UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BRUCE D. KUNSMAN, et al.

Plaintiffs,

v.

SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ AND LAWRENCE M. BECKER, IN THEIR CAPACITY AS XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN ADMINISTRATORS and as INDIVIDUALS, XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN, XEROX CORPORATION, HEWITT ASSOCIATES and HEWITT MANAGEMENT COMPANY LLC,

Defendants.

**Civil Action No.
08-CV-6080**

DEFENDANTS' SUPPLEMENTAL MEMORANDUM OF LAW IN RESPONSE TO THE COURT'S DECEMBER 1, 2011 ORDER

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PRELIMINARY STATEMENT

This Memorandum is submitted by defendants Xerox Corporation, the Xerox Corporation Retirement Income Guarantee Plan ("RIGP"), and the RIGP present and former Plan Administrators, Sally L. Conkright ("Conkright"), Patricia M. Nazemetz ("Nazemetz"), and Lawrence M. Becker ("Becker"), as well as by defendants Hewitt Associates and Hewitt Management Company, LLC, to respond to this Court's Order, dated December 1, 2011, requesting more information related to defendants' joint motion to dismiss the Amended Complaint, pursuant to Rule 12(b)(6) of the Fed. R. Civ. P., as to the following five specific issues:

> (i) whether the Court can determine, as a matter of law from the face of the Amended Complaint, at what point plaintiffs had actual knowledge of defendants' alleged breach of fiduciary duty;
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> (ii) whether actual knowledge of the alleged breach of fiduciary duty of plaintiffs' counsel, Mr. Jaffe, may be imputed to the *Kunsman* plaintiffs;
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> (iii) with respect to when the alternative six-year limitations period Section 413(1) begins to run, can the Court determine from the face of the Complaint when the last act constituting a part of the breach occurred? And whether plaintiffs sufficiently pled fraud or concealment so warrant the six-year period running from the date of discovery;
>
> (iv) whether the claims of the group of plaintiffs who sought to join the *Frommert* action in November 2006 by way of leave to file an Amended Complaint adding them to the action should be treated differently for limitations purposes as compared to the remaining plaintiffs; and
>
> (v) whether the issues presented in *Kunsman* are present in the *Anderson*, *Holland, Testa, and Clouthier* matters referenced in the caption of the Court's Order.

As discussed in detail below, since it is clear from the face of the Amended Complaint that the last alleged act constituting a part of the breach of fiduciary duty occurred more than six years before the Amended Complaint was filed, and plaintiffs have sufficiently failed to plead fraud or concealment, this Court can reach a conclusion on the untimeliness of plaintiffs' breach

of fiduciary duty claims without having to determine whether plaintiffs had actual knowledge of an alleged breach through an attorney or otherwise.

As also discussed below, there is no legal basis for treating the claims of certain of the plaintiffs differently merely because they belatedly tried to join in the *Frommert* action. The motion for joinder was itself untimely because it was filed more than two years after September 2004, the latest date by which plaintiffs could timely commence a breach of fiduciary duty action of their own.

Whether the resolution of the issues presented by the Court applies to the other related cases identified by the Court in the caption of its Order depends on the case and is addressed in supplemental memoranda filed in each of those cases. In *Anderson*, for example, the issues raised by this Court's December 1, 2011 Order are not relevant because the dismissal that case is based solely on the release signed by plaintiff. Nor are the issues raised by the Court relevant in *Clouthier,* both because the motion for summary judgment is based on the release signed by the plaintiff and because his claim for benefits under Section 502(a)(1)(B) for benefits is time-barred in any event. Notably, plaintiff did not interpose a breach of fiduciary duty claim in *Clouthier* so there is no need in that case to reach the issues presented in the December 1, 2011 Order.

In contrast, the resolution of the issues raised in the Court's December 1, 2011 Order are relevant to a degree in *Holland* and *Testa.* The specific reasoning as applied to the facts in those two matters is discussed more fully in the supplemental memoranda filed in separately in those cases.

Because the Court did not ask for clarification or additional briefing on the other grounds supporting a dismissal of the Amended Complaint, defendants respectfully refer the Court to

their prior motion papers in this case, as well as in *Anderson*, *Clouthier*, *Holland,* and *Testa,* for their discussion of these additional grounds.

