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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN STOLARZ,

Plaintiff,

- vs. –

GORDON S. ROSEN, et al.

Defendants.

CIVIL ACTION NO.
03 CV 3083 (JGK)

DEFENDANTS' OPPOSITION TO PLAINTIFF'S SUBMISSION FOR DAMAGES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii.
PRELIMINARY STATEMENT	1.
COUNTER-STATEMENT OF FACTS	1.
The Accounting	5.
LEGAL ARGUMENT	6.
I. PLAINTIFF'S DAMAGES CLAIMS ARE NOT A FORM OF EQUITABLE RELIEF AND CANNOT EXCEED THE AMOUNT CURRENTLY IN THE TRUST FUND.	6.
II. PLAINTIFF'S DAMAGES CLAIMS ARE BARRED UNDER THE APPLICAPLE STATUTES OF LIMITATIONS.	16.
ERISA limitations pursuant to analogous state statutes	17.
ERISA limitations pursuant to 29 U.S.C. § 1113	19.
Applying the three-year statute of limitations	21.
III. PLAINTIFF'S CALCULATION OF THE AMOUNT DUE UNDER THE PLAN AS DAMAGES IS GROSSLY OVERSTATED.	23.
IV. THE COURT SHOULD NOT IMPOSE STATUTORY PENALTIES ON DEFENDANTS.	24.
V. THE COURT SHOULD NOT AWARD ATTORNEYS' FEES TO PLAINTIFF.	27.
CONCLUSION	29.

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TABLE OF AUTHORITIES

Page

CASES

AMEX Assurance Co. v. Caripides, 316 F.3d 154 (2nd Cir.2003).........14

Augienello v. Coast to Coast Fin. Corp., No. 01 Civ. 11608,
2002 WL 1822926 (S.D.N.Y. Aug.7, 2002) 13

Beck v. Pace International Union, -- U.S. --, 127 S.Ct. 2310,
75 USLW 4399 (June 15, 2007)...23

Black v. Bresee's Oneonta Dept. Store, Inc. Sec. Plan,
919 F.Supp. 597 (N.D.N.Y. 1996) 9

Bona v. Barasch, 2003 WL 1395932 (S.D.N.Y. 2003) 11, 12, 13, 14

Bowen v. Massachusetts, 487 U.S. 879 (1988) 8

Carey v. IBEW, 201 F.3d 44 (2d Cir. 1999) ....22.

Caputo v. Pfizer, Inc. 267 F.3d 181 (2d Cir. 2001) 20, 21

Coan v. Kaufman, 457 F.3d 250 (2d Cir. 2006) 7, 13

Chase Manhattan Bank v. Banque Intra, S.A., 274
F. Supp 496 (S.D.N.Y.1967) 7

Chambless v. Masters, Mates & Pilots Pension Plan,
815 F.2d 869 (2d Cir.1987)..27

Employers Ins. Co.. of Wausau v. Crouse-
Community Center, Inc., -- F.Supp.2d ----
2007 WL 1231696 (N.D.N.Y. 2007)..18

*Fisher v. J.P. Morgan Chase & Co.***,** 230 F.R.D. 370

(S.D.N.Y. 2005)..14, 15

*Fraser v. Lintas: Campbell-Ewald***,** 56 F.3d 722
(6th Cir. 1995) 8

Freund v. Washington Square Press, Inc., 34
N.Y.2d 379, 314 N.E.2d 419, 357 N.Y.S.2d 857

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=5d9f1498-439c-42b2-a4cb-f738c3de99da

(N.Y. 1974) 8

Geller v. County Line *Auto Sales, Inc.*, 86 F.3d 18
(2d Cir. 1996) 10, 11

Gerosa v. Sava, 329 F.3d 317 (2d Cir. 2003) 10, 11

Gidatex, S.r.L. v. Campaniello Imports, Ltd., 49 F.Supp.2d
298 (S.D.N.Y. 1999)..11

*Great-West Life & Annuity Ins. Co. v. Knudso*n,
534 U.S. 204 (2002)..11, 12

Harzewski, *supra*, *v. Guidant Corp*., --- F.3d ----,
2007 WL 1598097 (7th Cir. 2007) 15

Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999) 24

In re Methyl Tertiary Butyl Ether (MTBE)
Products Liability Litigation, WL 1601491
(S.D.N.Y. 2007) 18, 19

Kishter v. Principal Life Ins. Co., 186 F.Supp.2d
438 (S.D.N.Y.2002) 11, 13

Kulzer v. Pittsburgh-Corning Corp., 942 F.2d 122 (2d Cir.1991)...........18

Lockheed Corp. v. Spink, 517 U.S. 882 (1996) 23, 24

Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985)........................15

McDonald v. Pension Plan of NYSA-ILA Pension
Trust Fund, 320 F.3d 151 (2d Cir. 2003)................................25, 27

Mertens v. Hewitt Assocs., 508 U.S. 248 (1993) 7

Miles v. New York State Teamsters Conference
Pension Plan, 698 F.2d 593 (2d Cir.1983).................................17

Miller v. Fortis Benefits Ins. Co., 475 F.3d 516 (3d Cir. 2007).........16, 22

New York City Economic Development Corp.
v. T.C. Foods Import and Export Co.,
Inc., 11 Misc.3d 1087(A), 819 N.Y.S.2d 849,
2006 N.Y. Slip Op. 50754(U) 7

