UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROBERT TESTA

Plaintiff,

V.

LAWRENCE BECKER, et al.

Defendants.

Civil Action No.
10-06229(DGL)

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMPLAINT

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PRELIMINARY STATEMENT

This Memorandum is submitted by Plaintiff Robert Testa ("Plaintiff" or "Testa") in opposition to Defendants' motion to dismiss Plaintiff's Complaint.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY REGARDING THIS CASE

As alleged in the Complaint, prior to 1983 Testa was an employee of Xerox Corporation ("Xerox"), a participant in a defined-contribution plan then maintained by Xerox (the "Retirement Plan"), and a "Member" of the defined-benefit Retirement Income Guarantee Plan ("RIGP"). Cmplt. ¶¶ 51–53. Upon termination of his employment in 1983, Testa received a distribution of about $30,000 from the Retirement Plan (and nothing from the RIGP). Cmplt. ¶ 54. He was subsequently rehired in 1985 and continued to work for Xerox for 23 more years until he retired on August 30, 2008. Cmplt. ¶¶ 52–53.

Testa received a pension benefit statement on January 13, 2009. Cmplt. ¶ 65. While the net benefit represented on that statement resulted from a substantial offset under the outlawed "phantom account" approach, Defendants excluded such information from the statement to deceive Testa and similarly situated RIGP Members. Cmplt. ¶¶ 68-69. Testa subsequently applied for and received a lump sum distribution from the RIGP on February 4, 2009. Cmplt. ¶ 70. On May 26, 2009, Testa submitted a written claim for additional benefits, since the offset caused the distribution to be substantially less than the amount he believes was due to him. Cmplt. ¶ 80. Administrative proceedings ensued, leading to denial of his final appeal on August 4, 2009. Cmplt. ¶ 83. Testa filed this Complaint in the Central District of California on January 28, 2010. Defendants then successfully removed the case here to the Western District of New York.

By any stretch of the imagination, Testa's complaint was timely. The Plan Administrator's application of the illegal phantom account against Testa, and his filing of this current motion, continues his consistently overzealous protection of the short-term

profit-making interests of his employer, to the detriment of the beneficiaries to whom he owes explicit fiduciary duties.

The Plan Administrator filed a similar motion in *Kunsman v. Conkright*, 08-CV-6080. That motion has not yet been decided but was argued before this court by the late Robert Jaffe, Esq., on February 4, 2009, the same day Testa was paid his heavily reduced benefit. In that hearing, this court appropriately stated: "I don't know how Xerox, in good faith, in light of what the Second Circuit said here, could ever use the phantom account against" an employee rehired before 1998 (*id.* at page 9). This court added that ignoring the Second Circuit's 2006 decision in *Frommert v. Conkright*, 433 F.3d 254 (2nd Cir. 2006) ("*Frommert 2006*") in that manner "sounds like contempt." *Id.* at page 8.[1] The Plan Administrator, failing to take these comments to heart, then rejected Testa's claim and appeal. To be clear here, Plaintiff is not saying that the correct benefit computation is clear, but only that it is outrageous that the Plan Administrator continues to use the phantom account after the decisions in *Frommert 2006* and in *Miller v. Xerox Corp. Ret. Inc. Guar. Plan*, 464 F.3d 871 (9th Cir. 2006) ("*Miller*").

HISTORY OF RELATED LITIGATION ESTABLISHING RIGP DEFECTS

1. To Analyze the Statute of Limitations Applying to any Claim, It Is Necessary to Understand the Nature of the Particular Claim. As discussed below, this suit was filed within one year of the denial of Plaintiff's claim for retirement benefits and thus is clearly timely. However, since the application of a statute of limitations to a claim depends on the nature of that claim, we must first outline the claims Plaintiff has made.

Detailed statutory terms in the Employee Retirement Income Security Act ("ERISA") protect a plan participant's right to his "accrued benefit" as defined in the plan and in Section 3(23) of ERISA (29 U.S.C. §1002(23)). See ERISA §204; 29 U.S.C. §1054. Ultimately, the question in these RIGP cases is how severely a RIGP Member's accrued benefit payable at retirement age may be offset because he received a prior distribution from the separate Retirement Plan before Xerox terminated that defined-contribution plan in 1989. The offset asserted by the Plan Administrator arises from "phantom account" terms which purport to offset the Member's accrued benefit under the

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[1] This is not the 2008 decision that was reviewed by the Supreme Court.

RIGP by those prior Retirement Plan distributions as increased by hypothetical earnings on such distribution. Cmplt. ¶ 33. The result of that offset, as applied to most affected Plan Members, is that all benefits accrued after 1989 are negated (leaving only the actual 1989 Retirement Plan balance as it has grown since 1989).