ARGUMENT

POINT I

PLAINTIFFS' BREACH OF FIDUCIARY CLAIMS ARE TIME-BARRED

Plaintiffs' breach of fiduciary duty claims are set forth in the SECOND and THIRD Counts in the Amended Complaint. (Compl. ¶¶ 112-121).[1] Even assuming for purposes of this motion that plaintiffs have adequately pled sufficient facts to address the threshold question in every case charging a breach of fiduciary duty, that is, that each of the named defendants was acting as a plan fiduciary with regard to the alleged breach, *see Bell v. Pfizer, Inc.*, 626 F.3d 66, 73 (2d Cir. 2010), the conclusion that plaintiffs' breach of fiduciary duty claim is time-barred is warranted because the latest date upon which plaintiffs could have commenced an action was September 2004, and this action was not commenced until four years later.

A. The Relevant Statutory Provision

The relevant statutory provision governing claims for breach of fiduciary duty under ERISA is Section 413, which provides, in pertinent part, that:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation of this part, *after the earlier of –*
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or omission; or
>
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;

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[1] References to the Amended Complaint filed in this action are designated ("Am. Compl.[paragraph number]").

> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. § 1113 (emphasis added).

B. Plaintiffs Commenced this Action More than Six Years after the Alleged Breach or Violation and/or after the Breach or Violation Was Cured

As is evident from the face of the Amended Complaint, plaintiffs' breach of fiduciary duty claims are predicated on the alleged material misrepresentations or omissions relating to the methodology to offset their prior distribution as contained in SPD and personal benefit statements issued to them prior to September 1, 1998. (*See* Am. Compl. ¶ ¶ 85, 111, 118, 130(a)). Plaintiffs claim that these misrepresentations and omissions violate ERISA's notice requirements, contained in Section 204(g) and (h), by using an offset methodology for prior distributions without adequately disclosing to plan participants that such methodology would reduce their benefits. (Compl. ¶¶ 85-86). By incorporating into their Amended Complaint the factual findings of the Second Circuit's 2006 decision in *Frommert*, (*see* Am. Compl. ¶ ¶ 80(c), (d); 81), plaintiffs have also alleged that, by way of the issuance of the September 1998 SPD, the RIGP was properly amended to include the offset provision for prior distributions and that they received sufficient information as to how the methodology was being applied to calculate their benefits to constitute adequate disclosure under ERISA.

Based in the foregoing, in apply Section 413(1)(A) and (B), this Court can properly conclude that the last action that could have constituted the breach or violation of ERISA occurred prior to September 1998 and that, by September 1998, the plan fiduciary had cured any alleged breach or omission. Thus, in the absence of fraud or concealment, the latest date by which Plaintiffs could have timely commenced a breach of fiduciary duty claim was September

2004, pursuant to the six year the deadline imposed by Section 413(1)(A) and (B). Plaintiffs did not file their Complaint until 2008, four years after such deadline had passed.

Accordingly, plaintiffs' breach of fiduciary duty claims are time-barred. *See Martin v. Public Serv. Elec. & Gas Co.*, 271 F. App'x 258, 261 (3d Cir. 2008); *Keen v. Lockheed Martin Corp.*, 486 F. Supp. 2d 481 (E.D. Pa. 2007).

This result is consistent with the Second Circuit's decision in *Hirt v. Equitable Ret. Plan for Emples., Managers & Agents*, 285 F. App'x 802 (2d Cir. 2008). In that case, like this one, the plaintiffs' claims were based upon an alleged failure to notify them of amendments to a pension plan which reduced their benefits, in violation of ERISA Section 204(h). The Second Circuit affirmed the dismissal of the complaint on statute of limitations grounds reasoning that the plaintiffs had failed to sue within six years of having received an SPD clearly repudiating any pre-amendment benefits that plaintiffs could possibly claim. *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 and reasoning that, although "[e]nforcing a statute of limitations is never easy," such limitations period are designed to promote fairness concerns of their own, including that "no one should be forced to defend against a stale claim.").

C. Determining When Plaintiffs Had "Actual Knowledge" is Unnecessary

As acknowledged by the Court in its December 1, 2011 Order, "[i]f the last act here occurred more than six years before the *Kunsman* complaint was filed in February 2008, then the fiduciary duty claim would be time-barred regardless of when plaintiffs learned of the breach, absent fraud or concealment. . .. " Decision and Order at 4. *See Brown v. Owens Corning Inv. Review Comm.*, 622 F3d 564, 570 (6th Cir. 2010) (even though an ERISA plaintiff alleging breach of fiduciary duty generally has six years within which to file suit, this period may be

shortened to three years when the victim had actual knowledge of the alleged breach or violation); *Kopilas v. Dispigna*, 1992 U.S. Dist. LEXIS 5863, at *11 (S.D.N.Y. Apr. 28, 1992).

As demonstrated above, the last such act clearly occurred more than six years prior to the filing of the Amended Complaint, and therefore, the Court need not resolve the issue as to when plaintiffs had actual knowledge and/or whether knowledge by their prior counsel could be imputed to them because their breach of fiduciary duty claims are barred under Section 413(1) for reasons discussed above.

