UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROBERT TESTA,

Plaintiff,

-vs.-

LAWRENCE M. BECKER, et al.,

Defendants.

Civil Action No.:
10-06229(DGL)

DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS COMPLAINT

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PRELIMINARY STATEMENT

Defendants Xerox Corporation Retirement Income Guarantee Plan ("RIGP") and Lawrence Becker, the plan administrator of the RIGP, submit this Reply Memorandum of Law in further support of their joint motion to dismiss the Complaint, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

ARGUMENT

POINT I

PLAINTIFF'S ERISA CLAIMS ARE TIME-BARRED

A. Plaintiff's ERISA Claims Accrued in 1998

As set forth in detail in defendants' initial Memorandum of Law, plaintiff's ERISA claims, having accrued in 1998, are now untimely interposed. As a result, plaintiff cannot state a plausible claim for relief. In a desperate attempt to avoid outright dismissal of this action on this basis, plaintiff asks this Court to ignore well-established legal precedent that ERISA claim accrues when the plan participant discovers, or with reasonable due diligence could have discovered, a clear repudiation of a claim for benefits. *See Bilello v. JPMorgan Chase Ret. Plan*, 607 F. Supp. 2d 586, 593-94 (S.D.N.Y. 2009)(*citing Hirt v. Equitable Ret. Plan for Emples., Managers & Agents*, 285 Fed. Appx. 802 (2d Cir. 2008)).

As the Second Circuit has explained, "[t]he SPD's important role in disclosure goes both ways: just as employees may rely on the terms of the plan as described in the SPD, so may a clear description in the SPD put them on notice of that plan's terms, including its clear repudiation of a claim for benefits." *Id.* at 593-94. The notice provided in the SPD marks the accrual date of the employee's cause of action with regard to the repudiation. *Hirt*, 285 Fed. Appx. 802 at 804 (2d Cir. 2008). *Accord Carey v. IBEW Local 363 Pension Plan*, 201 F.3d 44, 48 (2d Cir. 1999).

Despite have received notice by way of a 1998 Summary Plan Description ("SPD") adequately disclosing the terms of the offset provision for prior distributions, *see Frommert v. Conkright*, 433 F.3d 254, 260 (2d Cir. 2006), plaintiff contends that he could wait until he retired ten years later to sue. In support of his position, plaintiff relies upon principally upon isolated comments made by this Court early on during the oral argument of a motion to dismiss filed in *Kunsman v. Conkright*, 08-CV-6080. Plaintiff fails to acknowledge, however, that these comments were made by the Court early in its discussion of the issue with defendants' counsel. The Court stated later that, though its first reaction was to question why defendants still used the offset provision, it was necessary to reconsider the impact of the *Hirt* and *Carey* cases on *Kunsman* plaintiff's Complaint and "focus on Ms. Clemens' suggestion that the statute of limitations was not something before the Second Circuit" in *Frommert*. *See* transcript of hearing on Feb. 4, 2009, in *Kunsman v. Conkright*, p. 32. Significantly, no final decision has been issued in *Kunsman*.

Plaintiff's attempts to distinguish both the *Hirt* and *Carey* cases are unavailing. In *Carey*, the Second Circuit expressly held that a cause of action accrues upon "a clear repudiation by the plan that is known, or should be known, to the plaintiff, *regardless of whether the plaintiff has filed a formal application for benefits*." *Carey v. IBEW Local 363 Pension Plan*, 201 F.3d 44, 48 (2d Cir. 1999) (emphasis added). In *Hirt*, the Second Circuit affirmed that principle of law as applying in ERISA cases where there has been a claim that a plan provision or amendment was initially inadequately disclosed to plan participants, but which provision was later disclosed in a SPD. *Hirt*, 2008 U.S. App. LEXIS 14540, at *4-5 (*citing Frommert v. Conkright*, 433 F.3d at 265). The Second Circuit then held that any claim that the plaintiffs had received insufficient notice of the certain plan amendments "accrued with the distribution of the SPD in December

1992." *Id.* Applying this analysis to the present case warrants a dismissal of plaintiff's claims.

