plan Administrator's decision on that basis because it dismissed Plaintiff's benefits claim as untimely. The District Court's error was in reviving that stale benefits claim by determining that the denial somehow constituted a separate breach of fiduciary duty. Regardless, the District Court should not have applied the directive in *Frommert I* without also considering whether the Plaintiff had timely commenced his action.

The decisions and orders refusing to dismiss his Third Claim for failure to follow the directives of the Circuit Courts of Appeal should be reversed and judgment should be entered in favor of Defendants dismissing the Complaint in its entirety.

ARGUMENT

THE DISTRICT COURT IMPROPERLY GRANTED JUDGMENT TO PLAINTIFF ON A TIME-BARRED CLAIM FOR BENEFITS

A. The Applicable Statute of Limitation for a Benefits Claim under ERISA is Six Years

Plaintiff's first two claims are for benefits under Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B). This statutory provision does not contain an

express statute of limitations for such benefit. As a general rule, when Congress omits a statute of limitation for a federal cause of action, the courts borrow the local time period that is most analogous to the case at hand. *Novella*, 661 F.3d at 144; *Burke v. PricewaterhouseCoopers LLP Long Term Disability Plan*, 572 F.3d 76, 78 (2d Cir. 2009). In New York, an ERISA claim for benefits is governed by the six-year statute of limitations contained in New York Civil Practice Law and Rules § 213. *Burke*, 572 F.3d at 78. *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).

B. Accrual Occurs Upon a Clear Repudiation by the Plan

As recognized by the Second Circuit, a plaintiff's cause of action under ERISA accrues upon a clear repudiation by the plan that is known, or should be known, to the plaintiff, regardless as to whether or not the plaintiff has filed a formal application for benefits. *Novella,* 661 F.3d at 147 (explaining that a reasonableness approach "best balances a pension plan's legitimate interest in predictability and finality with a pensioner's legitimate interest in having a fair opportunity to challenge a miscalculation of benefits when it becomes known—or should have become known—to him"); *Carey*, 201 F.3d at 48 (a cause of action under ERISA accrues when there is "a clear repudiation [of benefits] that is known, or should be known, to the plaintiff"); *Hirt v. Equitable Ret. Plan for*

Emples., Managers & Agents, 285 F. App'x 802, 804 (2d Cir. 2008) (a plaintiff's ERISA cause of action in New York accrues, and the six year statute of limitation period begins to run, when there is "a repudiation by the fiduciary which is *clear* and made known to beneficiaries") (emphasis in original) (citation omitted).

C. Plaintiff's Benefit Claims Accrued in 1998

It is undisputed that Plaintiff had *actual notice* as to how his retirement benefits would be calculated under the RIGP, including the offset provisions for his prior distributions. In *Frommert I*, upon which Plaintiff and the District Court heavily rely, the Second Circuit itself found that any alleged deficiency in the SPD at issue here was cured with the issuance of the 1998 SPD. *Frommert I*, 433 F.3d at 268-69. Plaintiff has alleged that "before 1998" the SPDs and other notices provided to him were inadequate, a concession that they were adequate after 1998. (A-27, ¶ 75). Plaintiff's claim for benefits under Section 502 (a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B) accrued then, and the District Court properly dismissed his claims for benefits as untimely interposed. *See Hirt*, 285 F. App'x at 804 (holding that the plaintiffs' cause of action accrued upon the distribution of a 1992 SPD which "unequivocally repudiated" their understanding as to their entitlement to certain benefits and dismissing such claims as time-barred); *Bielello v. JP Morgan Chase Ret. Plan*, 607 F. Supp. 2d 586, 593 (S.D.N.Y. 2009) (finding that

the SPD provided notice of clear repudiation of a plan's terms and granting Rule 12(b)(6) motion to dismiss ERISA claims on statute of limitations grounds).

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*, 661 F.3d at 147; *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 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." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984). 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*, 559 U.S. at 517. 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) (citing, among others, *Conkright*, 559 U.S. at 517-18) (discussing the importance of deferring to actuarial calculations).