Nicholas v. Miller, 189 F.3d 191 (2d Cir.1999)..18

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=5d9f1498-439c-42b2-a4cb-f738c3de99da

Patterson-Priori v. Unum Life Ins. Co. of Am., 846 F.Supp. 1102 (E.D.N.Y.1994)..16, 19

*Scalamandre v. Oxford Health Plans (N.Y.), Inc***.,** 823 F.Supp. 1050 (E.D.N.Y. 1993)...9

Strom v. Goldman Sachs, 202 F.3d 138 (2d Cir. 1999) 10, 13

Van Brunt v. Rauschenberg, 799 F. Supp. 1467 (S.D.N.Y. 1992)..11

*Van Tu v. Koster***,** 364 F.3d 1196 (10th Cir. 2004)....................................18

STATUTES AND REGULATIONS

29 CFR 2550.404a-1 Investment Duties 24

29 CFR 2550.404c-1-ERISA 404(c) Plans...24

29 U.S.C. 1132(a)(3)..6, 10, 13, 16, 17

29 U.S.C. § 1113..17, 19, 20, 21, 22

Fed. R. Civ. P. 9(b)...20, 21

ERISA Section 404 6

ERISA Section 405 6

ERISA Section 406 .... 5, 6

ERISA Section 409...6, 15

ERISA Section 502...6, 7, 10, 13, 15

Internal Revenue Code Section 401(a) 2

N.Y. C.P.L.R. 21...17

N.Y. C.P.L.R. 214...17, 19

U.S. Treasury Regulation 1.411(d)(2)(b)(2)(i).......................................24

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http://www.jdsupra.com/post/documentViewer.aspx?fid=5d9f1498-439c-42b2-a4cb-f738c3de99da

TREATISES

22A *N.Y. Jur*. 2d Contracts § 515 8

3 E. Allan Farnsworth, *Farnsworth on Contracts* § 7.5
(2d ed.1998)..14

5 Corbin, *Contracts*, section 1002...8

11 Williston, *Contracts* (3d ed.) section 133...8

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PRELIMINARY STATEMENT

Defendants submit this memorandum of law and supporting supplementary accounting in opposition to plaintiff's submission seeking damages upon the granting of a summary judgment by Judge Koetl. As set forth below, plaintiff's demands are not legally sustainable, his fantastic reckoning of damages is wildly inappropriate, his demand for statutory penalties is based on no proof of bad faith and there is no legal basis for the high penalties or attorneys' fees demanded.

COUNTER-STATEMENT OF FACTS[1]

Plaintiff John Stolarz seriously mischaracterizes the facts relating to Airline Software Plan and the submission by defendant Airline Software on September 3, 2004 to the Internal Revenue Service (IRS) on September 3, 2004. This VCP filing was made as a supplement to the earlier submissions by defendant Airline Software Inc. ("Airline Software") pursuant to Revenue Procedure 2003-44, Part V, providing for anonymous submissions to correct and amend plans utilizing IRS guidance, resulting in the issuance of Revenue Procedure 2003-44 on June 23, 2004, with respect to the Plan. The reason for this submission was that certain of the information required by IRS was not available in 2004 and, that being the case, the information that was submitted was based on the employer's recollection and estimates when specific documented information was not available.[2]

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[1] The facts herein are based on the previous authenticated submissions by defendants (as a convenience to the Court, we have refiled the first Declaration of Stanley Rand), plus the Affidavit of Gordon Rosen and the Second Declaration of Stanley Rand submitted herewith.

[2] Most of Airline Software's records were shipped to Oklahoma in 2000, because of a planned merger between Airline Software and an Oklahoma company, Giro Inc. After the failure of this merger, the records were not properly managed, and many of the documents that IRS requested as part of the VCP determination process were not available. Consequently, IRS never issued any determination as to whether the Airline Software Plan was an ERISA qualified plan or not; Judge Koeltl's order, however, including a finding that no ERISA qualified plan ever existed at Airline.

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The Plan that was intended to be adopted was a Money Purchase Plan that was anticipated to qualify under the 1954 Internal Revenue Code (IRC) section 401(a) as further amended and which became part of the Internal Revenue Code of 1986. The Plan was established in 1985 with an effective date of December 31, 1985. The Plan was based on a prototype plan sponsored by the New England Life company which was encapsulated in a Summary Plan Description (SPD). All Airline Software employees were given a copy of the SPD.

Nine Airline Software employees elected to be covered by this Plan. Two such employees were Gordon Rosen and his wife, Gail Rosen. The Rosens later voluntarily withdrew as plan participants, pursuant to applicable provisions of the Internal Revenue Code (IRC) and ERISA.

As Airline Software's VCP filing states, in 1990 Airline Software experienced serious financial difficulties arising from major regulatory and economic changes affecting the aviation industry. As a result, by 1992 six of the original employees of Airline Software had resigned from the company. Airline Software submitted copies of Federal Tax Returns, Forms 1120 for 2001 through 2003 to IRS as part of its VCP filing. The 2003 Form 1120 shows that as at 12/31/2003 Airline Software had negative retained earnings – i.e., it bled money – in the amount of approximately ($530,000).

Page 7 of the VCP filing further states that by the end of 1992 all but two common law employees who were plan participants had resigned from Airline Software. There was one more resignation in 1993 thereby leaving only one employee who was a plan participant at Airline Software, namely, plaintiff John Stolarz. He stayed with Airline Software through November 6, 2001 the date of his resignation.

