UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BRUCE D. KUNSMAN, et al.,

Plaintiffs,

v.

SALLY L. CONKRIGHT, et al.

Defendants.

C. A. No. 08-CV-6080(DGL)

PLAINTIFF JOSEPH MCNEIL'S SUPPLEMENTAL MEMORANDUM PURSUANT TO DECEMBER 1, 2011 ORDER REQUESTING ADDITIONAL INFORMATION RELATING TO STATUTE OF LIMITATIONS DEFENSE

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PRELIMINARY STATEMENT

Plaintiff Joseph McNeil ("Mr. McNeil" or "Plaintiff") respectfully submits this memorandum to respond to this Court's December 1, 2011 Order seeking additional information concerning Defendants' statute of limitations defense.

PROCEDURAL BACKGROUND

The *Kunsman* Action was filed on February 21, 2008 (Doc. 1[1]), on behalf of a group of plaintiffs, including Mr. McNeil, who alleged that the defendant administrators of the Xerox Corporation ("Xerox") Retirement Income Guarantee Plan ("the Plan" or "RIGP") violated the Employee Retirement Income Securities Act ("ERISA") in its application of the so-called phantom account offset to reduce the benefits due under the Plan. The Amended Complaint (Doc. 4) asserts claims for denial of benefits under ERISA (Count I), for breach of fiduciary duty under ERISA (Counts II and III), and for conspiracy to commit fraud (Count IV).

On June 10, 2008, Defendants moved to dismiss the claims of the *Kunsman* Plaintiffs (Doc. 6), including that of Mr. McNeil, arguing, *inter alia*, that it was barred by the applicable statute of limitations. On August 1, 2008, Plaintiffs opposed the motion (Doc. 10) and a reply was filed by Defendants on August 18, 2008 (Doc. 11). A hearing on Defendants' motion to dismiss was held on February 4, 2009 (Doc. 19).

Attorney Robert Jaffe ("Mr. Jaffe"), now deceased, initially represented Mr. McNeil in this action (Doc. 2). On February 3, 2009, new counsel appeared for Mr. McNeil (Doc. 15), and moved to stay this proceeding pending a decision on Mr. McNeil's contemporaneous motion to intervene in *Frommert, et al. v. Conkright, et al.*, C.A. No. 00-CV-06311(DGL) (W.D.N.Y.) (the "*Frommert* Action") to assert class claims. *Frommert* Docs. 167, 168, 179.[2] By order dated

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[1] Citations are to the document number on the ECF docket in this case.

[2] Citations are to the document number on the ECF docket in the *Frommert* Action.

November 17, 2011, this Court denied Mr. McNeil's motion to intervene, stating that he should litigate the issues raised in the intervention complaint in the *Kunsman* Action instead. *Frommert* Doc. 237, at 23-24. Among the issues raised in the intervention complaint that are not addressed in the Amended Complaint is whether Defendants are obligated under ERISA to treat all similarly situated plan participants alike. *See, e.g., Frommert* Doc. 167, Ex. A at ¶¶35, 44.

By order dated December 1, 2011 (Doc. 47), this Court sought supplemental briefing on Defendants' statute of limitations defense. Specifically, the Court sought clarification on:

- whether this Court can, as a matter of law, from the face of the complaint, determine at what point the plaintiffs had actual knowledge of Defendants' alleged breach of their fiduciary duty;

- whether Mr. Jaffe's actual knowledge of the alleged breach of fiduciary duty which he acquired during his representation of the *Frommert* Plaintiffs can be imputed to the *Kunsman* Plaintiffs;

- whether the Court can determine from the facts alleged in the Amended Complaint when the last alleged act constituting a part of the breach occurred;

- whether the plaintiffs have sufficiently pleaded fraud or concealment to warrant the application of limitations period of six years from the date of discovery to Plaintiffs' breach of fiduciary duty claims; and

- whether there is any significance to the fact that some, but not all of the *Kunsman* Plaintiffs sought to join the *Frommert* Action in November 2006, which this Court rejected because (a) they had not yet retired from Xerox and (b) the Second Circuit had already ruled that Defendants could not apply the phantom account offset to Plaintiffs, like Mr. McNeil, who were rehired before September 1, 1998.

Plaintiff McNeil submits this memorandum to respond to those questions and to notify this Court about new relevant authority bearing on the statute of limitations issues. For the reasons set forth herein, neither Mr. McNeil's fiduciary duty claim nor his denial of benefits claim is time-barred by the applicable statutes of limitation.

STATEMENT OF FACTS[3]

Mr. McNeil worked for Xerox from November 1972 until December 1980. When he left Xerox's employ at that time, he took a modest lump sum distribution of his accrued benefits in the RIGP of approximately $16,000. *See* Affidavit of Joseph McNeil ("McNeil Aff.") at ¶2. Mr. McNeil was rehired by Xerox in March 1998. *Id.* at ¶3.

Mr. McNeil never received a copy of the September 1, 1998 Summary Plan Description ("SPD"). *Id.* at ¶4. However, in each year from 1999 until 2007, Mr. McNeil received a "You & Xerox" Value Added Account Statement (the "Statements"). *Id.* at ¶5, and Exs. A-G. The Statements obfuscated and misled, and failed to provide Mr. McNeil with accurate information about his RIGP benefits. The Statements disclosed that his benefit at retirement is the greatest of the following three components: the RIGP formula, the Cash Balance Retirement Account (CBRA), or the Transitional Retirement Account (TRA), and reported those values as follows[4]:

Year	RIGP Formula Monthly Benefit	Current Value of CBRA (Lump Sum)	Current Value of TRA (Lump Sum)
1999	$769 per month	$2,478	$0
2000	$696 per month	$5,576	$0
2001	$1,067 per month	$11,378	$0
2002	$1,300 per month	$17,755	$0
2003	$1,364 per month	$22,566	$0
2006	$1,974 per month	$36,724	$0
2007	$2,241 per month	$43,198	$0

Id. at ¶¶5-6 and Exs. A-G.

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[3] Although the individual circumstances of Mr. McNeil and each of the other *Kunsman* plaintiffs are not pled in the Amended Complaint, these additional facts serve to show why it is highly inappropriate to dismiss this action on statute of limitations grounds where, as here, there is nothing in the complaint on its face that shows that Mr. McNeil's claim is time-barred. If this Court were of the view that this additional detail regarding each plaintiff's individual circumstances should be pled in order to respond to Defendants' affirmative statute of limitations defense, leave to amend should be freely granted under Fed. R. Civ. P. 15(a).