D. The Lower Court Erred in When It Relied on a Decisions Rendered in Cases in Which Plaintiff Was Not a Party Without Considering Appropriate Defenses

The District Court improperly retroactively revived Plaintiff's stale claim: (i) by initially finding that Plaintiff had stated a facially valid claim for breach of fiduciary duty when he sought an award of the same benefits under the guise of a claim asserted under 29 U.S.C. § 1132(a)(3) for an alleged failure to comply with a court's directive; and (ii) by subsequently granting Plaintiff summary judgment and denying Defendants summary judgment on that claim. *See e.g.*, *Novella,* 661 F.3d at 147-48; *Martin v. Public 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). *See also Carey,* 201 F.3d at 49-50 (plaintiff's ERISA claim is barred by the statute of limitations regardless of whether or not he formally applied for benefits at his retirement).

Plaintiff's reliance on the Second Circuit's finding in *Frommert I*, 433 F.2d 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 Plaintiff on his breach of fiduciary duty claim was unwarranted. The *Frommert* action was never certified as a class action, and Plaintiff is not and was not a party to that case. Rather, the plaintiffs in *Frommert* are a group of over a 100 former employees who "left the company at one time or another and were subsequently rehired." *Frommert I*, 433 F.3d at 257.

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.

While the Second Circuit in *Frommert I* held that the Defendants failed to meet their obligations to provide "advance notice" of the amendment as required by 204(h), which meant that the offset provision could not be applied to employees rehired before the issuance of the 1998 SPD, *Frommert I*, 433 F.3d at 268, the Court also found that for employees rehired subsequent to the amendment of the Plan through the 1998 SPD, the phantom account offset is a component of the Plan that they joined and thus may permissibly be applied. *Id.* at 269.

Significantly, the precise issue that was before the District Court, as to what happens when a rehired employee is not diligent and fails to bring a timely claim

for benefits, was not before the Court in *Frommert I*, and hence, the Court did not resolve the issue that is now before this Court. *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 at 41.

This same reasoning applies to the Ninth Circuit's Decision and Order in *Miller*. The *Miller* case involved only three named plaintiffs: Plaintiffs Miller, Sudduth and Denton. 464 F.3d at 871. Miller and Sudduth commenced their action by filing a Complaint on December 23, 1998 and Denton commenced his action by filing his Complaint on March 12, 1999. *Id.* at 874. The two actions were consolidated on January 4, 2002, and a trial consisting of closing arguments was held on April 2, 2002. *Id.* The Ninth Circuit reversed the order of the lower court, reasoning, among other things, that the "Employees [the Plaintiffs] – 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." *Id.* at 878. The case was not certified as a class action and any determination as to other plan participants' rights and whether or not they were timely interposed was not essential to the Court's opinion. *See In re Bean*, 252 F.3d at 118.

F. The Courts of Appeal Never Intended to Preclude Valid Defenses to Claims

Subsequent decisions by the Courts in *Frommert* and *Miller* have made it abundantly clear that the Courts of Appeal never intended their Decisions in those cases to be an unswerving mandate that the Plan Administrator could not apply the offset provision to all employees rehired before the issuance of the 1998 SPD, regardless of any defenses the Plan may have to such benefit claims.[5]

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.

[5] The Second Circuit subsequently explained its holding of why the earlier SPDs did not contain sufficient notice of the offset provision until the issuance of the 1998 SPD, and the Court expressly stated that its holding in *Frommert I* was as follows: "We held that the 1998 SPD to be inapplicable *to the Plaintiffs here* because it was untimely, not because it was insufficiently comprehensive." *Frommert v. Conkright*, 738 F.3d 522, 533 n.12 (2d Cir. 2013) (emphasis added).

Similarly, on remand, the District Court in *Miller* considered whether two of the plaintiffs' claims (Miller and Sudduth) were barred by releases. *Miller v. Becker ("Miller 2010")*, Nos. CV 98-10389-GHK (CTx), CV 99-2589-GHK (CTx), 2010 U.S. Dist. LEXIS 144520, at *10-*13 (C.D. Cal. Sept. 22, 2010). Such consideration by the District Court of these individualized defenses to the claims of the two *Miller* plaintiffs provides support to Defendants' position on this appeal that the Plan Administrator acted properly in considering the statute of limitation defense when denying Plaintiff's belatedly asserted claim for benefits under the RIGP.