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As late as the time that the VCP filing was made, Airline Software did not have possession of the records needed to document contributions to the Plan's Trust Account. Those records were eventually obtained and formed the basis of Airline Software's Accounting which is dated June 17, 2005. The six common law employees of Airline Software who resigned through 1992/1993 were paid their accrued pension benefits.[3] The determination of their accrued benefits was calculated for each departing employee in accordance with the Description of Procedure that forms an integral part of the Accounting as of June 17, 2005. With respect of the six plan participants that resigned through 1992/1993 all accrued benefits were paid to these employees. Payments were made either out of Trust Assets or general assets of Airline Software, or a combination of both.

At the time the Plan was adopted, all employees, including plaintiff, were provided a copy of the Summary Plan Description, which explained in plain language the benefits available under the Plan and the procedures to be followed under the Plan. During Stolarz's employment with Airline Software, he contributed to the Plan by making voluntary deductions from his paycheck for as long as the Plan was in effect. For his own part, Stolarz had requested a calculation of his balance under the plan in 1997. This calculation, made on the same basis as those made for previous employees, was provided to him on December 18, 1997 (see Exhibit _ to Rosen Declaration). This schedule, again, was developed in the manner set forth in the Accounting of June 17, 2005 and consistent with the method used to calculate the benefit payout to all previous Airline Software employees. When provided with this calculation, Stolarz raised no issues as to how investment results were determined until the commencement of this cause of

[3] None of the six departing plan participants who received a lump sum distribution of their accrued benefits sought to roll over their distributions on a tax free basis to individual retirement accounts (IRA's).

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action. On or about February 16, 2001, Stolarz wrote a letter to Airline Software requesting an additional copy of the Summary Plan Description and a statement showing the balance in his Plan account. On or about February 19, 2001, Airline Software responded to Stolarz's letter and told him that his request was being forwarded to New England Life, which managed the Plan. Airline Software did not hear anything else from Stolarz afterwards regarding this request.

On or about November 6, 2001, Stolarz sent a letter to Airline Software stating that he was resigning immediately from his employment at Airline Software. In his letter plaintiff's only reference to the Plan was a brief statement that he was resigning in part because he claimed that Airline Software had failed to provide a statement of the balance in his account. Significantly, plaintiff did not claim that he was owed, nor that he had reason to believe he was owed, any benefits pursuant to the Plan. On or about November 16, 2001, Airline Software replied to plaintiff by stating that it was unaware of any failure to provide him a statement of the balance in his account and that it would look into any possible oversight.

Subsequent to plaintiff's resignation, Airline Software received a letter from plaintiff's counsel dated December 31, 2001, which asserted various legal claims that, it was alleged, plaintiff may have regarding his compensation under New York state law. The letter also requested information about plaintiff's Plan account, mentioning a "concern" about "possible under funding" of the Plan. Again, however, no claim was made that any benefits were owed to plaintiff.

On March 13, 2002, Airline Software received follow-up correspondence from plaintiff's counsel, which again mentioned issues that, it was claimed, may have arisen under New York state law. In this letter, no mention was even made of any concerns regarding the Plan. The next contact between Airline Software and plaintiff came more than one year later, in May 2003, and

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consisted of this instant action being filed by plaintiff against Airline Software.

Under 406(a)(1)(C) of ERISA fiduciary responsibility rules, if a participant does not direct investments of his account, the fiduciaries are duty-bound to invest the money of the plan participant "prudently." A common default investment under the law as it stood at the time of Stolarz's employment was a money market account. That was the investment approach that was used by Airline Software since 1985. Alternatively, all accrued benefit calculations of phantom accounts of plan participants were based on actual investments which consisted of money market funds and US Government Bond Funds, both of which fall within the default investment approach.

The second element of the VCP filing was that Airline Software's Plan was frozen in 1992 based on IRS Revenue Ruling 69-25 and in view of the significant reduction in the number of plan participant from seven to one during the period from 1985 to 1992. In essence, as of 1992, the plan became a plan to provide life insurance coverage to Stolarz, its sole plan participant.

The Accounting

The accounting submitted herewith, and which must be considered as part of any consideration of damages, is based on the historical approach that has been employed by Airline Software since the Plan was adopted in 1985. The accounting is based on the preparation of phantom schedules for each plan participant based on actual conservative investments to determine the participant's accrued benefit. Until March 28, 2002 when the Department of Labor (DOL) implemented regulations regarding the determination of when participant contributions to pension plans are late, this approach of calculating accrued benefits was not in violation of any DOL contribution standards. Further detail as to the factual, financial and legal bases of Airline

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Software's Supplemental Accounting are set forth in that Accounting, which is submitted herewith and incorporated herein, as well as in Section (III) below in the Legal Argument.

LEGAL ARGUMENT

(I) PLAINTIFF'S DAMAGES CLAIMS ARE NOT A FORM OF EQUITABLE RELIEF AND CANNOT EXCEED THE AMOUNT CURRENTLY IN THE TRUST FUND.