[4] Mr. McNeil has been unable to locate his statements for 2004 and 2005. *Id.* at ¶5.

With respect to the RIGP formula benefit, the Statements explained that "Your benefit will grow with your service and earnings. It will be reduced if you've had a prior distribution, received amounts before age 65 (or age 62 with 30 years of service) or from another Xerox plan, or are subject to a court order of Qualified Domestic Relations Order." The Statements did not explain how the RIGP formula benefit would be "reduced," or how the RIGP formula benefit offset would be calculated. Most importantly, nowhere in the Statements did Xerox disclose that if Mr. McNeil retired as of the Statement date that he would receive no retirement benefits whatsoever. *Id.*

On August 10, 2007, Mr. Jaffe sent a letter to the Plan Administrator on behalf of Mr. McNeil and others (*Id.* at ¶7 and Ex. H), requesting that their pension benefit upon retirement be calculated in accordance with the formula set forth in this Court's January 24, 2007 order in *Frommert v. Conkright*, 472 F. Supp. 2d 452 (W.D.N.Y. 2007) ("*Frommert II*").[5] The Administrator responded by letter dated August 15, 2007 (*Id.* at ¶8 and Ex. I) stating that the use of the phantom account offset was part of the Plan's design and correct under "the terms of the Plan." *Id.* The Administrator further stated that, because *Frommert II* was on appeal, that "until final resolution to the contrary, the plan provisions govern." *Id.* She further stated that that "ERISA requires that RIGP be administered strictly in accordance with its terms and further requires that RIGP be administered consistently to all plan participants – without exception." *Id.* She further explained that Mr. McNeil had a right to appeal the denial of benefits, that such an appeal must be made in writing within 60 days of the denial, and that "[i]n the event there is an adverse determination on appeal, your clients will have the right under ERISA to bring civil action." *Id.*

On August 20, 2007, Mr. Jaffe sent a second letter (*Id.* at ¶9 and Ex. J) appealing from

[5] As this Court is well aware, the formula set forth in *Frommert II* is no longer operative.

the Plan Administrator's August 15, 2007 decision, stating that the continued use of the phantom account offset for plan participants rehired prior to the issuance of the September 1, 1998 SPD was in contravention of the Second Circuit's decision in *Frommert v. Conkright*, 433 F.3d 254 (2d Cir. 2006) ("*Frommert I*"). In an August 23, 2007 letter (*Id.* at ¶10 and Ex. K) denying Mr. McNeil's administrative appeal, the Administrator wrote:

> [Y]ou refer to the *Frommert v. Conkright* decision rendered by the United States Court of Appeals for the Second Circuit. In view of the appeal of this case, ***until final resolution to the contrary, the plan provisions govern***.
>
> Accordingly, I have concluded that your clients' RIGP benefits are being calculated correctly and according to the terms of the Plan document. ERISA requires that the RIGP be administered strictly in accordance with its terms and ***further requires that the RIGP be administered consistently to all plan participants – without exception***. (emphasis added).

Id. He concluded the letter by stating: "This represents a final and binding decision under the Plan and you have no further appeal rights under ERISA…. Based on this adverse determination, ***you have the right under ERISA to bring civil action***." (emphasis added). *Id.*

Thus, Mr. McNeil had every reason to believe that his benefits would be calculated in the same manner as the plaintiffs in *Frommert* once the issues were finally resolved by the courts. *Id.* at ¶11. Mr. McNeil did not learn that he would be treated differently from the *Frommert* Plaintiffs until Defendants moved to dismiss the Amended Complaint in this action on statute of limitations grounds. *Id.* at ¶12. Indeed, nowhere in the administrative record (*Id.* at Exs. H-K) did Defendants remotely suggest that Mr. McNeil's claims might be time-barred despite Plan provisions that required the Plan Administrator to provide a written explanation that "clearly set[] forth … [t]he specific reason or reasons for the denial [with] [s]pecific reference to the provision(s) on which the denial is based." Affidavit in Support of Motion to Dismiss by Margaret A. Clemens ("Clemens Aff.") at Ex. A (Doc. 6-3), at 71-72. To the contrary, Defendants expressly stated that Mr. McNeil had "the right under ERISA to bring civil action,"

McNeil Aff. Exs. I and K, which he did on February 21, 2008.

Mr. McNeil retired on March 18, 2008. *Id.* at ¶13. Despite having worked an additional ten years, Mr. McNeil he did not receive any retirement benefits under the Plan. *Id.*

ARGUMENT

I. THE STATUTE OF LIMITATIONS CAN BE RAISED ON A MOTION TO DISMISS ONLY IF THE RUNNING OF THE STATUTE OF LIMITATIONS IS APPARENT ON THE FACE OF THE COMPLAINT.

Mr. McNeil asserts claims for breach of fiduciary duty (Counts II and III) and for denial of benefits (Count I) under ERISA. As explained in greater detail below, the breach of fiduciary duty claims and the denial of benefits claim are governed by different limitations periods. Defendants argue that, regardless which limitations period is applied, the ERISA claims are time-barred because "each of the plaintiffs received actual notice in 1998 that their retirement benefit under the [Plan] would be offset by the appreciated value of the prior distribution" when Xerox issued the September 1, 1998 SPD, which "described in sufficient detail how the offset provision would be applied." Doc. 6-5, at 14.

The statute of limitations is an affirmative defense that may be raised on a motion to dismiss only if the running of the statute is apparent from the face of the complaint. *See McKenna v. Wright*, 386 F.3d 432, 436 (2d Cir. 2004); *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 74-75 (2d Cir. 1998); *Alves v. Valeo Elec. Sys.*, 2009 WL 414049, *8 (W.D.N.Y. Feb. 18, 2009) (rejecting "affirmative defense of the statute of limitations [that] does not appear from the face of the complaint"); *Ello v. Singh*, 531 F. Supp. 2d 552, 568 (S.D.N.Y. 2007) ("Dismissal for failure to state a claim based on a statute of limitations is appropriate only if a complaint shows clearly that a claim is not timely."). For the reasons set forth below, Mr. McNeil's ERISA claims are not barred by the applicable limitations periods.

II. MR. MCNEIL'S BREACH OF FIDUCIARY DUTY CLAIMS ARE TIMELY.

In Counts II and III of the Amended Complaint, Mr. McNeil asserts claims for breaches of fiduciary duty. Under ERISA, as plan fiduciaries, Defendants were required to discharge their duties with respect to a plan solely in the interest of the participants and beneficiaries and

- for the exclusive purpose of providing benefits to participants and their beneficiaries;
- with the care, skill, prudence, and diligence; and
- in accordance with the Plan documents.