The Second Circuit and the District 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 (2d Cir. 2015) and *Clouthier v. Becker*, No. 08-cv-6441L, 2016 U.S. Dist. LEXIS 7196 (W.D.N.Y. Jan. 21, 2016). The District Court in *Miller* also considered whether the *Miller* plaintiffs had signed valid releases and thus waived their claim following the Ninth Circuit decision in that case. *See Miller 2010*, 2010 U.S. Dist. LEXIS 144520 at *10-*13.

In fact, the District Court in this case 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. The District 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*.

In the matter here before the Court, the District Court should have permitted Defendants to interpose the statute of limitations defense both to the denial of a claim for benefits and as a valid defense to the Third Claim for breach of fiduciary duty for an alleged failure to comply with *Frommert I* or *Miller*.

As discussed in subsection (F) below, Defendants never waived the statute of limitation defense. Moreover, the Plan Administrator carefully considered whether the decision in *Frommert I* and *Miller* compelled him to pay benefits to a non-party to those actions whose claim was not timely during the administrative claims process. The Plan Administrator did not ignore a court order, but concluded

that the court orders did not apply to Plaintiff. (*See* A-484-485, 502). There is no evidence of a breach of fiduciary duty in such circumstances.

G. The Plan Administrator Properly Denied Time-Barred Claims

In *Firestone*, 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. As explained by the Plan Administrator in his August 4, 2009 letter denying the appeal, (i) Testa was not a plaintiff in the *Miller* or the *Frommert* actions (and no final judgments had been entered in those cases at the time of the letter) and he would not necessarily be entitled to the same relief as those plaintiffs; (ii) as stated in his initial denial letter, the SPD had fully described the Plan's offset provisions to all plan participants since 1998; and (iii) ERISA requires that the RIGP be administered strictly in accordance with its terms. (*See* A-484-484, 502).

The Plan Administrator's decision to deny Plaintiff benefits, whether viewed under an arbitrary or capricious standard or *de novo*, was a reasonable one because, as found by the District Court here, Plaintiff's claim 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. This conclusion is supported by the Supreme Court's decision in *Heimeshoff*, where the Court 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). *See, e.g.*, *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 Retirement Benefit Plan*, 582 F. App'x 103, 104-05 (4th 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 Plaintiff's claim was a reasonable one, grounded in the Plan and the law, the District Court's determination that the denial itself was a breach of fiduciary duty lacks foundation and should be reversed. As the District Court held in its 2013 Order, the gravamen of Plaintiff's claim is one for benefits under 29 U.S.C. § 1132(a)(1)(B), and not one for breach of fiduciary duty. Such claim, had it been timely interposed and not dismissed, would have been reviewed under *Firestone's* deferential standard to determine whether the denial was arbitrary and capricious.

Instead, in determining that the Plan Administrator breached his fiduciary duty, the District Court failed to consider the fact that the Plan Administrator had reviewed the terms of the *Frommert* and *Miller* Decisions when denying Plaintiff's untimely claim and the fact that the Plan Administrator considered that Plaintiff was not a party to those actions and that he was not similarly-situated to the plaintiffs in those cases. Denying a claim for benefits that is untimely is not a breach of fiduciary duty.

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*, 201 F.3d at 47 (quoting *Johnson v. Railway Express 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 County Welcome Ctr*, 466 U.S. at 152. *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").

These principles apply no less in ERISA benefits cases such as this one. *See Muehlgay v. Citigroup Inc*, No. 649 F. App'x 110, 111-12 (2d Cir. 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)).

There is no basis for the District Court's *ex post facto* application of the *Frommert I* and *Miller* decisions, nor is it permissible. *See E. Enters. v. Apfel*, 524 U.S. 498, 532 (1998) ("Retroactivity is generally disfavored in the law…in accordance with fundamental notions of justice that have been recognized throughout history.") (citations and quotations omitted).

The District Court's Decisions and Orders below should be reversed only to the extent that the Court granted Plaintiff's motion for summary judgment on the breach of fiduciary duty claim that Defendants failed to comply with purported directives of appellate courts and that it denied Defendants' motion to dismiss and/or for summary judgment dismissing that claim.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that this Court reverse the May 10, 2017 judgment entered in favor of Plaintiff on his

motion for summary judgment both on the merits and as to the remedy; and further reverse the May 9, 2017 Decision and Order granting Plaintiff's motion for summary judgment and denying Defendants' cross-motion for summary judgment in favor of Defendants; and further order that judgment be entered in favor of Defendants dismissing the Complaint in its entirety including, but not limited to, the Third Claim in the Complaint, and further affirm the 2013 Order of the District Court granting the Defendants' Rule 12(b)(6) motion to dismiss the First, Second and Fourth Claims in the Complaint.