As was the case in *Hirt*, the *Frommert* plaintiffs contended that the defendants violated ERISA § 204(h) by not providing them with adequate notice of the plan provision or amendment requiring an offset for the appreciated value of prior distributions. Although the Court found that proper notice of the plan provision was not provided until 1998, the Second Circuit expressly held that the language of the 1998 RIGP SPD was sufficient to put the plaintiffs on notice of the details of how the offset provision would be used in calculating pension benefits. *Frommert v. Conkright*, 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"). Such 1998 notice was clear repudiation of any understanding that a plan participant may have had that their retirement benefits would be calculated without an offset for the appreciated value of their prior distributions.

Like the *Frommert* and *Kunsman* plaintiffs, plaintiff here received *actual notice in 1998* that his retirement benefit under the RIGP would be offset by the appreciated value of his prior distribution. Plaintiff's allegations at paragraphs 75 and 78 of the Complaint reveal his awareness of this notice. His claim for benefits under the pre-1998 Plan terms accrued then, and the law simply does not permit him to wait until he retires to complain. Unlike the *Frommert* plaintiffs, however, plaintiff here sat on his rights and chose not to commence an action for over ten years. Accordingly, for the reasons discussed in defendants' initial memorandum of law, plaintiff's claims must be dismissed as time-barred.

Plaintiff now attempts to revive his stale claims by relying on the fact that he filed formal applications for benefits with the Plan Administrator in 2009 – eleven years after his claim accrued, and five years after his statute of limitation had expired. Contrary to what plaintiff would have the Court believe, rather than supporting his position, the *Carey* case warrants a

dismissal of his claims. In *Carey*, the Second Circuit expressly rejected the notion that a plaintiff could revive a stale claim merely by filing a formal application for benefits after his statute of limitations had expired. *Carey*, 201 F.3d at 49. *See also Roberts v. Metro. Life Ins. Co.*, 2007 U.S. Dist. LEXIS 21198 (S.D.N.Y. 2007) (refusing to permit a plaintiff to revive a stale claim by submitting additional evidence or requesting a reexamination of his pension request); *Patterson-Priori v. Unum Life Ins. Co. of Am.*, 846 F. Supp. 1102, 1106-07 (E.D.N.Y. 1994).

Additionally, plaintiff proposes that his claims are revived by the decisions in *Layaou v. Xerox Corp.*, 238 F.3d 205 (2d Cir. 2001); *Frommert*, 433 F.3d 254; and *Miller v. Xerox Corp. Ret. Income Guar. Plan*, 464 F.3d 871 (9th Cir. 2006), *cert. denied*, 549 U.S. 1280 (2007). Unlike plaintiff here, the plaintiffs in *Layaou*, *Frommert*, and *Miller* filed their Complaints within their applicable time limitations. Plaintiff has offered no authority that allows him to rely upon timely causes of action filed by others to save his own time-barred Complaint.

It is also significant that by the time plaintiff's one-year statute of limitation ran in 1999 (*see infra* Point I(B)), none of the decisions in *Layaou*, *Frommert*, and *Miller* had been issued. Given the adequate notice provided in the 1998 SPD, plaintiff had no basis for believing during the 1998/1999 time period that the offset provision would not be applied to him. This same rationale applies even if plaintiff relies upon the six-year statute of limitations generally applied to ERISA claims in New York because that time expired in 2004 – well before the Second Circuit's decisions in *Frommert* and *Miller*, and the *Layaou* case was settled before it was appealed and was specific to the plaintiff in that case.

Indeed, if plaintiff is allowed to revive his time-barred claims based on Court decisions issued long after the expiration of the statute of limitations, then the entire purpose of the statute of limitations is weakened. *Cf. Carey*, 201 F.3d at 49 (stating that the statute of limitations would

be rendered meaningless if a plaintiff is allowed to revive a stale claim).[1]

In sum, plaintiffs' ERISA claims regarding the offset for prior distributions are time-barred regardless as to whether the Court applies a one, three, or even six year statute of limitations period. Accordingly, defendants' motion to dismiss plaintiff's Complaint in its entirety should be granted.

B. The Statute of Limitations Governing Plaintiff's Claim is One Year

An ERISA plan's SPD can alter the statute of limitations for claims arising out of that plan. Plaintiff contends otherwise, stating that the SPD is not a "written agreement" that can shorten a statute of limitations under New York law. (Plaintiff's Memorandum of Law in Opp., p. 14). This is not the case. *See e.g., Suthar v. Eastman Kodak Co*. 2010 U.S. Dist. LEXIS 41859 (W.D.N.Y. April 28, 2010) (Siragusa, J.); *Wesley v. NMU Pension & Welfare Plan*, 2002 U.S. Dist. LEXIS 23, *10 (S.D.N.Y. Jan. 3, 2002).