The use of that phantom account to integrate benefit payments has been the subject of litigation on both Coasts for more than a decade. The courts which have been presented with these disputes have clearly understood that the exaggerated offsets were wrong and unfair. In determining exactly what rules were broken, those courts have had to work through the labyrinthine complexity of the arrangement designed by Xerox and its teams of benefits consultants (as well as the details of ERISA itself). That analysis has now clearly established, beyond any doubt or the right to appeal, that the phantom account approach is unlawful for three reasons. While the exact appropriate remedy is not yet clear for every claim, it is arbitrary and unreasonable for the Plan Administrator to continue to apply the phantom account.

2. As Determined in *Miller*, the RIGP Violates Substantive ERISA Requirements. The most fundamental problem with the phantom account approach (the "*Miller Defect*') is that the phantom account ploy effectively forfeits ERISA-protected accrued benefits by exaggerating the amount of any RIGP defined benefits that may have been satisfied by prior distributions from the defined-contribution Retirement Plan. Simply put, the Plan Administrator persists in applying an unlawful position. While the litigation heard to date in the Western District of New York has not yet required this court to address this issue, the outcome on this issue is not subject to any reasonable doubt.

The ERISA statute actually contains detailed provisions regarding rehire situations. As the general rule, a plan must continue to recognize all periods of service for rehired plan participants. ERISA §204(d); 29 U.S.C. §1054(d). If the employer (i.e., the plan sponsor) is concerned about potential benefit duplication, it has a statutory mechanism to resolve that concern. That is, it can require rehired participants to repay prior distributions, along with interest (the "buy back" rule). ERISA §204(e); 29 U.S.C. §1054(e). Applicable interest rates are carefully defined in the statute. See ERISA §204(c); 29 U.S.C. §1054(c), which was amended at various times.

Xerox forsook the Congressionally approved approach. Although nothing in the ERISA statute (other than the right to rely on those buy-back rules) allows any offset at all for prior distributions, Treasury Regulations in their grace allow an offset for the accrued benefit "attributable to" prior distributions from the RIGP. 26 C.F.R. §1.411(a)-7(d)(6). This Regulation is effectively parroted in Section 9.6 of the RIGP. Accordingly, in 2006, the Ninth Circuit concluded: "The Employees [plaintiffs in that case] – 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 benefits only the benefit actually attributable to the Profit Sharing Plan distributions." *Miller, supra*, 464 F.3d at 878.

While that clear principle prohibits use of the phantom account, the determination of what defined benefit is "actually attributable to" the prior distribution remains to be made in this current case and on the remand of the *Miller* case which is still pending in the Central District of California. The obvious answer is the right one. When Xerox sent Testa packing in 1983, the RIGP benefit "actually attributable" to whatever distributions he received from any Xerox plan at that time could not have exceeded the RIGP accrued benefit (i.e., the monthly retirement annuity) he had then earned, based on his pay and years of service at that time.[2] Any larger distributions were just a feature of the now-defunct Retirement Plan and were not "actually attributable" to any RIGP accrued benefits.

In fact, in its most recent decision in this case, this court clearly pointed in the right direction. That decision notes that the relevant terms of the RIGP (Sections 9.6 and 1.1) define the RIGP's "accrued benefit" (as of the date of the Retirement Plan distribution) by applying the RIGP's benefit formula to the Member's service and compensation as of the time of that distribution. *Frommert v. Conkright*, 472 F. Supp.2d 452, 457-458 (W.D.N.Y. 2007).

3. <u>As Determined in *Frommert 2006*, the RIGP Was Improperly Amended</u>. Secondly, in *Frommert 2006*, the Second Circuit reversed this court and determined that

[2] Since this approach effectively builds in the "time value of money," the resulting offset would be significantly larger than that previously applied by this Court in *Layaou, infra,* and in its latest decision in this case.

Xerox failed to give necessary notice to RIGP Members (the "*Frommert Defect*') when it attempted to add the phantom account terms into the RIGP after it was restated in 1989. As a result, the amendment violated ERISA Section 204(h) (29 U.S.C. § 1054(h)) and is not a valid part of the RIGP for Members (like Testa) who resumed employment prior to 1998.

4. As Determined in *Layaou*, the RIGP's Summary Plan Description Did Not Disclose the Offsets Defendants Seek to Apply. The third problem (the "*Layaou Defect*') is the Plan Administrator's failure to comply with ERISA disclosure obligations. A month after ruling against the plaintiffs in *Frommert v. Conkright,* 328 F. Supp. 2d 420 (W.D.N.Y. 2004) (i.e., the decision later reversed by the Second Circuit), this court distinguished the claims made by Layaou and granted full relief to that plaintiff (that is, an offset only for the actual dollar amount of the prior Retirement Plan distribution). *Layaou v. Xerox Corporation*, 330 F. Supp. 2d 297 (W.D.N.Y. 2004). That decision rested on a prior decision of the Second Circuit, which held that the Plan Administrator had failed to comply with requirements to notify Plan participants through an understandable Summary Plan Description and related annual benefit statements of circumstances which could result in forfeiture of large amounts of their accrued benefits. *Layaou v. Xerox Corp*. 238 F. 2d 205 (2nd Cir. 2001). As this court's back-to-back 2004 decisions clearly demonstrate, the *Layaou Defect* is something different from the *Frommert Defect*.