Date: September 21, 2017
Fairport, New York

/s/ Margaret A. Clemens

Margaret A. Clemens
Pamela S.C. Reynolds
LITTLER MENDELSON, P.C.
375 Woodcliff Drive, 2nd Floor
Fairport, NY 14450
585-203-3400

Attorneys for Defendants

149364526

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P.32 (a)(7)(B) because it contains 8,531 words, excluding the parts of the brief exempt by Fed. R. App. P. 32(f) and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 Times New Roman.

Dated: Fairport, NY
March 27, 2015

/s/ Margaret A. Clemens
Margaret A. Clemens

SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROBERT TESTA,

Plaintiff,

DECISION AND ORDER

10-CV-6229L

v.

LAWRENCE BECKER, as plan administrator of the Xerox Corporation Retirement Income Guarantee Plan, and XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN, an Employee Pension Benefit Plan,

Defendants.

INTRODUCTION

Plaintiff Robert Testa brings this action against the Xerox Corporation Retirement Income Guarantee Plan ("RIGP") and the administrator of the RIGP, alleging that his pension benefits have been reduced in violation of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1101 *et seq.*

Plaintiff brought this action in the United States District Court for the Central District of California in January 2010. The action was transferred to this Court in April 2010, based on a forum selection clause that was added to the RIGP in July 2008.

Two motions are now pending before this Court: plaintiff's motion for summary judgment (Dkt. #49) and defendants' cross-motion for summary judgment (Dkt. #53). For the reasons that follow, plaintiff's motion is granted, and defendants' motion is denied.

BACKGROUND

This is one of several related cases presenting roughly similar claims by current and former employees of Xerox Corporation ("Xerox"). Plaintiff Testa began working for Xerox in 1972, and left in 1983, at which time he took a lump-sum distribution of about $30,000 from the then-existing Profit Sharing Plan ("PSP").

Testa returned to Xerox for a second period of employment, from 1985 to 2008. In 1990, Xerox discontinued the PSP. *See Conkright v. Frommert*, 559 U.S. 506, 524 (2010). When it did so, Xerox merged the PSP into the RIGP. Plaintiff then became a participant in the RIGP.

When Testa finally retired from Xerox in 2008, defendants calculated his benefit utilizing a so-called "phantom account" offset. That offset involves defendants' deduction from a participant's pension benefit, not only of the amount of the lump sum that the participant received when he first left Xerox, but also a sum representing the hypothetical interest that the lump sum would have earned had it remained in the pension plan until the employee's retirement at the end of his final period of employment with Xerox. *See Frommert v. Conkright*, 433 F.3d 254 (2d Cir. 2006) (explaining the details of the phantom account).

On or about January 13, 2009, Testa received a "pension calculation statement," setting forth the amount of his pension benefit, as determined by defendants. For the purposes of this Decision and Order, the details of that calculation are not important, but what is important is that defendants utilized the phantom account offset. Plaintiff alleges that his pension benefit, following his final period of employment, is significantly lower than it should be, due to the application of the phantom account offset.

Some of the relevant correspondence does not seem to be in the record, but it is referred to by the parties, and the substance of that correspondence is not in dispute. It appears that on or about January 30, 2009, Testa sent a letter to the Xerox Benefits Center, raising his objections to Xerox's calculation of the amount of his benefit. Apparently Xerox's response was not to

plaintiff's liking, because he sent them another letter dated May 26, 2009, in which he sought to appeal what he characterized as Xerox's denial of his claim for additional benefits.

By letter dated June 2, 2009, Arlyn Kaster (described as "Mgr. Pension and Life Ins. Benefits"), responded to plaintiff. Kaster stated that Testa's January 30 letter had not been submitted in accordance with prescribed procedures, and hence would not be treated as a formal claim. Kaster added that Xerox would construe Testa's May 26 letter as a claim, but without waiving any defenses that Xerox might have in any future lawsuit, including the defense that Testa's claims were time-barred. Dkt. #52-3 at 10.