ERISA assigns fiduciaries specific duties, including the duties specified in sections 404, 405, and 406 of the statute. Section 409(a), 29 U.S.C. § 1109(a) (2000), makes fiduciaries liable for breach of those duties. Under section 409(a), a fiduciary is personally liable for restitution, and for "such other equitable or remedial relief as the court may deem appropriate," including removal of the fiduciary. Plaintiff claims that he can seek monetary relief under equity, presumably under ERISA Section 502(a)(3) (he does not say; this is discussed in greater detail *infra*). That section permits a participant, beneficiary, or fiduciary to sue "(A) to enjoin any act or practice which violates any provision of [ERISA] or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of [ERISA] or the terms of the plan...." 29 U.S.C. 1132(a)(3) (2000). Because section 502(a)(3) provides for "appropriate equitable relief" only, plaintiff cannot seek traditional damages under that section. See *Mertens v. Hewitt Assocs*., 508 U.S. 248, 257-58 (1993) (refusing to permit a suit for monetary damages to go forward under section 502(a)(3)). He can only obtain "appropriate equitable relief" – not compensatory damages. *Coan v. Kaufman*, 457 F.3d 250, 264 (2d Cir. 2006). This rule of law, well established in this Circuit, is discussed more *infra.*

Here plaintiff tries to make a demand for money an equitable claim by seeking, in his second cause of action, "restoration of his full benefit under the Pension Plan, including

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appropriate interest." Plaintiff's Moving Brief at 15. "Restoration" is an odd choice of words, and not one associated with any particular legal remedy. Indeed, it appears that plaintiff is wary of making a demand for a remedy sounding in **restitution**, well aware as he is of the statutory limits of that remedy; yet he dares not mention the word "damages," and thereby raise the obvious point that damages are a legal, not an equitable, remedy not provided for by ERISA. Thus the choice of the word "restoration," a noble-sounding term redolent of the righting of wrongs and other equitable concepts, but not one associated with any legal theory for the awarding of damages – much less the far-out numbers demanded here by plaintiff.

No; rather, it is restitution, i.e., unjust enrichment damages, that plaintiff seeks. Under New York law, the basic elements of an unjust enrichment claim are: "1) defendant was enriched; 2) such enrichment was at the expense of the plaintiff; and 3) the circumstances were such that in equity and good conscience the defendant should make restitution." *Chase Manhattan Bank v. Banque Intra, S.A.,* 274 F. Supp 496, 499 (S.D.N.Y.1967). Plaintiff hints at this in the first brief heading in his legal argument, which reads, "The court should put the plaintiff **in the position in which he would have been**, if not for the defendants' fiduciary breaches" (emphasis added) – in other words, provide restitution. "The object of restitution is to restore the status quo ante – to put the parties back into the position they were in before the unjust enrichment occurred. Restitution requires that a benefit must have passed from the plaintiff to the defendant for which the plaintiff should be compensated in equity and good conscience. An injured party who has not conferred a benefit may not obtain restitution." *New York City Economic Development Corp. v. T.C. Foods Import and Export Co., Inc.***,** 11 Misc.3d 1087(A), 819 N.Y.S.2d 849, 2006 N.Y. Slip Op. 50754(U) (N.Y. Sup. Apr 17, 2006), citing 22A *N.Y. Jur*. 2d Contracts § 515.

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Here, however, there is no allegation, much less proof, of any benefit bestowed by plaintiff, nor any unjust enrichment of defendants. Clearly the relief plaintiff seeks – "put the plaintiff in the position in which he would have been", he urges – is, basic contractual damages, i.e., "the benefit of the bargain":

> Money damages are substitutional relief designed in theory "to put the injured party in as good a position as he would have been put by full performance of the contract, at the least cost to the defendant and without charging him with harms that he had no sufficient reason to foresee when he made the contract." (5 Corbin, *Contracts*, s 1002, pp. 31-32; 11 Williston, *Contracts* (3d ed.), s 1338, p. 198.) In other words, so far as possible, the law attempts to secure to the injured party the benefit of his bargain, subject to the limitations that the injury – whether it be losses suffered or gains prevented – was foreseeable, and that the amount of damages claimed be measurable with a reasonable degree of certainty and, of course, adequately proven.

Freund v. Washington Square Press, Inc., 34 N.Y.2d 379, 314 N.E.2d 419, 357 N.Y.S.2d 857, 859-860 (N.Y. 1974). This – reliance contract damages at law – is precisely the manner in which plaintiff has described both his general damages demand and the imaginative, unprecedented claim in Section (IV) of his brief for compensation "for the loss of tax favorable treatment."[4]

But this is not a breach of contract case; plaintiff admits in the opening sentence of his legal argument that he seeks **ERISA statutory damages based on defendants' breach of fiduciary duty**. The only relevant question then in determining whether plaintiff can obtain legal, contract-based relief on his own behalf when he is proceeding under a statutory grant of

[4] All the arguments in this section demonstrating the lack of legal authority for the award of reliance damages apply *a fortiori* to that Section (IV) of plaintiff's brief and to the subsection dealing with the same topic in Section (I), beginning on page 17. Here, at, least, plaintiff admits his compensatory damages theory is based on no legal authority whatsoever, and asks the Court to grant itself plenary power and "fashion an additional award" based on an utterly unrelated IRS Code provision with no basis in the ERISA statute (Plaintiff's Memorandum of Law at 24). Defendants naturally expect and pray that, to the contrary, the Court will decline this invitation, as other courts have done in the same circumstances. *See*, *Fraser v. Lintas: Campbell-Ewald***,** 56 F.3d 722 (6th Cir. 1995) ("We are not entitled to create a non-statutory remedy for breach of an obligation imposed by § 402(f)(1)"; declining to award damages based on plan's failure to advise a participant of an option that would enable him to avoid taxes).