D. There Are No Allegations of Fraud or Concealment Post-1998

Although the statutory time period for the commencement of suits contained in Section 413(1) and (2) contains an exception in cases where there is fraud or concealment, such exception is of no assistance to plaintiffs. Under well-established law, to alleged fraud or concealment, a plaintiff's complaint must specify the time, place, speaker and content of the alleged misrepresentations. *Oechsner v. Connell Ltd. Pshp.*, 101 F. App'x 849, 851 (2d Cir. 2004); *Caputo v. Pfizer, Inc.*, 267 F.3d 181, 191 (2d Cir. 2001) (discussing Fed. R. Civ. P. 9(b)). A complaint must also specify how the misrepresentations were fraudulent and plead events that give rise to a strong inference that the defendant had an intent to defraud, knowledge of the falsity, or reckless disregard for the truth. *Oechsner,* 101 F. App'x at 851.

As this Court's December 1, 2011 Order recognizes, there are no such allegations in the Amended Complaint pled with regard to the breach of fiduciary duty claims. In fact, the only allegations relating to fraud are contained in the FOURTH Count, a state law conspiracy to defraud claim preempted by ERISA. Even assuming for purposes of this motion only that the allegations in the Amended Complaint were sufficient to fall within the fraud or concealment

exception to statute of limitation contained in Section 413, which they are not, plaintiffs' breach of fiduciary duty claims are still time-barred.

As recognized by the Supreme Court, although the plan administrator may have made a mistake in his interpretation of the RIGP's offset provisions prior to 1998, there has never been any finding by the lower courts that the plan administrator had acted in bad faith in doing so. *Conkright v. Frommert*, 130 S. Ct. 1640, 1642, 1648 (2010). More importantly, for purposes of the instant motion, the Second Circuit in *Frommert* held that the language of the 1998 SPD was sufficient to put plan participants on notice of the details of how the offset provision would be used in calculating pension benefits. *Frommert v. Conkright*, 433 F.3d 254, 260 (2d Cir. 2006) ("[T]he details of the phantom account offset functions were set out in full in the 1998 Summary Plan Description.").

As discussed above, a review of the allegations contained in the Amended Complaint show that any alleged "fraudulent misrepresentations" about or "concealment" of the offset mechanism ended with the issuance September 1998 SPD. Accordingly, even utilizing the fraud and concealment exception to Section 413, Plaintiffs had six years from September 1998 within which to sue. They did not do so, and their breach of fiduciary duty claims are time-barred.

POINT II

THE RELATION BACK DOCTRINE CANNOT NOT PROPERLY BE USED TO REVIVE PLAINTIFFS' STALE CLAIMS

In an effort to avoid outright dismissal of their Amended Complaint on statute of limitations ground, plaintiffs seek to rely on the relation back doctrine contained in Rule 15(c) of the Fed. R. Civ. P. (Am. Compl. ¶ 2). Rule 15(c)(1) permits the relation back of an amended pleading to the date of the original pleading in the following, limited situations:

(A) the law that provides the applicable statute of limitations allows relation back;

> (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out -- or attempted to be set out -- in the original pleading; or
>
> (C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
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> > (i) received such notice of the action that it will not be prejudiced in defending on the merits; and
> >
> > (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

Fed. R. Civ. P. 15(c)(1).

A discussed in defendants' initial memoranda, while Rule 15(c) allows for the amendment of a pleading to relate back to the date of an initial pleading, it does not apply where, as here, a plaintiff did not formally join the prior civil action upon which he or she seeks to rely. *See White v. BFI Waste Services, LLC*, 375 F.3d 288, 294 (4th Cir. 2004). Defendants were not on notice that these 89 new plaintiffs were asserting ERISA claims as against them, nor were the *Frommert* and *Layaou* plaintiffs ever suing in a representative capacity. Accordingly, the Amended Complaint cannot and does not relate back to the initial pleading in *Frommert*.

Of the eighty-three plaintiffs who commenced this action, there is a smaller group of twenty-four individuals (referred to in the Amended Complaint as the Carville Group and the Falcon Group), who sought to intervene in the *Frommert* action by way of filing a motion to join in as plaintiffs in November 2006. Plaintiffs' counsel in the *Frommert* action, then Robert Jaffe, withdrew the motion in 2007, allegedly in reliance on this Court's comment to the effect that there was no basis for adding these groups to *Frommert* action at that time because 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 seem to foreclose defendants from utilizing that methodology in calculating benefits for "new" retirees' pension benefits. In fact, had the motion not been

voluntarily withdrawn, the *Frommert* defendants would have continued to vigorously oppose it on the grounds the plaintiffs' claims were already time-barred and because a number of plaintiffs had executed releases

In any event, for purposes of this Rule 12(b)(6) motion, there is no need for this Court to treat the group of twenty-four plaintiffs who attempted to belatedly join in the *Frommert* action seven years after that litigation was commenced, any differently from the remaining plaintiffs. All of these plaintiffs sat on their rights and waited too long to commence an action and/or join in another timely-commenced action.