Kaster informed Testa that Xerox had determined that Testa was not entitled to any additional benefits, because Testa was not a plaintiff in the *Frommert* action (which was commenced in 2000) or in any other litigation concerning the phantom account. *See* Dkt. #52-3. By letter to plaintiff dated August 4, 2009, Plan Administrator Lawrence Becker essentially affirmed that ruling, and stated that "[t]his represents a final and binding decision under the Plan ... ." Dkt. #52-3 at 16.

Plaintiff filed this lawsuit in January 2010, in the Central District of California. The action was transferred to this Court in April 2010. The complaint asserted four causes of action, as explained below. A full understanding of this case, however, requires some familiarity with the related cases referenced above, many of which predate this lawsuit.

As indicated in Kaster's letter, this is not the first case stemming from Xerox's use of the phantom account. To the contrary, the phantom account has given rise to much litigation, and numerous reported cases over the years, in this and other courts, including the Supreme Court of the United States *See*, *e.g.*, *Frommert*, 559 U.S. 506; *Frommert v. Conkright*, 738 F.3d 522 (2d Cir. 2013); *Miller v. Xerox Corp. Retirement Income Guarantee Plan*, 464 F.3d 871 (9th Cir. 2006), *cert. denied*, 549 U.S. 1280 (2007); *Clouthier v. Becker*, No. 08-CV-6441, 2016 WL 245157 (W.D.N.Y. Jan. 21, 2016). At least in this circuit, the primary focus of that litigation has been on defendants' failure to provide plan participants with adequate notice of the existence and

operation of the phantom account. *See Frommert v. Conkright*, __ F.Supp.3d __, 2016 WL 7186489, at *11 (W.D.N.Y. Dec. 12, 2016) ("At its heart, this case has always been primarily about (1) Xerox's application of the phantom account, to employees who were not given clear and adequate notice of its existence and how it was utilized, in violation of ERISA, and (2) how to remedy that violation").

While some issues remain to be resolved in some of these cases, one thing that has been established is that Xerox violated ERISA by applying the phantom account to certain employees, who were inadequately apprised of the phantom account's existence, the fact that it would be applied to them, and the effect that its application would have on the amount of their pension benefits. As this Court recently stated, "If nothing else, this litigation has established that defendants violated ERISA through their application of the 'phantom account' to employees who retired before the existence and operation of that account was fully disclosed in [the summary plan description issued in] 1998, and that plaintiffs who were adversely affected by that inequitable conduct are entitled to relief." *Frommert*, 2016 WL 7186489, at *2 (citing cases).

In the case at bar, plaintiff originally asserted four claims under ERISA. On October 30, 2013, the Court issued a Decision and Order, 979 F.Supp.2d 379, granting defendants' motion to dismiss plaintiff's first, second and fourth causes of action. Those causes of action asserted claims for pension benefits under 29 U.S.C. § 1132(a)(1)(B), and for "other appropriate relief" under § 1132(a)(3).

The Court dismissed those three claims principally on the ground that they were time-barred. *Id.* at 383. Familiarity with that decision is assumed, for purposes of this Decision and Order, but the gist of the decision was that plaintiff could not seek benefits directly under the terms of the plan itself, or under the summary plan description ("SPD"), because Xerox's 1998 SPD had put plaintiff on notice of the existence and operation of the phantom account, when that SPD was issued to and received by him. At the latest, then, plaintiff's six-year limitations period under § 1132(a)(1)(B) expired in 2004. *Id.* The Court added that plaintiff could not simply

recast his claim for benefits in the guise of a catchall fiduciary-duty claim for "other appropriate relief" under § 1132(a)(3).

The Court denied, however, defendants' motion to dismiss the third cause of action, in which plaintiff asserted a claim under 29 U.S.C. § 1132(a)(3), based on his allegation that defendants have refused to comply with controlling court precedent, in violation of their fiduciary duties. In that cause of action, plaintiff seeks an order compelling defendants to comply with the ruling of the Court of Appeals for the Ninth Circuit in *Miller v. Xerox Corp. Retirement Income Guarantee Plan*, 464 F.3d 871 (9th Cir. 2006), *cert. denied*, 549 U.S. 1280 (2007). In *Miller*, the Ninth Circuit held that the phantom-account methodology violates ERISA, and that "[t]he benefit properly attributable to the [prior] distributions is simply the ... annuity amount that those distributions would have provided." *Id.* at 875.[1]