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rights that provides only for recovery of "appropriate equitable relief." The answer from the courts is an emphatic no.

We start with the premise set forth in *Bowen v. Massachusetts,* 487 U.S. 879 (1988) that "Almost invariably . . . suits seeking . . . to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty." Plaintiff, obviously aware of this problem, assumes that, like one's teeth, if ignored it will just go away. While he describes damage theories that are frankly benefit-of-the-bargain compensatory, contract-type formulations, he does not present[5] any authority for the proposition that equitable relief includes an award of financial compensation. Rather, Stolarz goes right to the numerous cases that opine on the appropriate rate of interest for restitution – without even alerting the Court to the fact that in all but two cases[6] in Section (I) of plaintiff's moving brief, and quite unlike here, **the Plan itself, its trustees, its successor in interest or the Department of Labor is a party.** They were not brought by individual employees. Plaintiff is counting interest

[5] Defendants are at an obvious disadvantage here, forced to play defense against an invisible, and perhaps non-existent, offense. It is possible that plaintiff will do in his reply what was his burden to do on his moving brief, namely to set out the legal basis for his damages claim, though defendants are hard-pressed to imagine what that might be. If so, and if it differs from the legal theory defendant has been forced to guess at here, defendant reserves the right to request the opportunity to file a sur-reply to address plaintiff's arguments for the first time.

[6] The two cases do not hold that the damages sought by plaintiff here based on breach of fiduciary duty are available to an individual plan member. The first, *Black v. Bresee's Oneonta Dept. Store, Inc. Sec. Plan*, 919 F.Supp. 597 (N.D.N.Y. 1996), involved an unfunded "Top Hat" plan which, as the Court points out, "was exempted from parts 2, 3 and 4 of Title I of ERISA (regarding participation, vesting, funding and fiduciary responsibility)." *Id*. at 602. The court granted damages on a contract theory, not on the grounds of a breach of fiduciary duty. *Id.* Similarly, *Scalamandre v. Oxford Health Plans (N.Y.), Inc*., 823 F.Supp. 1050 (E.D.N.Y. 1993), a case involving wrongfully denied health benefits, makes no mention of any of the possible statutory bases for plaintiff's claim here, and, like *Black*, is obviously analyzed on a contractual basis. Neither these cases, nor any of the others cited by plaintiff, even remotely supports his claim for an entitlement to damages based on defendants' breaches of fiduciary duty; neither deals with Section 1132(a)(3).

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without justifying, so to speak, his principle. He has placed the cart before the horse, providing ampleauthority about how to calculate interest on an award, but offering no basis for his claim to the award itself.

What authority, then, can plaintiff rely on to establish a right to an affirmative judgment of money on the scale set forth in its accounting based on his theory of recovery? We can only guess; perhaps he relies on *Strom v. Goldman Sachs,* 202 F.3d 138 (2d Cir. 1999), which indeed held that the term "equitable relief" under section 502(a)(3) included a compensatory award for breach of fiduciary duty. But it is now clear in this Circuit that punitive or speculative affirmative financial damages are not available under a restitution theory:

> Section 1132(a)(3) permits money awards only in very limited circumstances. Classic compensatory and punitive damages are **never included** within "other appropriate equitable relief." With regard to non-fiduciary defendants, we have said that the "only conceivable equitable claim" for cash money lies under the antique equitable remedy of restitution. In order to make out a claim for restitution, a plaintiff must show that the defendant has unjustly received from the plaintiff a benefit, such as a payment, or that the defendant holds funds or property that in good conscience should belong to the plaintiff.

Gerosa v. Sava, 329 F.3d 317, 321 (2d Cir. 2003) (citations omitted, emphasis added). Similarly, *Geller v. County Line Auto Sales, Inc.*, 86 F.3d 18, 22-23 (2d Cir. 1996), this Circuit rejected a claim for money damages masquerading as equitable relief, writing as follows:

> The plaintiffs also seek to premise ERISA liability on a theory of restitution under § 1132(a)(3). The defendants respond that restitution is not available because they were not unjustly enriched and that the claim against them is essentially one at law for damages. The district court correctly stated that to receive restitution, a plaintiff must demonstrate that the defendant "had wrongfully secured a benefit, or had passively received one which it would be unconscionable for him to retain." In an action for restitution, the essential inquiry is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. . . . Because the defendants were not unjustly enriched, a restitution award is not available.

86 F.3d at 22-23 (citations omitted). Plaintiff's claim is that defendants failed to "keep up" the

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Plan and, as discussed later, failed properly to invest both the funds in it and the funds that "should have" been in it. These are not, however, allegations of unjust enrichment.[7] There is no proof, nor any serious allegation, of unjust enrichment or benefit received by the defendants here; indeed, Airline Software and its principal, Gordon Rosen, not only never took any money belonging to Stolarz; one is essentially out of business, and the other is a person with virtually no personal assets. *See* Declaration of Gordon Rosen, filed herewith.