29 U.S.C. § 1104(a)(1)(A), (B) and (D). A fiduciary's duty of loyalty to plan participants encompasses a duty of disclosure as well. This duty naturally includes a prohibition against lying. *Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996). It also requires a fiduciary to deal fairly and honestly with plan beneficiaries, and imposes an affirmative duty on plan fiduciaries to provide complete and accurate information so that participants can make informed decisions regarding their retirement benefits. *See, e.g., Devlin v. Empire Blue Cross and Blue Shield*, 274 F.3d 76, 89 (2d Cir. 2001); *Ballone v. Eastman Kodak Co.*, 109 F.3d 117, 124 (2d Cir.1997); *Pocchia v. NYNEX Corp.*, 81 F.3d 275, 278 (2d Cir. 1996).

The statute of limitations for these claims is set forth in ERISA § 413 which provides that claims for fiduciary breaches under ERISA must be brought no later than the earlier of (1) six years after "the date of the last action which constituted a part of the breach or violation," or "in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation" or (2) "three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation." 29 U.S.C. § 1113. ERISA § 413 further provides 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." *Id.*

This Court's December 1, 2011 Order posed a series of questions concerning the

operation of both the three- and the six-year limitations periods set forth in ERISA § 413, 29 U.S.C. §1113. Neither limitations period precludes Mr. McNeil from prosecuting his breach of fiduciary duty claims.

A. <u>Mr. McNeil's Claims Are Not Barred by ERISA Section 413(2).</u>

ERISA § 413(2) provides that a cause of action for breach of fiduciary duty must be brought no later than "three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation." 29 U.S.C. §1113(2). The Court has posed two questions regarding the "actual knowledge" requirement:

- Can the Court determine "as a matter of law, from the face of the complaint, at what point the plaintiffs had actual knowledge of the defendants' alleged breach of their fiduciary duty"?
- Could Mr. Jaffe's actual knowledge of a fiduciary breach be imputed to Mr. McNeil, and the other plaintiffs in the *Kunsman* case?

The answer to both questions is **"No."**

1. The Court Cannot Determine As a Matter of Law From the Face of the Complaint, at What Point Mr. McNeil Had Actual Knowledge of the Fiduciary Breaches.

The Court cannot determine as a matter of law that Mr. McNeil had actual knowledge of the fiduciary violations more than three years prior to the filing of the complaint. As this Court correctly observed in its December 1, 2011 Order, the Second Circuit has expressly rejected a "constructive knowledge" standard for purposes of § 413(2), instructing instead that "plaintiffs must have had specific knowledge of the actual breach upon which they sued." *Caputo v. Pfizer, Inc.*, 267 F.3d 181, 193 (2d Cir. 2001). "[A] plaintiff has 'actual knowledge of the breach or violation' within the meaning of ERISA ... when he has knowledge of all material facts necessary to understand that an ERISA fiduciary has breached his or her duty or otherwise violated the Act." *Frommert*, 433 F.3d at 272, quoting *Caputo*, 267 F.3d at 193. "The 'actual knowledge' standard is a subjective one." *Stavola v. Ne. Utilities*, 453 F. Supp. 2d 584, 590 (D.

Conn. 2006); *see also McConnell v. Costigan*, 2002 WL 313528, **8-9 (S.D.N.Y. Feb. 28, 2002) (employing subjective analysis to determine whether plaintiff had actual knowledge). Therefore, as general matter, whether Plaintiffs "had actual knowledge triggering the three-year statute under 413(2) cannot be resolved on a motion pursuant to 12(b)(6)." *Schultz v. Texaco Inc.*, 127 F. Supp. 2d 443, 450 (S.D.N.Y. 2001).

Here, in order to establish that Mr. McNeil had actual knowledge of the fiduciary violation, Defendants would have to establish from the face of the pleadings: (1) that Mr. McNeil knew that Defendants would apply the phantom account offset to reduce his RIGP formula benefit; (2) that Mr. McNeil knew that the Plan did not permit Defendants to apply the phantom account offset to reduce his RIGP formula benefit; and (3) that Mr. McNeil knew that Defendants' communications with him concerning his RIGP benefits were not accurate.[6]

As the Second Circuit held in *Frommert I*¸ when it rejected this Court's findings that the plaintiffs' claim for breach of fiduciary duty was untimely:

> The flaw with the district court's conclusion is that the plaintiffs' claim for breach of fiduciary duty is not premised solely on the defendants' adoption of the phantom account; rather, it is based on allegations that the defendants made ongoing misrepresentations about the origins of the phantom account in an effort to justify its usage. ***As a result, learning the manner in which the phantom account functions was not sufficient to provide "actual knowledge" that the breach of fiduciary duty had occurred***.

433 F.3d at 272 (emphasis added).

[6] *See, e.g, Stavola*, 453 F. Supp. 2d at 590 (defendant must show that plaintiffs "knew not only of the relevant events that occurred, but also that those events supported a claim for breach of fiduciary duty or violation under ERISA."); *Suozzo v. Bergreen*, 2002 WL 1402316, *9 (S.D.N.Y. June 27, 2002) (plaintiff did not have actual knowledge of fiduciary breach until he knew that allegedly void plan amendment would be applied to him); *Bilello v. JPMorgan Chase Ret. Plan*, 649 F. Supp. 2d 142, 165 (S.D.N.Y. 2009) ("Since the earliest that the plaintiff could have discovered that the Plan Administrator's alleged failures actually had a negative impact on his pension benefit by causing a wear-away of his pension benefits was upon receipt of the calculation of his benefits in September 2007, this claim is timely.").

Defendants have argued that the September 1, 1998 SPD (Doc. 6-3) gave Mr. McNeil and the other *Kunsman* plaintiffs actual knowledge of the fiduciary breaches. Doc. 6-5, at 14. Even if Mr. McNeil received a copy of the 1998 SPD (which is a matter in dispute, McNeil Aff. at ¶4), the SPD did not give him actual knowledge that his ERISA rights had been impaired for two reasons:

First, in *Frommert I*, the Second Circuit held that the 1998 SPD did not operate to amend the Plan for employees like Mr. McNeil, who were rehired prior to the 1998 amendment. 433 F.3d at 268-69. Thus, Mr. McNeil had no reason to believe that his rights had been impaired by the 1998 Amendment, particularly in light of Defendants' misrepresentations about Mr. McNeil's benefits in his Statements. McNeil Aff. at ¶¶5-6 and Exs. A-G.