In denying defendants' motion to dismiss this claim as untimely, I stated that "Plaintiff may have been on notice since 1998 of the existence and operation of the phantom account mechanism, but he could not have anticipated, after both the Second and Ninth Circuits disapproved of the use of that mechanism in 2006, that defendants would essentially ignore those rulings, and continue to apply the phantom account, as to anyone who had not won a victory in court." 979 F.Supp.2d at 384. The reference to the Second Circuit was to that court's 2006 decision in *Frommert*, 433 F.3d 254, in which the Second Circuit ruled that Xerox's phantom account mechanism was not properly added to the RIGP until the issuance of the 1998 SPD, and that it would violate § 204 of ERISA for the plan administrator to apply the phantom account to employees rehired by Xerox prior to the issuance of the 1998 SPD.

Plaintiff now moves for summary judgment. He asks the Court to require defendants to pay him benefits based on either the "new hire" methodology adopted by the Court in *Frommert*, or–which is plaintiff's preferred approach–an "actual annuity" formula, which plaintiff contends

[1]As explained in my October 2013 decision, *Miller* is of particular relevance here because this case was commenced in the Central District of California, which is in the Ninth Circuit.

is more in line with *Miller*. Those alternatives will be described in more detail below.

Defendants have cross-moved for summary judgment. Defendants do not argue that the plaintiff's sole remaining claim is time-barred, but that the Plan administrator correctly denied it as time barred. The Court addresses defendants' motion first.

DISCUSSION

I. Defendants' Motion

In an attempt to find a way around this Court's 2013 decision denying their motion to dismiss plaintiff's third cause of action under § 502(a)(3) as untimely, defendants have taken a new tack. They state that they are *not* asking the Court to reconsider that ruling. Instead, they say, they are seeking judgment in their favor on the merits of this claim, because the Plan administrator did not breach his fiduciary duty in the first place. In fact, they claim, the administrator got it right. The reason, defendants state, is that the administrator correctly determined that Testa's *administrative* claim for additional benefits was time barred.

This argument is simply a repackaging of defendants' argument–which the Court has already rejected–that plaintiff's § 502(a)(3) claim is time barred. In effect, defendants state that even if plaintiff's fiduciary-duty claim, asserted in this Court, is not time barred, it is meritless, because the underlying administrative claim was properly denied as time barred.

That is a fine distinction, indeed. The Court understands the distinction, and its fineness alone does not render defendants' argument meritless. But it *is* meritless.

As a preliminary matter, the Court finds inapposite defendants' argument that the Second and Ninth Circuits left the door open for the assertion of individualized defenses. In support of that assertion, defendants note that the Second Circuit, as well as this Court, have permitted the application of the phantom account offset to plaintiffs who waived their ERISA claims by signing releases. *See Anderson v. Xerox Corp.*, 614 Fed.Appx. 38, 39 (2d Cir. 2015); *Frommert*

v. Conkright, 535 F.3d 111, 12023 (2d Cir. 2008), *rev'd and remanded on other grounds*, 559 U.S. 506 (2010)); *Clouthier*, 2016 WL 245157, at *2.

This Court does not hold that defendants are precluded from asserting *any* defense as to any claim asserted by a plan participant, related to the phantom account. But that is beside the point. There is an obvious and significant difference between a plaintiff who has knowingly and voluntarily released his claims under ERISA, and a plaintiff who is confronted with a fiduciary's unexpected refusal to apply to him court-issued directives, who acts swiftly to challenge that refusal.

Defendants' argument that the *Frommert* and *Miller* courts "never intended to preclude valid defenses to claims" thus begs the question. Defendants assume that their motion for summary judgment, which is ultimately based on the 1998 SPD, is "valid," even after the court of appeals decisions issued in 2006, disapproving of the application of the phantom account to plan participants rehired prior to 1998. Untimeliness is not a valid defense here, regardless of whether that defense is put forth in terms of the timeliness, or the substance, of plaintiff's § 1132(a)(3) claim.

As stated, then, defendants' contention that they are seeking judgment on the merits of this claim is little more than an attempt to resurrect their previously rejected argument that plaintiff's claim is time barred. Defendants have simply recast that assertion as an argument that the administrator properly denied plaintiff's administrative claim as time barred.