5. Nothing in the Supreme Court's Decision Cures Any of These Defects. All of these cases – *Miller*, *Frommert 2006*, and *Layaou* -- are clearly good law today. The Complaint in this case raises the defects established by each of them. The Supreme Court decision issued in *Conkright v. Frommert*, 130 S. Ct. 1640 (2010) ("*Conkright*") on April 21 did not alter *Frommert 2006* or *Layaou* (and even cited *Miller* favorably). The remand for further proceedings under that Supreme Court decision simply addresses the manner to determine a fall-back benefit computation to cure the *Frommert 2006 Defect* after the phantom account was exorcised by *Frommert 2006*.[3]

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[3] The *Miller Defect* must be considered on the *Frommert* remand since terms of the RIGP apply only insofar as consistent with ERISA. See also RIGP §10.5(c) quoted at page 8 below. The *Layaou Defect* was not involved in the Supreme Court review.

ARGUMENT

POINT I: THE APPLICABLE STANDARD FOR DETERMINING MOTIONS TO DISMISS UNDER RULE 12(b)(6)

Defendants' Memorandum of Law in Support of Motion to Dismiss Complaint contains a rather lengthy discussion of standards under Rule 12(b)(6). That discussion makes two points: (a) a complaint may be subject to dismissal if its claims are not "plausible" and (b) documents referred to in the complaint (in this case, the benefit plan text) may be considered under a 12(b)(6) motion. Those observations appear correct and sufficiently complete. Taking such referenced documents into account, the Complaint in this matter is not only "plausible" but compelling.

POINT II: PLAINTIFF'S CLAIM FOR BENEFITS UNDER THE LAWFUL TERMS OF THE RIGP PLAN TEXT PURSUANT TO SECTION 502(a)(1)(B) IS NOT TIME-BARRED

A. The Statute of Limitations under ERISA Section 502(a)(1)(B) Starts to Run Only When a Claim for Benefits Is Denied. Plaintiff's first claim is brought "to recover benefits due to him under the terms of his plan"[4] under ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). When does a cause of action to recover retirement "benefits due to him" arise? The answer seems self evident.

An employee's benefits under a defined benefit pension plan accrue and grow over the course of the employee's career. No reasonable person would suggest, as the Plan Administrator does here, that a plan participant loses his right to enforce benefits

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[4] Because Defendants refused to agree to a tolling agreement, Plaintiff was compelled to file this action while the Supreme Court was considering *Conkright*. Based on the Supreme Court's decision in that case, the benefit offset to be taken into account under the first claim will exceed the actual dollar amount of the earlier Retirement Plan distribution (the offset asserted in the Complaint) but will be considerably less than the phantom account offset claimed by Defendants. Although Defendants' Motion does not raise this point, Plaintiff requests leave to amend the Complaint in this regard in the unlikely event that the Court determines that an amendment is necessary to state a cause of action.

earned early in his career unless he periodically files suit to confirm or clarify such benefits. Such a defense would force every plan member to file a lawsuit against the plan almost every year.

Eventually, a time comes when a plan participant is ready to receive the benefits he has earned over his career. That time does not arise while he is still employed nor necessarily even upon his termination of employment. Retirement benefits typically commence at retirement age (such as age 65) or some earlier post-termination date when the participant elects to start his benefits. See ERISA §§3(24); 206(a); 29 U.S.C. §§1002(24); 1056(a). Thus, the trigger is pulled only when (or after) the participant reaches that age and then elects such a "benefit commencement date."

In one form or another (depending on the plan's particular procedures), the participant applies for benefits at that benefit commencement date. The general rule is that "the limitation period . . . generally begins to run when a plan denies a beneficiary's formal application for benefits." *Carey v. IBEW Local 363 Pension Plan*, 201 F.3d 44, 47 (2nd Cir. 1999), *Barnett v. International Business Machines Corp*., 885 F. Supp. 581, 591 (S.D.N.Y. 1995)[5]. There is some debate as to whether this starts upon an initial denial or only once all administrative remedies have been exhausted. *See Burke v. Pricewaterhousecoopers LLP Long Term Disability Plan*, 572 F3d 76, 79 (2nd Cir. July 9, 2009). Under either view, Testa is within this limit, even if Defendants' aggressive one year statute of limitations applies.