Second, the 1998 SPD was ineffective to give Mr. McNeil actual knowledge of the fiduciary breaches for the same reason that the Second Circuit in *Frommert I* held that the 1995 Benefits Update did not give the *Frommert* Plaintiffs actual knowledge that their ERISA rights had been impaired. As the Second Circuit explained:

> Although the 1995 Benefits Update may have provided notice that the plaintiffs' benefits would be lower than they expected, it certainly did not inform the plaintiffs that the phantom account was being applied in contravention of the Plan's terms. Thus, while the Benefits Update may have heightened the plaintiffs' concerns regarding their expected benefits, "it is not enough that [plaintiffs] had notice that something was awry; [plaintiffs] must have had specific knowledge of the actual breach of duty upon which [they sued]." Such knowledge of an actual breach could only come with disclosure that the defendants misrepresented the terms of the Plan in justifying the usage of the phantom account.

433 F.3d at 272-73.

Thus, this Court cannot determine as a matter of law, from the face of the complaint, at what point Mr. McNeil had actual knowledge of the defendants' breach of their fiduciary duty.

2. *Mr. Jaffe's Knowledge Cannot Be Imputed to Mr. McNeil.*

Mr. Jaffe's knowledge of a fiduciary breach cannot be imputed to Mr. McNeil until he became a client of Mr. Jaffe. Any knowledge acquired by Mr. Jaffe during his representation of

the *Frommert* Plaintiffs cannot be attributed to Mr. McNeil prior to that date because Mr. Jaffe was not acting as Mr. McNeil's agent prior to that time. As the court held in *Immunocept, LLC v. Fulbright & Jaworski, LLP*, 504 F.3d 1281 (Fed. Cir. 2007): "Knowledge or notice to an attorney ***acquired during the existence of the relationship of attorney and client, and while acting within the scope of his authority***, is imputed to the client." *Id.* at 1287.

Nothing in *Veal v. Geraci*, 23 F.3d 722 (2d Cir. 1994) holds to the contrary. In *Veal*, Veal's attorney acquired the knowledge of the misconduct that gave rise to Veal's claim against Geraci at the time that he was representing Veal. The Court observed:

> In the present case, it is undisputed that Veal's attorney attended both the first state-court *Wade* hearing at which Rene testified and the February 8, 1988 hearing at which Geraci disclosed the details of the events on which Veal now relies for his cause of action. Having heard that testimony, Veal's attorney knew that Geraci had caused Rene to be in a position to see Veal in custody and in isolation just prior to viewing him in the lineup. Veal's attorney quickly realized that the testimony revealed a potential tainting of the lineup identification in violation of Veal's constitutional rights, and he made a motion challenging the lineup identification on precisely that ground on February 10, 1988. Thus, whether or not Veal himself heard Geraci's testimony, Veal's attorney plainly had knowledge of the conduct giving rise to Veal's present claim, and under traditional principles of agency the attorney's knowledge must be imputed to Veal. Accordingly, Veal had reason to know of the conduct giving rise to his present claim no later than February 8, 1988, the date on which his counsel knew of it, prompting counsel to move, on Veal's behalf, to suppress the lineup identification.

Id. at 725. Under these circumstances an attorney's knowledge could be imputed to his client. *Id.*

Here, by contrast, any knowledge acquired by Mr. Jaffe between 2001 and 2003 cannot be imputed to Mr. McNeil because Mr. Jaffe was not representing Mr. McNeil between 2001 and 2003 when he was prosecuting the *Frommert* Action on behalf of a different group of plaintiffs.

In this regard, the decision in *L.I. Head Start Child Development Services, Inc. v. Economic Opportunity Commission of Nassau County, Inc.*, 558 F. Supp. 2d 378 (E.D.N.Y. 2008) is instructive. In *L.I. Head Start*, the record was replete with evidence of the actual knowledge of plaintiffs' counsel of the ERISA violations that he acquired during a prior ERISA

action. *Id.* at 395-98. Specifically, "[d]uring discovery in the prior action, the defendants sent plaintiffs' counsel numerous documents which contributed to his 'actual knowledge' of both the alleged pleaded and the non-pleaded violations." *Id.* at 396. Nevertheless, the Court held that "knowledge of plaintiffs' counsel is not imputed to the plaintiffs in the class." *Id.* at 398.

Similarly, the court held in *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992 (E.D.N.Y. 2006), *reversed on other grounds sub nom. McLoughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), that although "[i]n some cases it is appropriate for an attorney's knowledge to be imputed to the client, ***particularly where there is a single attorney and a single known client in an ongoing relationship*** ... [p]rinciples of agency applicable in the single-attorney single-client relationship cannot be transposed into the class action context…." *Id.* at 1072. In so holding, the court posed the following question which is equally relevant here: "How can a smoker who was not even aware when he purchased a pack of cigarettes years ago that any of the class attorneys existed be assumed to have known what the attorneys knew?" *Id.* The court went on: "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Id.* Thus, the court held "The knowledge of class counsel cannot be imputed to the members of the class for the purposes of determining whether this suit is barred by the statute of limitations. *Id.*

For the same reasons, any knowledge that Mr. Jaffe acquired during his representation of the *Frommert* Plaintiffs cannot be imputed to Mr. McNeil and the other *Kunsman* Plaintiffs under established principles of agency.

B. Mr. McNeil's Claims Are Not Barred by ERISA Section 413(1).

ERISA § 413(1) provides an alternative six-year limitations period which runs from "the date of the last action which constituted a part of the breach or violation," or "in the case of an

omission, the latest date on which the fiduciary could have cured the breach or violation" subject to the statute's "fraud or concealment" exception. 29 U.S.C. § 1113(1). As this Court observed in its December 1, 2011 Order (Doc. 47 at 4):

> If the last such 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 on the part of defendants, which would give the plaintiffs six years from the date of discovery of the breach to file suit.

The Court then posed a number of questions concerning the operation of this provision:

- Can the Court determine, from the face of the complaint, when the last alleged act constituting a part of the breach occurred?
- Have the *Kunsman* Plaintiffs sufficiently pleaded fraud or concealment to warrant the application of a six-year period from the date of discovery?