Defendants' argument also ignores a fundamental point that the Court set forth in its 2013 decision. Based on the Court's prior statements, one might reasonably have thought that this issue was dead and buried. But defendants persist in attempting to resuscitate it.

That point concerns the Second Circuit's very precise, explicit directive in *Frommert*, as described by this Court in a related case:

> 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 "the phantom account 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 and still persist in using the phantom account. This is especially so for a fiduciary.

Kunsman v. Conkright, 977 F.Supp.2d 250, 263 (W.D.N.Y. 2013).

If further clarification is needed, the Court will spell it out again. In 2006, the Second Circuit held that the phantom account *may not be applied* to an employee rehired prior to 1998. That same year, the Ninth Circuit in *Miller* did so as well.[2] Plaintiff Testa was rehired prior to 1998, and he finally retired and sought benefits in 2008. In 2009, the Plan administrator issued a decision, as to Testa, that essentially ignored the Second and Ninth Circuit's 2006 proscription of the application of the phantom account to employees rehired prior to 1998. That refusal, by the plan fiduciary, to follow controlling court decisions is what forms the basis of this claim.

Defendants' contention that neither *Miller* nor *Frommert* held that defendants are precluded from asserting individualized defenses to ERISA claims thus misses the mark. This has nothing to do with whether defendants *may* assert individualized defenses, including defenses based on the statute of limitations. The Court finds only that the defense asserted here--that Testa's fiduciary-duty claim is substantively meritless–is fatally flawed, because the administrator's decision was erroneous and wrongful.

Defendants also argue that the statements by the Second Circuit in *Frommert*, and by the Ninth Circuit in *Miller*, to the effect that defendants may not apply the phantom account to plan participants, are mere *dicta*, and not binding on defendants. The Second Circuit's statement that "the phantom account may not be applied to employees rehired prior to the issuance of the 1998 SPD" hardly sounds like *dictum*, however. To the contrary, it seems like a clear directive.

Finally, lest there be any doubt on this score, I find that plaintiff's third cause of action is timely, and that plaintiff is entitled to relief on this claim. In my 2013 Decision, I stated that

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[2]Though the Ninth Circuit based its decision on reasoning that differed from the Second Circuit's, it similarly held that "Xerox may not use a projected-to-the-present value generated from a phantom account as a proxy for the actual distribution amount." 464 F.3d at 876.

plaintiff's § 502(a)(3) claim presumably arose no earlier than 2006, but no evidence has been presented to the Court that plaintiff was made aware, more than three years before he filed suit in January 2010, that defendants would refuse to abide by the 2006 directives of the Second and Ninth Circuits. For all that the record shows, it was not made known to plaintiff that his pension benefits would be reduced based on the phantom account (in apparent contravention of the courts of appeals' disapproval of the application of that account) until after his 2008 retirement.

All the evidence in the record indicates that this claim did not accrue until the administrator denied plaintiff's claim in 2009. No additional proof has been presented to the Court indicating that plaintiff was apprised, prior to the denial of his claim in 2009, that the administrator would refuse to apply the *Frommert* holding to Testa or to anyone else who was not a plaintiff in *Frommert*. As has been made abundantly clear, that refusal was unjustified and constituted a breach of the administrator's fiduciary duty to plaintiff. The only question remaining before this Court, then, is the relief to which plaintiff is entitled.

II. Plaintiff's Motion

In his motion for summary judgment, plaintiff argues that this Court should, at the least, "apply the *Frommert* result to the *Testa* case." (Dkt. #49-1 at 6.) But plaintiff goes on from there to argue that it would be better for the Court to apply a different remedy, more beneficial to him than that ordered in *Frommert*. Specifically, plaintiff contends that the Court should apply an "actual annuity" approach, if that would result in a monthly benefit more favorable to plaintiff than the new-hire remedy adopted in *Frommert*. Plaintiff adds that his proposed actual-annuity formula would "probably" result in a benefit more generous than the new-hire approach that this Court used in *Frommert*. (Dkt. #49-1 at 8.)

Plaintiff argues that though the Court's "new hire" remedy may address defendants' disclosure violations, it is not adequate to satisfy ERISA's substantive requirements. Plaintiff contends that "ERISA rules allow a RIGP Member's final two-period RIGP 'accrued benefit'

(expressed as an annuity) to be offset only by the similarly-computed (and similarly expressed) RIGP 'accrued benefit' earned by the end of the Member's first period of service." (Dkt. #49-1 at 10.)