In any event, even a generalized allegation of financial benefit to defendants – absent proof that the property a plaintiff seeks is either identifiable or in the hands of the fiduciaries – would not, under ERISA, be grounds for an award of restitution to an individual plaintiff, as discussed below. At about the same time as the decision in *Gerosa* was published,[8] this Court also ruled that *Strom* could not be reconciled with the subsequent ruling in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) that money damages are not equitable relief in an ERISA context. See *Kishter v. Principal Life Ins. Co.*, 186 F.Supp.2d 438, 444-45 (S.D.N.Y.2002) (concluding that *Great-West* repudiated *Strom* and its reasoning); *Bona v. Barasch*, 2003 WL 1395932 (S.D.N.Y. 2003) (Mukasey, J.) (rejecting damages claim in

[7] An unjust enrichment claim under New York law must contain the following elements: (1) the defendant was enriched; (2) enrichment was at the plaintiff's expense; and (3) the defendant's retention of the benefit would be unjust. See *Van Brunt v. Rauschenberg*, 799 F. Supp. 1467, 1472 (S.D.N.Y.1992). Proof of unjust enrichment is a fact question and is not to be inferred, and is not an appropriate basis for a summary judgment. *Gidatex, S.r.L. v. Campaniello Imports, Ltd*.**,** 49 F.Supp.2d 298 (S.D.N.Y. 1999). Here plaintiff has made no factual submissions showing unjust enrichment, despite having taken defendants' depositions, and indeed the record is bare of proof of any benefit retained by defendants arising from their breach of fiduciary duty.

[8] The *Bona v. Barasch*, 2003 WL 1395932 (S.D.N.Y. 2003) decision, discussed at length here, does not cite *Gerosa*, which evidently had not yet been reported (both are 2003 cases) and which seems to suggest that *Strom* is still good law. In fact, in the passage from *Bona* quoted above, which cites to *Strom*, clearly enunciates a restitution theory limited in the manner set out in *Bona* – solely allowing restitution to the extent of a corpus of money in the hands of the defendant especially where, as here, there is no proof, nor even an allegation, of unjust enrichment. *See*, *Geller*, 86 F.3d 18, 22-23.

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equitable action under ERISA).

In *Great-West*, the plaintiff urged that reimbursement to a health plan from payments made to a beneficiary by a third party constitutes "equitable relief" authorized by section 502(a)(3) of ERISA. The Supreme Court denied the relief sought, ruling that because the plaintiff was seeking to impose personal liability on the plan beneficiary for a contractual obligation to pay money, the relief it sought was legal, rather than equitable, and therefore was not available under section 502(a)(3). The Supreme Court based its holding on two rationales:

- An injunction ordering the payment of money is not an "injunction" at all. *Id.* at 210-11 ("[A]n injunction to compel the payment of money past due under a contract, or specific performance of a past due monetary obligation, was not typically available in equity.").
- Restitution under equity is limited to **equitable** restitution. A plaintiff seeking legal damages under a restitution theory is less limited; he can "show just grounds for recovering money to pay for some benefit the defendant had received from him," *id.* at 213 (see our discussion of unjust enrichment *supra*). In contrast, restitution in equity is "ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be **traced to particular funds or property in the defendant's possession**." *Id.* (emphasis added).

Thus the Court, relying in part on *Bowen*, limited the funds to which plaintiff could claim an equitable entitlement to those in defendants' possession.

Here, there is no proof of the existence of any such funds besides the money actually in the Plan's trust fund, nor indeed is there any; yet without saying so explicitly – because of the

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obvious legal problems with doing so – plaintiff clearly aims for the imposition of liability beyond these assets. The law is now clear, however, that despite the opinion in *Strom* there is no basis for such an award.

Although *Strom* has never been explicitly overruled, its questionable viability was recognized by the Second Circuit in *Coan v. Kaufman*, 457 F.3d at 264 (the Supreme Court's reasoning in *Knudson* "cuts across the grain of *Strom*."). As here, *Strom* involved an alleged breach of fiduciary duty, and, as Judge Mukasey pointed out in *Bona*, "[a]n alleged breach of fiduciary duty always has been within the exclusive jurisdiction of equity," *Strom,* 202 F.3d at 145; presumably the absence of a legal remedy for damages might influence a court of equity to find away to make such award. As Judge Mukasey writes, "However, the broad language in *Great-West* suggests otherwise." *Bona* at *11. It is worth excerpting Judge Mukasey's analysis at length:

> In *Great-West,* the Court declined to hold that the special equity-court powers applicable to trusts define the reach of § 502(a)(3). The Court explained that the phrase "equitable relief," as Congress used it in section 502, refers only to those categories of relief that were **typically** available in equity, and not to any relief that conceivably could be granted by an equity court. Thus, in determining whether monetary relief in a particular case can be classified as equitable restitution, the crucial question under *Great-West* is whether a suit seeks to restore to the plaintiff particular funds or property in the defendant's possession.
>
> [N]otwithstanding *Strom,* this court has applied *Great-West* to actions for breach of fiduciary duty. *See Kishter,* 186 F.Supp.2d at 445-46 (granting summary judgment on a breach of fiduciary claim brought under § 1132(a)(3) where the executor an ERISA beneficiary's estate sought to recover money that the beneficiary would have received if not for defendants' alleged failure to provide information about a life insurance policy); *Augienello v. Coast to Coast Fin. Corp.,* No. 01 Civ. 11608, 2002 WL 1822926, at *5-6 (S.D.N.Y. Aug.7, 2002) (dismissing an ERISA breach of fiduciary duty claim under § 1132(a)(3) where the plaintiffs sought deferred compensation funds).
>
> In this case, as in *Kishter* and *Augienello,* Individual Plaintiffs have not asked for equitable restitution, even though they have sued defendants for breach of fiduciary duty. According to *Great-West,* restitution is appropriate as an equitable

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> remedy only where the specific property being sought is identifiable and in the hands of the defendant. Individual Plaintiffs have not alleged that **the property they seek is either identifiable or in the hands of the trustees**, from whom plaintiffs seek monetary relief.