This pension situation is different from circumstances that frequently arise with medical and disability plans. If an employee suffers a medical problem, he is normally expected to file a claim with respect to the particular event or cost item as it arises and is identified at a discrete point in time. This requires the employee to satisfy some sort of notice requirement and, in the event of a denial of his claim, to appeal promptly. That is, such claims involve specific incidents and do not usually involve ongoing and continuous accruals. A distinction should also be made from certain other factual determinations under a pension plan. For example, a plan might include terms under which a participant is deemed to waive objections to the plan's records of his employment data (such as

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[5] The accrual of a claim under ERISA is determined by federal law. *Barnett, supra,* 885 F. Supp. at 591.

breaks in service) if he does not object in a timely manner. The validity or application of such rules is not at issue in this case.

B. The Statute of Limitations Does Not Validate an Unlawful Plan Term. Since Plaintiff brought this action for benefits promptly after denial of his retirement benefit claim, the 502(a)(1)(B) claim is clearly timely. Plaintiff's first cause of action seeks not just a pension benefit of some amount but one computed in a proper and lawful manner (taking into account principles established in *Miller* and in *Frommert* 2006)[6]. ERISA imposes legal restrictions on pension plan terms. Compliance with those restrictions is not only part of the law, but also part of the terms of the RIGP itself. RIGP Section 10.5 states:

> "In performing her duties, the Administrator shall act solely in the interest of the Members of the Plan and their beneficiaries and . . . c. In accordance with the documents and instruments governing the Plan insofar as such documents and instruments are consistent with the provisions of Title I of ERISA."
>
> Exh. B to Becker Decl. at 31.

The Plan Administrator's apparent position here is that his failure to comply with the law for six years (or rather for one year) absolves him and the RIGP from having to comply with the law after that period and thus forfeits Plaintiff's vested benefit rights under ERISA. That bold contention ignores that such compliance is a continuous obligation and that the Member's cause of action arises only when he reaches a benefit commencement date. The addition of the phantom account to the RIGP tainted the Plan (and the Plan Administrator's decisions) with the *Miller Defect*. That taint remains to this day.

Analysis of the *Frommert Defect* is a little more complicated. *Frommert 2006* determined that the "phantom account" terms may be considered to be part of the RIGP with respect to Members who were rehired after 1998, but not for those rehired before that date. This simply defines when the phantom account was effectively amended into the RIGP. Now that such a date is clarified, the analysis is otherwise the same. That is, for a Member like Testa who was rehired before 1998, the phantom account is simply not part of the RIGP. Not in 1998 and not in 2010. For one rehired after 1998, the phantom

[6] The *Layaou* defect is raised by the second cause of action.

account terms may be considered part of the RIGP. In that case, however, those terms still are invalid under *Miller*. The adoption of a plan does not start the running of the statute of limitations regarding a claim for benefits subsequently earned under the plan's lawful and applicable terms. Nor does the adoption of a properly noticed amendment to a plan.

C. The Plan Administrator Cannot Rely on a "Clear and Unequivocal Repudiation" To Accelerate the Running of the Statute of Limitations in this Case. Under longstanding legal principles, the statute of limitations applying to claims against a trustee or other fiduciary may start to run when he has repudiated his fiduciary obligations. The repudiation must be "clear and unequivocal." Perhaps, if that high threshold is satisfied, the clock may start to run even with respect to a claim for accrued pension benefits. However, a trustee who contests a legal interpretation in a lawsuit brought by one or more beneficiaries is not thereby clearly and unequivocally repudiating his obligation to pay lawfully computed benefits to other beneficiaries once the dispute is straightened out (especially where the plan explicitly requires him to do so).[7]

At some point, a fiduciary may resist compliance with the law and his obligations in such a stubborn and arrogant way as to suggest that he is clearly and unequivocally repudiating his obligations to comply with his duty and with the law itself. Perhaps the Plan Administrator is now crossing even that high threshold. If so, perhaps the statute of limitations is now starting to run for other Plan Members. It is for that reason that the fourth cause of action in this case seeks to remove Mr. Becker and replace him with someone who does not feel that he is above the law.

POINT III: PLAINTIFF'S SECOND CLAIM, SEEKING BENEFITS UNDER THE TERMS OF THE PLAN AS COMMUNICATED THROUGH THE SPD, IS NOT TIME-BARRED

Plaintiff's first cause of action (under ERISA Section 502(a)(1)(B)) – as discussed above – seeks his pension benefit based on the lawful terms of the RIGP text, taking into

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[7] Consider a serial law breaker who repeatedly ignores his legal responsibilities. The fact that he unsuccessfully contests three separate lawsuits by various victims doesn't mean that the statute of limitations is running against a claim that may subsequently be brought when he harms a fourth victim.

account both *Miller* and *Frommert 2006*. Plaintiff's second cause of action related to the *Layaou Defect* becomes important only if full relief is not granted under the first cause of action. That second claim (also under Section 502(a)(1)(B)) asserts that Plaintiff is entitled to additional benefits "under the terms of his plan" because the Summary Plan Description and related documents failed to inform him that Defendant would claim that a huge part of his accrued benefits would be withheld from him. While involving factual issues similar to those considered in *Frommert 2006*, the legal issues (and the potential remedies) are different. The relevant authority here is *Layaou*. The question is not what the "master plan document" says (nor how that document might be interpreted), but whether the SPD appropriately warned RIGP Members about large potential offsets to their accrued benefits that might be contained in that plan document.