Plaintiff's brief elaborates on that argument, but the bottom line is that, according to plaintiff,

> When Mr. Testa left Xerox in 1984, he had earned a RIGP 1.4% formula accrued benefit (expressed as a monthly annuity) of approximately $775. When his full service from both periods of service is considered, that formula accrued benefit was a total of $4,457.96 per month. Very simply, the appropriate offset to this accrued benefit is about $775 per month. That is the benefit to which Mr. Testa is entitled as a matter of law.

(Dkt. #49-1 at 15.)

Plaintiff also acknowledges, in a footnote, that this Court has previously rejected that proposed approach. *See* Plaintiff's Mem. (Dkt. #49-1) at 9 n.5 (citing *Frommert v. Becker*, 153 F.Supp.3d 599, 614-15 (W.D.N.Y. 2016)). Plaintiff goes on at some length to attempt to show why, as a matter of plan interpretation, the Court should adopt his proposed remedy.

Plaintiff is correct in stating that this Court *has* considered, and rejected, his proposed "actual annuity" remedy. Plaintiff states that this Court "briefly" discussed, and rejected the actual-annuity approach, but that dismissive characterization notwithstanding, the Court did set forth its reasons for rejecting that proposed remedy, at some length, in its January 5, 2016 Decision and Order in *Frommert*. 153 F.Supp.3d at 614-15.

I see no need to restate all those reasons here. But as the Court stated in *Frommert*, in adopting the new-hire remedy, the Court "recognize[d] that in fashioning an appropriate equitable remedy, I cannot simply ignore the terms of the Plan altogether, at least insofar as those terms were conveyed to plaintiffs." 153 F.Supp.3d at 615. Considering both the terms of the Plan and the extent of its disclosure to the plaintiffs, the Court found that "[t]he remedy the Court has adopted here [*i.e.*, the "new hire" remedy] strikes [an appropriate] balance ..., by ensuring that plaintiffs are fully, but not overly, compensated for both their periods of service." I reach the same conclusion here.

I also note that the Supreme Court, in its *Frommert* decision, recognized the value of uniformity in interpreting an ERISA plan. *See* 559 U.S. at 520 (expressing concern that some rulings might "well cause the Plan to be subject to different interpretations in California and New York"). While the Supreme Court made those statements in the context of a discussion of the degree of deference that the court should accord to the plan administrator's interpretation of the plan, the underlying principle applies here as well.

In short, there is no reason here to deviate or depart from the remedy that this Court imposed in *Frommert.* Plaintiff is therefore entitled to that same "new hire" remedy, as set forth in the Conclusion to this Decision and Order.

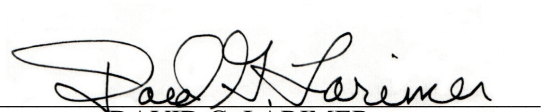
CONCLUSION

Defendants' motion for summary judgment (Dkt. #53) is denied.

Plaintiff's motion for summary judgment (Dkt. #49) is granted. Defendants must take immediate steps to recalculate and pay plaintiff benefits, both prospectively and retroactively, according to the "new hire" formula set forth in this Court's Decision and Order in *Frommert v. Becker*, 00-CV-6311 (Dkt. #283), issued on January 5, 2016.

Defendants' award of additional benefits to plaintiff must also include prejudgment interest, in accordance with the formula set forth in the Court's May 4, 2017 Decision and Order in *Frommert v. Conkright*, 00-CV-6311 (Dkt. #347).

IT IS SO ORDERED.



DAVID G. LARIMER
United States District Judge

Dated: Rochester, New York
May 9, 2017.

SPA-12

Judgment in a Civil Case

United States District Court
WESTERN DISTRICT OF NEW YORK

Robert Testa

v.

Lawrence Becker et al.,

JUDGMENT IN A CIVIL CASE
CASE NUMBER: 10-CV-6229

☐ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court**. This action came before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Plaintiff's motion for summary judgment is granted. Defendants must take immediate steps to recalculate and pay Plaintiff benefits, both prospectively and retroactively.

Date: May 10, 2017

MARY C. LOEWENGUTH
CLERK OF COURT

By: Barbara Keenan
Deputy Clerk