Bona at *11-12 (citations, internal quotations and footnotes omitted; emphasis added). Judge Mukasey then went on to do as defendants have been forced to do here – guess at the theory of recovery on which the plaintiffs were relying because of the use of "catch-all" language by the plaintiff. Giving plaintiff in *Bona* every benefit of the doubt, he still found these alternative theories wanting as well:

> Individual Plaintiffs' request for monetary relief is also not premised on an equitable claim for reformation of a written instrument. First, although the complaint's prayer for relief includes a demand for injunctive relief, the complaint does not demand reformation of the employee benefit plans. Second, even if the catch-all provision of the prayer for relief were interpreted to encompass a demand for reformation of the plans, the complaint contains no allegations that would support a claim for reformation. "[R]eformation is available in cases of fraud and mutual mistake." *AMEX Assurance Co. v. Caripides,* 316 F.3d 154, 161 (2nd Cir.2003); *see also* 3 E. Allan Farnsworth, *Farnsworth on Contracts* § 7.5 (2d ed.1998) (explaining that the equitable remedy of reformation is available in cases of mutual mistake or "when only one party is mistaken as to the contents or effect of a writing if that mistake was induced by the other party's fraudulent misrepresentation"). Here, plaintiffs have not alleged that the written terms of the employee benefit plans resulted either from fraudulent misrepresentation or from a mutual mistake.

Id. at *12. Although the concept of fraud has been thrown around in this case (by both sides), there has been no judgment of fraud, nor any intimation of mutual mistake, here. Judge Mukasey's opinion in *Bona*, besides being this Court's most recent expression of the law in this area, remains the state of the art. Indeed *Rankin* itself was rejected by this Court in *Fisher v. J.P. Morgan Chase & Co.***,** 230 F.R.D. 370 (S.D.N.Y. 2005) (Stein, J.) for its failure to reconcile its reasoning with the Supreme Court's holding in *Mass. Mut. Life Ins. Co. v. Russell,* 473 U.S. 134 (1985) ("the entire text of § 409 persuades us that Congress did not intend that section to authorize any relief except for the plan itself."). The Court's opinion in *Fisher* also provides

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broad support for the holding and analysis in *Bona*. As this Court wrote in *Fisher*:

> Section 502(a)(3) of ERISA . . . does provide individual participants a personal right of action to bring claims to enjoin practices that violate ERISA or the relevant plan, or to "obtain other appropriate equitable relief...." The Supreme Court has interpreted section 502(a)(3) to contemplate only the type of relief "typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." Compensatory damages – historically legal, not equitable, relief – are unavailable pursuant to section 502(a)(3). According to the Supreme Court, plaintiffs may invoke section 502(a)(3) "not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession."

Fisher, *id*. at 376 (citations omitted). Similarly, the Second Circuit, in *Gerosa*, ruled that affirmative restitution, beyond the corpus of funds actually identified as properly belonging to plaintiff, is not available under ERISA: "We agree with the District Court that the Plaintiffs have not alleged sufficient facts to make out a claim for restitution. The moneys sought by the Plaintiffs were never in Savasta's possession; rather, they are simply consequential damages resulting from Savasta's alleged negligence. Like the defendants in *Geller,* Savasta was never 'unjustly enriched,' and therefore no restitution claim can lie against it." 329 F.3d at 321-22. *Cf.*, *Harzewski*, *supra*, *v. Guidant Corp***.,** --- F.3d ----, 2007 WL 1598097 (7th Cir. 2007) (authorizing compensatory-type damages where claims are based on the literal terms of an ERISA plan document).

In short, not only does plaintiff provide no legal basis – not a single case, not a single statutory citation, on which it stakes it claim – for an award of damages here based on its fanciful accounting. There simply **is** no legal basis in this Circuit, regardless of the accounting methods used, for such demands, short of an assignment of all rights in the insurance policy and any funds still in the Plan trust account. No equitable, statutory or legal theory provides plaintiff with what he is looking for, a state of affairs put in place by Congress when it provided solely for "equitable" remedies in individual enforcement of ERISA, and interpreted clearly by the highest

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courts in the land who have found that "equitable" means only what every lawyer and judge has always understood it to mean: Not money damages.

(II) PLAINTIFF'S DAMAGES CLAIMS ARE BARRED UNDER THE APPLICAPLE STATUTES OF LIMITATIONS.

There is some conflict in this Circuit as to the appropriate statute of limitations for ERISA actions such as these. *See*, e.g., *Patterson-Priori v. Unum Life Ins. Co. of Am.,* 846 F.Supp. 1102, 1104 (E.D.N.Y.1994) (acknowledging existence of dispute); *see also*, *Miller v. Fortis Benefits Ins. Co.*, 475 F.3d 516, 518 fn. 1 (3d Cir. 2007) (same issue in Third Circuit). This is complicated by the fact that, based on plaintiff's submissions, it is difficult to determine whether the second cause of action is based on a breach of fiduciary duty, a claim for benefits (which is for a non-fiduciary cause of action), or both; *see Miller*, *id.* at 519-520.[9] The result under both approaches, however, is the same: Plaintiff is entitled only to a three-year statute of limitations, and, as demonstrated below, such a failure is fatal to his claim for damages under the circumstances of this case.