The Sixth Circuit's recent decision in *Asher v. Unarco Material Handling, Inc.*, 596 F.3d 313 (6th Cir. 2010) is instructive. In that case, the plaintiffs claimed that since their claims arose out of the same occurrence of which defendant was well aware due to the pending lawsuit against it, they could join in the action even though their claims were time-barred. Recognizing that the issue as to whether Rule 15(c) permits relation back of an amendment adding otherwise untimely plaintiffs was one of first impression in that circuit, the Sixth Circuit rejected that position as "untenable."

As the Sixth Circuit explained, an amendment which adds in a new party creates a new cause of action, and there is no relation back for purposes of limitations. *Id.*, 596 F.3d at 318. While Rule 15(c)(1)(C) permits such amendment changing the identity of parties, the type of changes permitted are limited to corrections of misnomers or misdescriptions. *Id.* at 319. Because the plaintiffs in that case were not seeking to correct a misnomer or misdescription of a proper party already in court, or to add in additional plaintiffs in an action originally brought as a class action, the court denied the motion as an attempt to circumvent the statute of limitations. *Id.*

Similarly, in *Lee v. Marvel Enters, Inc.*, 765 F. Supp. 2d 440 (S.D.N.Y. 2011), the District Court denied a motion for joinder, explaining that the tactic of seeking to intervene to add in a plaintiff for the purpose of gaining the benefit of the relation back doctrine to circumvent the statute of limitations for wholly separate claims "is condemned by the courts." In that case, the court refused to the plaintiffs to file another amended complaint in an action, reasoning that to do so would work a manifest injustice in light of the fact that the underlying transaction was more than a decade old, and suits had been brought by plaintiffs for several years.

This Court, like the courts in *Asher* and *Lee*, should decline to extend the relation back doctrine to the claims asserted in the Amended Complaint regardless as to whether the individual was a part of the Cargill or Falcon Groups or not. All of the plaintiffs sat on their rights for years and did not timely commence an action after they received the September 1998 SPD. In such circumstances, the relation back doctrine should not be applied. *See Nelson v. County of Allegany*, 60 F.3d 1010, 1015 (3d Cir. 1995) (the relation back rule "does not save the claims of complainants who have sat on their rights . . . and seek to take advantage of the rule to perform an end-run around the statute of limitations that bars their claims."). *See also Espinosa v. Delgado Travel Agency, Inc.*, No. 05 Civ. 6917 (SAS), 2006 U.S. Dist. LEXIS 71085, at *8 (S.D.N.Y. Sept. 27, 2006); *Leachman v. Beech Aircraft Corp.,* 694 F.2d 1301, 1308 (D.C. Cir. 1982).

As this Court is well-aware, the *Frommert* action was not a class action, and it had been litigated for several years before the motion to intervene was even filed. In fact, it was commenced by fourteen plaintiffs in 1999, and over the course of the next few years, other

groups of plaintiffs (whose claims were not time-barred) sought to and did join in that action until there was a total of 104 individual plaintiffs.

The time for joinder in the *Frommert* action had long since passed when the Cargill and Falcon groups sought to join the action. Indeed, discovery had been completed, and defendants had filed and won a motion for summary judgment. It was only after the Second Circuit reversed that ruling in 2006, seven years after the litigation had been commenced, that the Cargill and Falcon groups sought to join the action. By then, it was far too late for them to join in the *Frommert* action as new plaintiffs and have their claims relate back because their statute of limitations had long-expired. Indeed, certain of the plaintiffs had signed releases, and defendants had available defenses to such claims.

As the above cases make clear, intervention into a timely-commenced action cannot be used by a plaintiff who sat on his rights as a means of circumventing the statute of limitations. By the same logic, an untimely and failed intervention in a separate action certainly cannot be used to breathe life into an individual's otherwise stale claim. For all of the reasons discussed above, plaintiffs' claims were not timely interposed and must be dismissed.

CONCLUSION

For the above reasons, and for the reasons set forth in defendants' initial motion papers, defendants respectfully request that the Court grant defendants' Rule 12(b) (6) motion to dismiss the Amended Complaint in its entirety.

Dated: December 22, 2011

/s/Margaret A. Clemens
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