The answer to the first question is **"No"** and the answer to the second question is **"Yes."**

1. *This Court Cannot Determine As a Matter of Law that the Last Act Which Constituted a Breach or Violation Took Place More Than Six Years Before this Lawsuit Was Filed.*

As explained above, Plaintiff's breach of fiduciary duty claim is multifaceted. It encompasses not just Defendants' adoption of the phantom account but also its application to participants, such as Mr. McNeil, who were rehired prior to September 1, 1998, in violation of the Plan documents. It also encompasses allegations that Defendants made ongoing misrepresentations about the phantom account offset. The Amended Complaint alleges that the breaches were continuing in nature, in that Defendants "continu[ed] to apply the phantom account offset" at the time the Amended Complaint was filed to significantly reduce retirement benefits under the 1989 restatement, which as the Second Circuit in *Frommert I* held, applies to employees rehired before September 1, 1998. Amended Complaint at ¶¶115, 119. The Amended Complaint further alleges that Defendants failed to disclose to Xerox rehires material information relating to the calculation of their pension benefits. *Id.* at ¶118. It further alleges

that Defendants made material misrepresentations in personal benefit statements regarding the implementation of the phantom account, and that in response to administrative claims Defendants stated that the phantom account offset was authorized under the Plan, when it was not. *Id.* at ¶¶129-30. Thus, it is impossible to tell from the face of the complaint that the last alleged act constituting the fiduciary breach occurred more than six year prior to February 2008.

Indeed, as Mr. McNeil maintained in his proposed intervention complaint (*Frommert* Doc. 167, Ex. A at ¶¶35, 42-45), the unlawful conduct has not yet ceased. Under ERISA, Defendants "have a statutory obligation, as well as a fiduciary responsibility" (which they acknowledged in the letters denying Mr. McNeil's claim and his appeal)[7] to treat similarly situated plan participants alike. *See In re Citigroup Pension Plan ERISA Litig.*, 241 F.R.D. 172, 179-80 (S.D.N.Y. 2006); *Thompson v. Linvatec Corp.*, 2007 WL 1526418, *5 (N.D.N.Y. May 22, 2007); *Humphrey v. United Way of Tex. Gulf Coast*, 2007 WL 2330933, *8, *10 (S.D. Tex. Aug. 14, 2007) (certifying class under Rule 23(b)(1)(a) "because of the statutory obligations under ERISA to treat all class members alike."). Because Defendants continue to apply the phantom account offset to the *Kunsman* Plaintiffs, but in light of *Frommert I* no longer apply it to the *Frommert* Plaintiffs, Defendants continue to breach their fiduciary duties under ERISA.

2. *Plaintiffs Have Sufficiently Pled Fraud or Concealment to Warrant the Application of a Six-Year-from-Discovery Limitations Period.*

Since the answer to the first question is "No," the Court need not reach the second question. However, even if it needed to reach the second question, there is ample evidence to support the application of the "fraud or concealment" exception set forth ERISA § 413. The contours of the "fraud or concealment" exception were explained by the Second Circuit in

[7] *See* August 15, 2007 letter (McNeil Aff. Ex. I) and August 23, 2007 letter (McNeil. Aff. Ex. K) ("ERISA requires … that RIGP be administered consistently to all plan participants – without exception").

Caputo, 267 F.3d at 189, where the court declined to follow its sister circuits in fusing the phrase "fraud or concealment" into the single term "fraudulent concealment." The Second Circuit held instead:

> Giving each term independent significance (as one must when terms are used in the disjunctive unless the context dictates otherwise, the six-year statute of limitations should be applied to cases in which a fiduciary: (1) breached its duty by making a knowing misrepresentation or omission of a material fact to induce an employee/beneficiary to act to his detriment; or (2) engaged in acts to hinder the discovery of a breach of fiduciary duty.

Id. at 190.

When the "fraud or concealment" provision applies, it does not "'toll' the otherwise applicable six-or three-year statute of limitations established in § 413(1) or (2); rather, it prescribes a separate statute of limitations of six years from the date of discovery." *Id.* at 189.

Here, Plaintiffs allege that Defendants made false statements and omitted material information regarding Plan benefits in communications with Mr. McNeil and the other *Kunsman* Plaintiffs. Amended Complaint at ¶¶129-30. Those misrepresentations and omissions include making false and misleading statements in personal benefit statements about the implementation of a phantom account offset for which there was no authority to do so under the 1989 Plan amendment, and making false and misleading statements in response to administrative claims that the phantom account offset was part of the Plan. *Id.*

With respect to Mr. McNeil, the record shows that Xerox never provide him with the SPD but provided him with misleading statements (McNeil Aff. Exs. A-G) that hindered his ability to discover that Defendants had breached their fiduciary duties. In addition, Defendants represented to Mr. McNeil that his benefits had been "calculated correctly and according to the terms of the Plan," when that was not the case, and lulled Mr. McNeil into not suing by representing to him during the administrative appeals process that Xerox would treat him like the

Frommert Plaintiffs once the issues in *Frommert* were finally resolved. *Id.*, Exs. I and K.[8] As discussed in the following section, these reasonable beliefs were reinforced by statements to the same effect made by the Court, which Defendants made no effort to correct. Such affirmative conduct on the part of Defendants is sufficient to trigger the six-year from discovery limitations period.

C. <u>This Court's Rulings Reinforced Plaintiffs' Beliefs that Phantom Account Offset Could Not Be Applied to Employees Who Were Rehired Prior to September 1, 1998.</u>

Finally, this Court noted in its December 1, 2011 Order that several of the *Kunsman* Plaintiffs sought to join the *Frommert* Action in November 2006 by way of a motion for leave to file an amended complaint adding them to that action. *Frommert* Doc. 132. This Court further observed that in *Frommert II*, it stated that "[t]o the extent that any of the proposed new plaintiffs have not yet retired from Xerox, I see no basis for adding them to this lawsuit," and that the Second Circuit's prior holding that the phantom account could not be applied to employees rehired prior to the issuance of the 1998 SPD "would certainly seem to foreclose defendants from utilizing the phantom account in calculating 'new' retirees' pension benefits." Doc. 47 at 5, (quoting *Frommert II*, 472 F. Supp. 2d at 467).[9] Subsequent to that decision, the Court was informed by Plaintiffs' counsel that after reviewing the Court's January 24 Decision and Order, the plaintiffs had decided to withdraw their motion to amend the complaint in *Frommert*. The Court therefore denied the motion to amend as moot. *Frommert* Doc. 139.

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[8] To the extent these facts are not pled in the current complaint, Mr. McNeil should be granted leave to amend to raise them pursuant to Fed. R. Civ. P. 15(a).