ERISA contemplates that the SPD will serve as an "employee's primary source of information regarding employment benefits and employees are entitled to rely on the descriptions contained in the summary." *Robilotta v. Fleet Boston Fin. Corp. Group Disability Income Plan*, 2008 U.S. Dist. LEXIS 25689, *28 (E.D.N.Y. Mar. 31, 2008) (*citing Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 110 (2d Cir. 2003), *cert. denied*, 540 U.S. 1105 (2004)). Indeed, a SPD acts to amend the text of an ERISA plan when it provides a plan participant with notice of new plan terms and provisions. *See Flood v. Guardian Life Ins. Co.*, 2008 U.S. Dist. LEXIS 4458 (E.D.N.Y. Jan. 11, 2008); *Frommert v. Conkright*, 433 F.3d at 268-69 (stating that the 1998 SPD amended the RIGP to include the phantom account and comparative methodology

[1] It is worthwhile to note that this Court indicated during the hearing for the motion to dismiss in *Kunsman v. Conkright*, 08-CV-6080, that court decisions do not necessarily determine when a plaintiff's rights accrue. *See* transcript of hearing on Feb. 4, 2009, in *Kunsman v. Conkright*, p. 18.

by fully explaining them).

Courts have frequently held that a shortened limitations period in an SPD is binding on a plan participant. *See Suthar v. Eastman Kodak Co.*, 2010 U.S. Dist. LEXIS 41859; *Flood v. Guardian Life Ins. Co.*, 2008 U.S. Dist. LEXIS 4458 (E.D.N.Y. Jan. 11, 2008)(applying the shortened statute of limitations as set forth in the plan SPD). *Cf. Robilotta v. Fleet Boston Fin. Corp. Group Disability Income Plan*, 2008 U.S. Dist. LEXIS 25689 (E.D.N.Y. 2008) (finding that the shortened statute of limitations period was unenforceable because it was not contained in the plan's SPD); *and Manginaro v. Welfare Fund of Local 771, L.A.T.S.E.*, 21 F. Supp. 2d 284, 294 (S.D.N.Y. 1998) (*cited by Layaou Xerox Corp.*, 330 F. Supp. 2d 297, 303 (W.D.N.Y. 2004) (same principle as in *Robilotta, supra*).

The case upon which plaintiff relies for his argument that the SPD is not a written agreement that can shorten statute of limitations, *Bologna v. NMU Pension Trust of NMU Pension & Welfare Plan*, 654 F. Supp. 637 (S.D.N.Y. 1987), is inapposite to the present case. First, it does not concern the contents of a plan's SPD, which has been recognized time and again by the Courts as a document that effectively amends ERISA plans. Secondly, the Court in *Bologna* found that the rule shortening the limitation period for the subject trust was not a rule that the trustees were authorized to make under the Declaration of Trust. Conversely, the RIGP clearly authorizes the Plan Administrator to establish a claims procedure. (Becker Decl. ¶ 5 and its Ex. B, Section 10.7).

Plaintiff suggests that the one year statute of limitation as adopted by the RIGP is manifestly unreasonable and unenforceable, however, he cites *no authority* for this argument. It is well-established in New York that an ERISA plan can shorten the applicable statute of limitations. *See discussion, supra*. Indeed, a one-year limitation period on ERISA actions is

reasonable, as has been recognized in other jurisdictions. *See Syed v. Hercules Inc.*, 214 F.3d 155, 159 (3d Cir. 2000), *cert. denied*, 531 U.S. 1148 (2001) (holding that the applicable statute of limitations for ERISA claims in Delaware is one year); *Fleszar v. AMA*, 2010 U.S. Dist. LEXIS 24468, *20-*21, 23 (N.D. Ill. Mar. 11, 2010)(plaintiff's claim for benefits under ERISA § 502(a)(1)(B) was time-barred by the one-year statute of limitations adopted in a plan amendment).

For these reasons, the limitations period applicable to plaintiff's complaint is the one-year period set forth in the 1998 SPD.

POINT II

PLAINTIFF'S CLAIM UNDER ERISA § 502(a)(3) IS NOT A PLAUSIBLE ONE.