The Supreme Court decision in *Conkright* was based on an understanding or assumption that the RIGP master plan document grants the Plan Administrator's discretionary authority to construe the terms of that plan document itself. The question in *Conkright* was "whether a single honest mistake in *plan interpretation* justifies stripping the administrator of that plan of that deference for subsequent related *interpretations of that plan*." *Id.*. 130 S. Ct. at 1644 (emphasis added). The Court held that a single mistake should not change that standard. *Id.* at 1651. However, no authority says that the Plan Administrator has discretionary power under either the Plan or ERISA to determine the remedy for failing in his own statutory duty to warn Plan Members of potential offsets to their accrued benefits through suitable ERISA–mandated disclosure documents.[8]

The statute of limitations issues related to the second cause of action are, admittedly, more difficult than those for the first cause of action. Ultimately, however, the proper resolution of that challenge is the same. Certain disclosure documents were apparently distributed to Testa and other RIGP Members in the 1990's. Since those disclosure documents failed to disclose huge offsets to accrued benefits, Testa and

[8] Among other things, the SPD must inform plan participants of "circumstances which may result in . . . denial or loss of benefits" (ERISA §102(b); 29 U.S.C. §1022) and must be "written in a manner calculated to be understood by the average plan participant." ERISA §102(a); 29 U.S.C. § 1022(a). Of course, the record will also show that the Plan Administrator has made far more than a single mistake.

similarly situated Plan Members acquired certain rights to RIGP accrued benefits (potentially larger than those specified in the RIGP text). Those benefits (like other accrued benefits under the RIGP) were not payable until the Member's post-retirement benefit commencement date. Under general principles, the statute of limitations on this sort of benefit claim also started to run only on that benefit commencement date.

Apparently, the Plan Administrator wants some exception to the general rule to apply. Perhaps, he could have accelerated the commencement of the limitations period for this SPD-related claim by a clear and unequivocal repudiation of his obligations to comply with the terms of the law requiring him to pay these accrued benefits. His defense of claims made in *Layaou* (and parallel but different defenses in *Frommert 2006*) only reflect a disagreement over the factual conditions for such a claim. This does not demonstrate a repudiation – much less a clear and unequivocal one – of his obligations to perform his fiduciary duty under ERISA after the court resolved those issues. Nor has he ever clearly notified Members (at least before his opposition to this and other current cases) that he would continue to resist claims based on the legally binding precedents of *Layaou* and *Frommert 2006*.

There is a separate question as to the effect a belated adequate disclosure of the intended offset may have on the merits. While this question is not raised by the motion to dismiss, the Plan Administrator apparently believes that issuance of an adequate SPD (let's say, the day before an adversely affected RIGP Member retires) immediately cleanses the stains arising over years of non-disclosure. That claim is preposterous on its face. Substantial harm had been caused by the failures that occurred prior to such a belated disclosure. While the disclosure may have stopped the bleeding, there is no reason to think that the damage that already occurred was instantaneously repaired. The principles that prohibit retroactive reduction of plan benefits (i.e., ERISA § 204(g); 29 U.S.C. § 1054(g)) apply equally to benefits arising due to SPD defects.

<u>POINT IV: THE CASES ON WHICH DEFENDANTS RELY ARE INAPPOSITE</u>

Defendants rely principally on three cases for the proposition that the commencement of the limitations period was accelerated in this case so that it started to

run (apparently, for each claim in this case) in 1998 when Defendant informed Plan Members of the phantom account offset.

In *Carey*, *supra*, the Second Circuit held that the statute of limitation under Section 502(a)(1)(B) began to run when the plan fiduciary clearly repudiated any obligation to pay the plaintiff the benefit he claimed. The facts of that case are significant to understanding its import. The plaintiff sent the administrator a letter challenging its conclusion as to a break in service in 1989. He sent another letter in 1991, and appealed a denial made at that time. He apparently retired shortly after that (in 1992) and then filed a formal application for benefits in 1996. He did not file his lawsuit until 1998. The suit was held to be time barred since it came more than six years after the 1991 claim and appeal (even though his benefits were not payable until sometime in 1992). Thus, the "repudiation" in *Carey* was not some general practice of the plan administrator of opposing valid claims by plan participants, but a specific rejection of formal claims by Carey himself. *Carey* expressly stands for the general proposition that "the limitation period . . . generally begins to run when a plan denies a beneficiary's formal application for benefits." *Id*. at 47. This standard clearly supports Testa's position here.