[9] In another place in its opinion, this Court similarly stated: "Xerox may not lawfully use the phantom account mechanism, as to either the named plaintiffs in this lawsuit, ***or anyone else who was rehired by Xerox prior to 1998***, after having previously received a distribution of pension benefits." *Frommert II*, 472 F. Supp. 2d at 456-57 (emphasis added). *See also Frommert I*, 433 F.3d at 263 (2d Cir. 2006) ("phantom account may not be applied to employees rehired prior to the issuance of the 1998 SPD").

In light of these facts, the Court posed the following questions in its December 1, 2011 Order:

- What, if any, importance the Court should assign to the fact that at least some of the plaintiffs in *Kunsman* did attempt to bring, or join, ERISA claims in *Frommert*, roughly fifteen months before the *Kunsman* complaint was filed? Is that relevant to the limitations issue in *Kunsman*, and might it affect the outcome?

- Is it significant that the plaintiffs in *Frommert* later withdrew their motion to amend, in light of this Court's prior statements in that case indicating that it was unnecessary to add as plaintiffs anyone who had not yet retired from Xerox?

- Since only some, but not all, of the *Kunsman* plaintiffs were sought to be added in Frommert, should those two sets of *Kunsman* plaintiffs be treated differently for limitations purposes?

Mr. McNeil was not one of the plaintiffs who sought to intervene in the* Frommert *Action in November 2006, and any knowledge of those plaintiffs regarding any potential breach of fiduciary duty claims they may have had as of November 2006 cannot be imputed to him. However, even if their knowledge that their ERISA rights had been impaired could be imputed to Mr. McNeil, it would be of no moment since the *Kunsman* Action was filed less than three years after November, 2006.

The *Frommert II* decision is significant, however, in a number of respects. First, it reinforced the belief that the application of the phantom account offset to any employees rehired prior to September 1, 1998 violated the Plan and the expectation that any final determination regarding the legality of the phantom account offset would apply to all similarly situated plan participants, not just the *Frommert* Plaintiffs. Second, it led plan participants, like Mr. McNeil, to reasonably believe that there was no urgency to suing. Indeed, the Court's order in *Frommert II* implied that it would be premature for them to sue before they had retired and that it would be unnecessary to do so because the Second Circuit's holding in *Frommert I* would apply to them.

As set forth above, these expectations were reinforced by Defendants when they advised Mr. McNeil and the other *Kunsman* plaintiffs that "ERISA requires … that RIGP be

administered consistently to all plan participants – without exception," and that the phantom account offset would be applied "until final resolution to the contrary." McNeil Aff., Exs. I and K. Under these circumstances, Mr. McNeil and the other *Kunsman* Plaintiffs reasonably believed that there was no reason to rush and bring their own suit.

III. MR. MCNEIL'S DENIAL OF BENEFITS CLAIM WAS BROUGHT WITHIN THE APPLICABLE LIMITATIONS PERIOD.

In Count I of the complaint, Mr. McNeil also asserts a claim for denial of benefits under ERISA § 502(a)(1)(b), 29 U.S.C. §1132(a)(1)(b). Although the December 1, 2011 Order does not expressly address that claim, Mr. McNeil may proceed with this claim as well.

ERISA itself "does not prescribe a limitations period for 29 U.S.C. § 1132 actions to enforce rights to benefits." *Rotondi v. Hartford Life & Accident Group*, 2010 WL 3720830, *7 (S.D.N.Y. Sept. 22, 2010). Instead, "the applicable limitations period is that specified in the most nearly analogous state limitations statute." *Burke v. PriceWaterhouseCoopers LLP Long Term Disability Plan*, 572 F.3d 76, 78 (2d Cir. 2009). New York's six-year limitations period for contract actions, N.Y. C.P.L.R. § 213, is most analogous to § 1132 actions. *Burke*, 572 F.3d at 78. New York permits contracting parties to shorten a limitations period, however, if the agreement is memorialized in writing. *Burke*, 572 F.3d at 78 (citing N.Y. C.P.L.R. § 201). An ERISA plan's shorter limitations period will govern only if that period is reasonable, *Rotondi*, 2010 WL 3720830, at *7, and is disclosed to participants in the administrator's letter denying the claim benefits. *Novick v. Metro. Life Ins. Co.*, 764 F. Supp. 2d 653, 659-64 (S.D.N.Y. 2011).

Although state law provides the applicable limitations period, federal common law determines when the cause of action accrues. *See Guilbert v. Gardner*, 480 F.3d 140, 149 (2d Cir. 2007). When the plan contains a limitations provision, a claim for wrongful denial of benefits under ERISA § 502(a)(1)(b) accrues: "(1) when benefits are initially denied, or (2) when administrative remedies have been exhausted." *Burke*, 572 F.3d at 79.

Defendants' statute of limitations defense to Mr. McNeil's denial of benefits claim must be rejected for four reasons: First, as a preliminary matter, Defendants waived any statute of limitations defense when the Plan Administrator failed to raise it in response to Mr. McNeil's claim for benefits or in response to his subsequent appeal from that denial. Second, the contractual one-year limitations period is inapplicable because Defendants failed to disclose it to Mr. McNeil in its response to Mr. McNeil's claim for benefits and to his subsequent appeal. Third, the cause action accrued on the date that the benefits were initially denied (August 15, 2007) or the date on which his administrative remedies were exhausted (August 23, 2007). Therefore, this lawsuit, brought on February 21, 2008, is timely whether the one-year or six-year limitation period applies. Finally, Mr. McNeil's claim is timely even under a "clear repudiation" standard.

A. Defendants Have Waived Any Statute of Limitations Defense to Mr. McNeil's Claim for Benefits.

Despite the requirements of the Plan, Defendants did not assert the lack of timeliness of Mr. McNeil's claim as a reason to deny him benefits. Rather, Defendants addressed Mr. McNeil's claim and appeal on their merits, and asserted other defenses (McNeil Aff., Exs. I and K), without mentioning the timeliness of his claim. Indeed, Defendants expressly stated in their letters that Mr. McNeil had "the right under ERISA to bring civil action." *Id.*, Ex. K. As a result, any statute of limitations defense with respect to Mr. McNeil's claim to recover benefits under ERISA §502(a)(1)(B), 29 U.S.C. §1132(a)(1)(B), has been waived because Defendants failed to raise it during the administrative review. *See Lauder v. First Unum Life Ins. Co.*, 284 F.3d 375, 380-82 (2d Cir. 2002) (ERISA plan administrator "is deemed, as a matter of law, to have intended to waive a defense to coverage where other defenses are asserted, and where the insurer possesses sufficient knowledge (actual or constructive) of the circumstances regarding the unasserted defense.").