Plaintiff does not deny that 29 U.S.C. § 1132(a)(3) allows for "appropriate equitable relief"- which are not monetary damages - only when a plaintiff has suffered injuries that Section 1132 does not otherwise adequately remedy. *See* defendants' initial Memorandum of Law, Point IV. Instead, plaintiff attempts to veil his Third and Fourth claims as "seeking relief of a different sort" than a claim for benefits. However, plaintiff is ultimately seeking benefits or a recalculation of benefits under the RIGP, which claim is clearly redressable under 29 U.S.C. ¶ 1132(a)(1)(B).

The Second Circuit in *Frommert* is instructive in this regard. The *Frommert* plaintiffs sought equitable relief under 29 U.S.C. § 2232(a)(3) in the form of a declaratory judgment and an injunction. As explained by the Court, because the plaintiffs were ultimately seeking monetary damages through the recalculation of benefits, the necessary remedies could fully be provided under § 502(a)(1)(B), 29 U.S.C. ¶ 1132(a)(1)(B). *Frommert*, 433 F.3d at 270 (*citing Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996)). The Court also stated that "[w]hile the

plaintiffs seek to expand the nature of their claim by couching it in equitable terms to allow relief under § 502(a)(3), the gravamen of this action remains a claim for monetary compensation and that, above all else, dictates the relief available." *Frommert*, 433 F.3d at 270 (*citing Gerosa v. Savasta & Co.*, 329 F.3d 317 at 321 (2d Cir. N.Y. 2003)).

Similar reasoning applies here. The ultimate remedy plaintiffs seek is monetary damages in the form of the recalculation of their benefits consistent with the terms of the pre-1998 plan provisions. Indeed, plaintiff explicitly states in this Third Claim that he "is entitled to an order . . . compelling Defendants to comply with the direct order of the Ninth Circuit which directs that the RIGP and such Defendants *shall provide . . . a benefit from the RIGP* that subtracts from the aggregate RIGP benefit no more than the benefit actually attributable to his Prior PSP Distribution." Similarly, plaintiff's Fourth Claim seeks benefits to which plaintiff believes he is entitled. Plaintiff requests that the Court order the Plan Administrator "to exercise his fiduciary duties with respect to Testa's benefit claims." Plaintiff does not dispute that his ultimate goal is to have his benefits recalculated without the offset provision, resulting in monetary relief for himself. In other words, in both the Third and Fourth Claims, plaintiff is seeking to have his benefits recalculated, and ERISA ¶ 1132(a)(1)(B) provides the necessary mechanism enabling him to seek such relief; equitable relief under ¶ 1132(a)(3) is therefore unavailable.

Accordingly, plaintiff's claims under 29 U.S.C. § 1132(a)(3), which are also untimely, are not plausible one and should be dismissed on this additional basis.

POINT III

PLAINTIFF IS NOT ENTITLED TO RELIEF UNDER THE NINTH CIRCUIT'S OPINION IN *MILLER*

Plaintiff's reliance on the Ninth Circuit's opinion in *Miller v. Xerox Corporation Retirement Income Guarantee Plan* is misplaced. Unlike the plaintiffs in *Miller* who filed their

causes of action with regard to the offset provision in 1998 and 1999, plaintiff filed his in 2010 – approximately twelve years after his cause of action accrued. *See* Point I, *supra*. Plaintiff cannot now revive his stale claim by relying on any decision rendered in that lawsuit. Plaintiff's Third Claim is not a plausible one and should be dismissed.

POINT IV

PLAINTIFF SHOULD NOT BE ALLOWED TO AMEND HIS COMPLAINT BECAUSE AMENDMENT WOULD BE FUTILE

Since plaintiff's Complaint is time-barred in its entirety, amendment of his Complaint would be futile. *Wallace v. New York City Dep't of Corr.*, 112 Fed. Appx. 794, at **2-3 (2d Cir. 2004); *Van Buskirk v. N.Y. Times Co.*, 325 F.3d 87, 92 (2d Cir. 2003). Accordingly, plaintiff's request must be denied and the Complaint dismissed with prejudice.

CONCLUSION

For the reasons discussed above and set forth in detail in Defendants' initial Memorandum of Law, Defendants respectfully request that this Court grant its motion to dismiss Plaintiff's Complaint in its entirety.

Date: July 16, 2010
Rochester, New York

Respectfully submitted,

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