Two related *Hirt* decisions were issued on the same day. In the published decision, the Second Circuit rejected on the merits a claim that cash balance terms adopted in the 1988–1992 time period violated the age-discrimination prohibition found in ERISA § 204(b)(1)(H); 29 U.S.C. §1054(b)(1)(H). *Hirt v. Equitable Retirement Plan for Employees, Managers, and Agents*, 533 F.3d 102 (2nd Cir. 2008). Although the lawsuit was not filed until 2001, there was no suggestion that the suit was time barred. This is directly analogous to the *Miller* claim discussed previously.

The unpublished "Summary Order" in *Hirt v. Equitable Retirement Plan for Employees, Managers, and Agents*, 285 Fed.Appx. 802, 2008 WL 2675828 (2nd Cir. 2008)), bears some resemblance to claims based on *Frommert 2006*. In that Summary Order, the court held that a "notice based claim" (under Section 204(h)) regarding an amendment affecting prospective benefits was time barred. The Summary Order first recognized the general rule that the statute of limitations begins to run when a participant's benefit application is denied. However, it then determined that the

distribution of an SPD in 1992 "constituted a clear repudiation of any pre-amendment benefits that plaintiffs could possibly claim."

The appropriate analysis of this sort of question is provided by *Frommert 2006* itself. In that decision, the Second Circuit clearly held that the phantom account amendment described in the 1998 SPD became part of the RIGP only for Plan Members who were rehired after that SPD was distributed[9]. *Frommert 2006*, 433 F.3d at 268-269. This directly controlling precedent correctly characterizes the role of the 1998 SPD. That document did not repudiate obligations to pay benefits that had accrued (and could not properly have done so); rather it defined what terms became part of the Plan.

To the extent that the Summary Order in *Hirt* is inconsistent with this holding in *Frommert 2006*, obviously *Frommert 2006* will control here. Moreover, the *Hirt* Summary Order appears to be essentially a factual determination (which agreed with the determination made by the District Court on that point) that the particular terms of the SPD were an adequately unequivocal repudiation as to the potential cause of action itself. The underlying thinking appears to have been based on the similarity between factual issues underlying a claim under 204(h) (adequate disclosure of plan amendments) and the "clear repudiation" principle (also requiring consideration of adequacy of disclosure). Every Plan Member should not be obliged to file a lawsuit to cause the Plan Administrator to comply with settled law. Also, the Plan Administrator's refusal to follow binding legal precedent restarts any applicable limitation period.

The third case on which Defendants' rely, *Benoit v. Prudential Ins. Co. of Am.*, 2008 WL 2917492 (W.D.N.Y. 2008), hardly supports Defendants' position here. The court determined that, even if a certain benefit-denial letter related to an accident insurance policy constituted a clear repudiation, the statute of limitations did not bar the plaintiff's claim.

<u>POINT V: THE ONE YEAR LIMITATION PERIOD STATED IN THE RIGP IS NOT PROPERLY APPLICABLE HERE</u>

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[9] See the discussion of the February 4, 2009 hearing in the *Kunsman* matter, on page 2 of this brief.

A. The RIGP's Provision Does Not Change the Date When the Cause of Action Accrues. Defendants assert that a one-year statute of limitations applies here on the grounds that "parties . . . may contract for a shorter time period as long as the contractual period is not manifestly unreasonable." Dfdts' Brief at 7. Defendants contend that the normal standard is shortened by the following language in the 1998 Summary Plan Description (see Becker Dec., Ex. A at 72-73, cited at Defendants' Brief page 7):

> "A participant or beneficiary under the Company's plans must bring any action in state or federal court for the alleged wrongful denial of plan benefits, or for the alleged intentional interference with any ERISA-protected rights that the participant or beneficiary is or may become entitled to, within one year after the cause of action accrued. This is generally from the time one first knew or should have known of the alleged wrongful denial or interference, or as otherwise determined by a court of law.
>
> Failure to bring such an action within this time frame shall preclude a participant from bringing such action."

Nothing in this text changes the date when Plaintiff's causes of action accrued. As discussed above, that date is determined under federal law and a cause of action for retirement benefits arises only when the benefits are due and a claim is denied. The length of the limitations period has no bearing on the outcome of this case since Testa promptly filed this action after his claim for properly computed accrued benefits under the Plan was denied.

In any event, while New York law allows a statute of limitations for a contractual claim to be shortened by an appropriate "written agreement," the SPD is not a written agreement. *Cf. Bologna v. NMU Pension Trust*, 654 F. Supp. 637 (S.D.N.Y. 1987). It is a disclosure document that the Plan Administrator is required to distribute. The above-quoted SPD text does not say that the RIGP Member is contractually agreeing to any such shortening. It is simply an erroneous and misleading summary of applicable law.