Under similar circumstances, the court in *Shutts v. First Unum Life Insurance Co. of Am.*, 310 F. Supp. 2d 489, 494-95 (N.D.N.Y. 2004), held that the defendant "has waived its right to dispute the timeliness of [p]laintiff's filing of his notice of claim" where the defendant "fail[ed] to assert late notice as a ground for denying coverage." Likewise, in *Orgeron v. Moran Towing Corp.*, 1995 WL 708688, *3 (S.D.N.Y. Nov. 30, 1995), the court deemed an untimeliness defense was waived because defendants denied plaintiff's claim for benefits and upheld that denial on appeal on other grounds without citing plaintiff's lack of timeliness during the administrative review process. *See also Booth v. Hartford Life & Accident Ins. Co. of Am.*, 2009 WL 652198, **11-13 (D. Conn. Feb. 3, 2009) (citing *Lauder* and holding that defendant waived timeliness defense where defendant had actual or constructive notice that claim was not timely under the plan and did not raise it in administrative proceeding or in motion to dismiss); *Withrow v. Bache Halsey Stuart Shield, Inc.*, 2008 WL 1836696, **2-3 (S.D. Cal. Apr. 22, 2008) (refusing to permit discovery on limitations defense where administrator did not base its benefits denial on lack of timeliness).

B. <u>Mr. McNeil's Claim for Benefits Is Governed By a Six-Year Limitations Period.</u>

The Plan provides that a participant or beneficiary must bring any action for the alleged wrongful denial of benefits "within one year after the cause of action accrued." Doc. 6-3, at 73. The Plan does not define the term "accrued," but states that "[t]his is generally from the time one first knew or should have known of the alleged wrongful denial … or as otherwise determined by a court of law." *Id.*

Defendants maintain that Mr. McNeil's claim for benefits is governed by the one-year limitation provisions set forth in the Plan. Doc. 6-5, at 13. However, in their letters denying Mr. McNeil's initial claim for benefits and his appeal, Defendants advised Mr. McNeil that he had

"the right under ERISA to bring civil action," McNeil Aff., Exs. I and K, but in violation of ERISA regulations, they failed to disclose the applicable time limit for bringing a civil action after an adverse determination. Under these circumstances, the one-year limitations period set forth in the Plan is not enforceable, and Mr. McNeil was required to bring his claim within six years after the cause of action accrued.

The Southern District of New York recently addressed this question in *Novick*, 764 F. Supp. 2d at 660-64. The court carefully examined ERISA regulations and held that they required that the adverse determination letter state the limitations period for judicial review imposed by a summary plan description. *Id.* It further held that the defendant's letter denying benefits, which did not disclose the shortened limitations period, violated the Department of Labor's ("DOL") regulations governing ERISA, 29 C.F.R. § 2560.503-1.[10] *Id.* at 664. Under those circumstances, it ruled that New York's six-year limitations period applied to the action, and not the shortened limitations period set forth in the summary plan description. *Cf. Veltri v. Bldg. Serv. 32B-J Pension Fund*, 393 F.3d 318, 322-27 (2d Cir. 2004) (ERISA statute of limitations was equitably

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[10] DOL regulations require that "[e]very employee benefit plan ... establish and maintain reasonable procedures governing the filing of benefit claims, notification of benefit determinations, and appeal of adverse benefit determinations." 29 C.F.R. § 2560.503–1(b). The procedures are reasonable only if, *inter alia*, they comply with paragraphs (c) through (j). *Id.* § 2560.503–1(b)(1). Subsection (g) provides:

> [T]he plan administrator shall provide a claimant with written or electronic notification of any adverse benefit determination ... set[ting] forth, in a manner calculated to be understood by the claimant ... (iv) A description of the plan's review procedures and the time limits applicable to such procedures, including a statement of the claimant's right to bring a civil action under § 502(a) of the Act following an adverse benefit determination on review.

Id. § 2560.503–1(g)(1). Similarly, Subsection (j) states:

> In the case of an adverse benefit determination, the notification shall set forth, in a manner calculated to be understood by the claimant ... (4) A statement describing any voluntary appeal procedures offered by the plan ... and a statement of the claimant's right to bring an action under 502(a) of the Act.

Id. § 2560.503–1(j).

tolled where defendants failed to comply with the regulatory requirement that they provide notice to beneficiaries of the right to bring an action in court challenging a denial of benefits).

For the same reasons, the six-year limitations period is applicable here, and not the shortened one-year limitations period set forth in the SPD.

C. Mr. McNeil's Claim For Benefits Did Not Accrue Until August 2007 at the Earliest, and Is Therefore Timely Whether a One-Year or Six-Year Statute of Limitations Is Applied.

In their Memorandum in Support of its Motion to Dismiss, Defendants rely upon *Carey v. IBEW Local 363 Pension Plan*, 201 F.3d 44, 47 (2d Cir. 1999) and *Miles v. New York State Teamsters Conference Pension & Retirement Fund Emp. Pension Benefit Plan*, 698 F.2d 593, 598 (2d Cir. 1983), and argue that Plaintiff's claim for benefits "accrue[d] 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." Doc. 6-5 at 14. *Burke*, which was decided after Defendants' motion to dismiss had been briefed and argued, ***expressly rejected*** the clear repudiation accrual standard set forth in *Miles*, as inapplicable to a benefits claim when the ERISA plan contains a limitations period. 572 F.3d at 79, n. 2.

Instead, as held in *Burke*, where, as here, the plan contains a limitations period, the benefits claim accrues either: "(1) when benefits are initially denied, or (2) when administrative remedies have been exhausted." *Id.* at 79 (internal citations omitted). Thus, Mr. McNeil's claim did not accrue until August 15, 2007 at the earliest. Under either standard, Mr. McNeil's claim is timely whether the one-year or the six-year limitations period is applied.

However, even if the "clear repudiation" standard advocated by the Defendants (Doc. 6-5 at 14; Doc. 11 at 1-4) were applicable here, this Court could not determine, on the face of the complaint, that Mr. McNeil's benefits claim is time-barred. Defendants argue that the 1998 SPD put Mr. McNeil on notice that the phantom account offset would be applied to employees like

Mr. McNeil who were rehired prior to the SPD's issuance. Doc. 6-5 at 14; Doc. 11 at 3. In support of their argument, Defendants rely upon *Hirt v. Equitable Retirement Plan for Employees, Managers, and Agents*, 285 Fed. Appx. 802, 804 (2d Cir. 2008). Doc. 11 at 1-2.

Defendants' reliance on *Hirt* is misplaced. *Hirt* is a Summary Order that is not controlling and has no precedential effect. *See* Second Circuit Court of Appeals IOP 32.1.1. *Hirt* is also readily distinguishable. By its express terms, *Hirt* only applied to "plaintiffs' notice-based claims" asserted under ERISA § 204(h), 29 U.S.C. §1054(b)(1)(H), and not to a claim under ERISA § 502(a)(1)(b) for denial of benefits. 285 Fed. Appx. at 803. Moreover, *Hirt* "hinged upon the fact that the participants had received a summary plan description that 'unequivocally repudiated' a participant's entitlement to pre-amendment benefits by 'plainly and accurately' communicating the plan terms and distinguishing between pre- and post-amendment benefits." *Fenwick v. Merrill Lynch & Co., Inc.*, 570 F. Supp. 2d 366, 371 (D. Conn. 2008), *citing Hirt*, 285 Fed. Appx. at 804. As the court further explained in *Hakim v. Accenture United States Pension Plan*, 656 F. Supp. 2d 801 (N.D. Ill. 2009):

> The failure of the 1997 SPD to identify the differences between the pre- and post-amendment Plans precludes the Court from finding that the 1997 SPD unequivocally repudiated Plaintiff's entitlement to pre-amendment benefits. "Repudiate" means "to refuse to have anything to do with; to disown or cast off publicly." By not highlighting the distinctions between the old and new versions of the Plan, the SPD cannot be said to have cast off publicly the provisions of the old, pre-amendment Plan.

Id. at 820.

Here, there is nothing in the 1998 SPD that explained the distinction between pre- and post-amendment benefits, which would have put the plan participants on notice of the illegal cutback. Indeed, Defendants' position has been that the phantom account offset was applicable both before and after the 1998 SPD. Thus, the 1998 SPD – which the Second Circuit held was inapplicable to rehires like Mr. McNeil because of the lack of notice, *Frommert I*, 433 F.3d at 268-70 – did not amount to a clear repudiation of Mr. McNeil's claim. *See Custer v. S. New*

England Tel. Co., 2008 WL 222558, *4 (D. Conn. Jan. 25, 2008) (SPD, which did not put plan participants on notice of benefits reduction, did not trigger statute of limitations); *In re J.P. Morgan Chase Cash Balance Litig.*, 460 F. Supp. 2d 479, 484 (S.D.N.Y. 2006) (SPD, which failed to provide adequate notice regarding the decrease in their retirement benefit, did not trigger statute of limitations), *disapproved of on other grounds*, *Hirt v. Equitable Ret. Plan for Employees, Managers, and Agents*, 533 F.3d 102 (2d Cir. 2008); *Divito v. Pension Plan of Local 819 I.B.T. Pension Fund*, 975 F. Supp. 258, 265 (S.D.N.Y. 1997) (claim for benefits did not accrue on date of amendment), *abrogated on other grounds by Strom v. Goldman, Sachs & Co.*, 202 F.3d 138 (2d Cir. 1999).[11]

The earliest possible date that Defendants could argue there was a repudiation of his claim for benefits was when Mr. McNeil's administrative appeal was denied in August 2007, well within the statute of limitations whether a one-year or a six-year limitations period applied. *See Veltri v. Bldg. Serv. 32B-J Pension Fund*, 2003 WL 22705124, *3 (S.D.N.Y. Nov. 17, 2003), aff'd 393 F.3d 318 (2d Cir. 2004); *see also Miele v. Pension Plan of N.Y. State Teamsters Conference Pension & Ret. Fund*, 72 F. Supp. 2d 88, 99 (S.D.N.Y. 1999); *Kiefer v. Ceridian Corp.*, 976 F. Supp. 829, 843 (D. Minn. 1997).

However, even the August 2007 letters did not constitute the type of "clear" repudiation required by the Second Circuit. *See Carey*, 201 F.3d at 47-48 (under "clear repudiation"

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[11] *See also Romero v. Allstate Corp.*, 404 F.3d 212, 223 (3d Cir. 2005), ("when an ERISA plan is amended but the fact that amendment actually affects a particular employee or group of employees cannot be known until some later event, the cause of action of the employee will not accrue until such time as the employee knew or should have known that the amendment has brought about a clear repudiation of certain rights that the employee believes he or she had under the plan."); *Meagher v. Int'l Assoc. of Machinists and Aerospace Workers Pension Plan*, 856 F.2d 1418, 1422 (9th Cir. 1988) (rejecting the district court's ruling that the cause of action accrued when the inoperative amendment was passed or when plaintiff found out that the amendment was passed, and holding that plaintiff "was harmed only by the wrongful *application* of the amendment. Only then were his accrued benefits *decreased*.") (emphasis in original).

doctrine, a cause of action accrues "when there has been a repudiation by the fiduciary which is *clear* and made known to the beneficiary") (emphasis in original). At the same time Defendants denied Mr. McNeil's claim and appeal, they told Mr. McNeil that the phantom account provisions of the plan govern "until final resolution to the contrary" – hardly a clear and unequivocal repudiation. *See Larsen v. NMU Pension Trust of NMU Pension & Welfare Plan*, 902 F.2d 1069, 1073-74 (2d Cir. 1990); *Miles*, 698 F.2d at 598-99; *Hemphill v. Ryskamp*, 2008 WL 789894, *17 (E.D. Cal. Mar. 21, 2008) ("conditional denial" is not a "clear repudiation"); *Winnett v. Caterpillar, Inc.*, 496 F. Supp. 2d 904, 926-28 (M.D. Tenn. 2007) ("uncertain and conditional language" did not amount to clear and unequivocal repudiation), *rev'd on other grounds*, 553 F.3d 1000 (6th Cir. 2009).

Under these circumstances, Mr. McNeil's cause of action did not accrue until he retired in March 2008 and was told that he would not receive any benefits under the Plan. Thus, his claim for benefits under ERISA § 502(a)(1)(b) is timely.

Date: December 22, 2011

Respectfully submitted,

/s/ Michelle H. Blauner

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Certificate of Service

I, Michelle Blauner, hereby certify that the within document filed through the CM/ECF system will be sent electronically to all counsel of record, each of whom is registered participants as identified on the Notice of Electronic Filing.

/s/ Michelle H. Blauner
Michelle H. Blauner