Presumably, Defendants' Reply Brief will include a belated citation to Section 14.8 of the RIGP text. This states: "Any action brought in state or federal court for the alleged wrongful denial of Plan benefits or for the alleged intentional interference with

any Plan rights to which a person is or may become entitled under ERISA must be commenced within one year after the cause of action accrued." (Emphasis added) There are several reasons why this clause just doesn't support Defendants' position here. As previously noted, it does not change the date when Plaintiff's cause of action accrued. Also, this text does not address the claims Plaintiff is making. Plaintiff is seeking "to recover benefits due to him under the terms of the plan" and "to enforce his rights under the terms of the plan." If Xerox had intended to limit those easily described statutory remedies, it should have drafted language that clearly did so. Section 14.8 does not address those remedies. Instead, it deals with "wrongful denial of Plan benefits" and with "intentional interference with any Plan rights." Finally, there is no evidence that Testa was ever provided a copy of the Plan text containing this limitation rule that he allegedly agreed to.

B. The RIGP's One Year Statute of Limitations Is Manifestly Unreasonable and Unenforceable. Defendants appropriately acknowledge that a contractual shortening of the statute of limitations is not enforceable if it is manifestly unreasonable. In evaluating what is unreasonable, the court should bear in mind that no RIGP Member actually participated in any sort of negotiation or drafting of the "contractual" limitation. This is an entirely different situation from a clause included in a bilaterally prepared contract. Moreover, the SPD's statement is incredibly aggressive. Its principal focus does not appear to be contractual benefits claims at all, but rather statutory claims regarding interference with ERISA-protected rights. See ERISA §510; 29 U.S.C. §1140 (addressing "Interference with Protected Rights"). Since there is no authority suggesting that the right to enforce such ERISA laws can be circumscribed in this manner, Section 14.8 is invalid.

Burke, supra, cited by Defendants, affirmed a District Court decision. The District Court decision includes a discussion of the time span involved in administrative claims procedures involved under ERISA. That discussion concludes that, since the potential claims procedure spans 450 days, a three year contractual limitations period still leaves the plaintiff with a period of years to bring a claim to follow through on the administrative challenge. *Id.* at 550-551. That discussion begs the question of just how short a valid "contractual" provision can be (especially under protective legislation like

ERISA) before it becomes unconscionable and unenforceable. Two years? One year? A week? Even if the contractual period is applied to a circumstance where the plaintiff may already have representation (i.e., a formal benefit claim), the ability of the plan sponsor to dictate a shortened period cannot be unlimited. There is nothing in *Burke* (or in any other authority cited by Defendants or known to Plaintiff) that justifies a one year period in lieu of the normal six years (particularly if the period starts to run while a formal claims procedure is under way).

Burke involved a contractual three year limitations period. The parties in that case did not contest that such three year provision applied. *Id*. at 78. Significantly, the court also went out of its way to comment that the three year provision was permissible <u>because</u> it was longer than the provision that otherwise would have applied to the claim in that case (related to group health benefits) under New York law. *Id*. at 78.n.1.

The one year provision in this case is manifestly unreasonable and unconscionable. The clear goal of such a period is just to lay a trap for unwary Plan Members. It should not be given effect.

<u>POINT VI: PLAINTIFF'S THIRD AND FOURTH CLAIMS STATE VALID AND TIMELY CAUSES OF ACTION</u>

Defendant Becker has explicit fiduciary responsibilities both under ERISA and under the RIGP. Defendants' motion to dismiss is full of formulaic arguments contending that every claim brought under ERISA Section 502(a)(3) (29 U.S.C. §1132(a)(3)) is merely another way to seek benefits under Section 502(a)(1)(B). Having brought valid claims for such benefits (in the first and second claims), Plaintiff does not need an additional claim simply to recover such benefits. The third and fourth claims are seeking relief of a different sort.

The Complaint alleges that Becker is failing to perform his fiduciary responsibilities as required by the RIGP and ERISA. Both *Miller* and *Frommert 2006* made it as clear as possible that he had no leg to stand on in applying the phantom account, but he persists in doing so even after this court suggested that this "sounds like contempt." For the obvious purpose of favoring his employer over his beneficiaries, the

Plan Administrator is arrogantly imposing all possible roadblocks to such beneficiaries' recovery of rightful benefits.

Section 502(a)(3)(B) explicitly authorizes a civil action "to obtain other appropriate equitable relief . . . to enforce any provisions of this title or the terms of the plan." The facts presented here involved a fiduciary who is amply demonstrating that he has no intention to properly perform his fiduciary duties or to comply with laws applying to the RIGP. The clear goal is to wear out all possible claimants by endless litigation. The delay and cost, unfortunately, is likely to be a successful strategy for frustrating scores of deserving beneficiaries. The question then is whether "appropriate equitable relief" includes issuance of an order – such as one to replace the fiduciary – to avoid this sort of abhorrent behavior.

The Supreme Court has repeatedly observed that on such matters ERISA draws heavily from the common law of trusts. The question then is whether the common law of trusts gives a court of equity powers to control a recalcitrant trustee. Of course it does. Certainly, Section 502(a)(3) of ERISA supports individual equitable relief in appropriate cases. *Varity Corp. v. Howe*, 516 U.S. 489 (2002). Specifically, removal of trustees is appropriate when the trustees have engaged in repeated or substantial violations of their fiduciary duties. *Katsaros v. Cody*, 744 F.2d 270, 281 (2d Cir.), *cert. denied*, 469 U.S. 1072 (1984); *Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 659 (4th Cir. 1996). This has now become such a situation.[10]

Defendants also seek to dismiss the third and fourth causes of action based on statute of limitations claims. The applicable statute of limitations with respect to these claims is stated in ERISA Section 413; 29 U.S.C. §1113.. A significant issue regarding the accrual of the cause of action is when the Plan Administrator's recalcitrance became so clear as to justify the court intervention sought in that claim. In any event, the particular allegations of these claims involve conduct in recent periods, by the Plan Administrator's persistence in applying the unlawful phantom account in the years after the *Miller* and *Frommert 2006* decisions. The breaches that are being considered here are

[10] *Conkright* did not involve a claim of bad faith conduct by the Plan's fiduciary. Testa's Complaint does. Indeed, such a claim is very likely to succeed. See the discussion at page 2 above.

continuing ones. A fiduciary who continues to ignore his obligations year after year is keeping the statute of limitations open by his repeated conduct.

POINT VII: PLAINTIFF IS ENTITLED TO THE RELIEF SPECIFICALLY GRANTED BY THE NINTH CIRCUIT IN *MILLER*

Defendants' make broad assertions suggesting that no remedy is available to Plaintiff (or apparently to anyone) under ERISA Section 502(a)(3). Clearly, the Ninth Circuit disagreed. On September 13, 2006, the Ninth Circuit issued a decision stating that all similarly situated RIGP Members are entitled to a benefit computation that offsets their two-period RIGP defined benefit by no more than the "benefit actually attributable to the Profit Sharing Plan distributions." When Plaintiff's Complaint was filed (and still today), the *Miller* case is pending on remand in the Central District of California (where the current case was filed). There is not yet a District Court order fully implementing this direction from the Court of Appeals. Unfortunately, the Plan Administrator's refusal to enter into a tolling agreement forced Plaintiff to file this case before that issue could be fully sorted out.

A plan participant has the same right as the Secretary of Labor to bring a civil action to enforce terms of ERISA and to enjoin violations of ERISA. Compare ERISA §§ 502(a)(3) and 502(a)(5); 29 U.S.C. §§ 1132(a)(3) and 1132(a)(5). There is no reason why plan-wide relief may not be granted in a case brought by individual plan members. *See Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987); *Meyer v. Brown and Root Const. Co.*, 661 F. 2d 369, 374 (5th Cir. 1981); *Blue Cross and Blue Shield Ass'n v. Shalala*, 1996 WL 636131 (D.D.C. 1996) at 2-3. Obviously, that would help to put this protracted litigation to an end. The Ninth Circuit has issued a ruling that clearly prohibits the Plan Administrator from using the phantom account approach he has used in this case and thus clearly provides a basis for relief by the Plaintiff. Unless the Plan Administrator has "clearly and unequivocally" established that he will defy this order, the statute of limitations on enforcing the order is not yet running.

CONCLUSION AND COMMENTS REGARDING ORAL ARGUMENT

Common sense and applicable authority dictate that an action "to recover benefits due" under a pension plan accrues when those benefits are due and applied for. The first cause of action here seeks such benefits determined under the valid terms of the RIGP. Defendants' violation of the law over a period of years does not earn them the right to continue to do so. The second cause of action, seeking benefits arising from Defendants' failure to provide adequate warnings in the ERISA-mandated SPD, similarly accrues when such benefits became due. Even if Defendants' overly aggressive one year statute applies and can be enforced, Plaintiff's complaint was timely.

In an order issued June 1, 2010, this Court canceled the previously scheduled oral argument and stated that it would reschedule oral argument only if necessary. Of course, the principal factor determining whether to hold such an argument is whether the court believes it would be helpful to the court's evaluation of relevant issues. If so, Plaintiff's counsel would be happy to come to Rochester for that purpose. However, another factor that ought to be considered is the degree of inconvenience to the parties. This case was filed in the Central District of California, where Plaintiff worked and resided and where Plaintiff's counsel is located. One has to wonder whether part of the Plan Administrator's "strategy" in these cases is to frustrate RIGP Members' attempts to obtain an appropriate remedy by making the process inappropriately expensive and cumbersome for his beneficiaries.

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