One approach says that ERISA does not prescribe a limitations period for actions brought

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[9] The muddled complaint in *Miller v. Fortis* is so similar to the one in this case that it is worth at least setting out in the margin:

> Miller's complaint does not make clear whether he is pursuing both types of claim. In Count I, he seeks an adjustment of benefits under 29 U.S.C. § 1132(a)(1)(B), which provides a non-fiduciary cause of action to "recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." In Count II, Miller seeks equitable relief under 29 U.S.C. § 1132(a)(3), which provides a general cause of action "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." … Yet, **nowhere in his complaint does Miller mention what substantive provision of ERISA his § 1132(a)(3) claim relies on**, nor does he state the elements of a fiduciary cause of action.

Id. at 519-520 (emphasis added).

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under section 502 of ERISA, so the applicable statute of limitations period is that specified in the most closely analogous state limitations statute. *See* 29 U.S.C. § 1132(a)(1)(B); *Miles v. New York State Teamsters Conference Pension Plan,* 698 F.2d 593, 598 (2d Cir.1983). Accordingly, the Second Circuit has held that the six-year statute of limitations under Rule 213 of the New York CPLR applies to section 502 actions.[10] N.Y. C.P.L.R. 213(2) (2005); *Miles,* 698 F.2d at 598. Courts in the Second Circuit have also considered, however, whether or not the statute of limitations set forth in 29 U.S.C. § 1113, which generally applies to breaches of fiduciary duty, also applies to actions brought under section 502, such as this one. *See*, e.g., *Patterson-Priori*, *id.* at 1104. The other approach recognized both by *Patterson-Prior* and other cases, is that 29 U.S.C. § 1113 does apply, and we discuss it below.

<u>ERISA limitations pursuant to analogous state statutes</u>

While here plaintiff claims to seek only equitable remedies, as demonstrated above, his claim for financial compensation really sounds in law. If this Court were to determine, contrary to the precedent set out in Section (I), that plaintiff were entitled to damages at law, the appropriate statute of limitations would then be C.P.L.R. 214(2).[11]

The importance of this distinction is obvious. For defendants, three years is of course better than six. But the implications of the difference go beyond that simple formula: Plaintiff has stated its position, in conversation among counsel and the Court, that defendants cannot at this juncture make any sort of defense based on the statute of limitations, having not asserted the

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[10] Section 213 states: “The following actions must be commenced within six years: . . . 1. an action for which no limitation is specifically prescribed by law[.] 2. an action upon a contractual obligation or liability, express or implied, except as provided in section two hundred thirteen-a of this article or article 2 of the uniform commercial code or article 36-B of the general business law [.]” N.Y. C.P.L.R. 213.

[11] The following actions must be commenced within three years: … 2. an action to recover upon a liability, penalty or forfeiture created or imposed by statute except as provided in sections 213 and 215[.]” N.Y. C.P.L.R. 214.

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statute in the summary judgment proceedings of last year. In fact, this is not the case, as the Second Circuit has stated, relying on the broad language of *Kulzer v. Pittsburgh-Corning Corp.*, 942 F.2d 122, 125 (2d Cir.1991):

> Defendants have not waived their statute of limitations defense by failing to raise it in their motion under Rules 12(c) and 56 [summary judgment motion]. Statute of limitations is an affirmative defense that is preserved by assertion in a party's first responsive pleading. See *Kulzer v. Pittsburgh-Corning Corp.*, 942 F.2d 122, 125 (2d Cir.1991) (holding "bare assertion" of statute of limitations in answer preserved it to be raised again mid-trial, despite failure to raise it in pretrial dispositive motions); see also *Nicholas v. Miller*, 189 F.3d 191, 195 (2d Cir.1999) (holding assertion of qualified immunity in answer, not asserted in successful summary judgment motion, preserved it to be raised as ground for affirmance on appeal).

Colon v. Goord, 115 Fed. Appx. 469, 2004 WL 2367962 (2d Cir. 2004). *Accord*, *Van Tu v. Koster*, 364 F.3d 1196, 2000 (10th Cir. 2004) (when statute of limitations is pled in answer, it is "irrelevant that [defendant] did not present it in his motion to dismiss"). The application of this rule here is obvious and equitable, because the summary judgment as to liability did not address remedies. "The statute of limitations period for a breach of fiduciary duty claim under New York law depends upon the remedy sought. Where the party seeks a remedy in damages, the statute of limitations for a breach of fiduciary duty claim is three (3) years; however, where the party seeks a remedy in equity, the period is six (6) years." *Employers Ins. Co.. of Wausau v. Crouse-Community Center, Inc.*, -- F.Supp.2d ----, 2007 WL 1231696 at *2 (N.D.N.Y. 2007).

Thus, courts in this Circuit routinely apply different statutes of limitation to different aspects of relief – specifically, claims for equitable relief under the six-year statute and claims for damages under the three-year statute – on the same underlying claim. *See*, e.g., *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*, WL 1601491 (S.D.N.Y. 2007) ("*In re MTBE*"). Nor may a plaintiff toll the statute by bootstrapping one sort of relief by claiming the other (much less by calling a remedy at law and remedy in equity). As Judge Scheindlin wrote in

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In re MTBE (emphasis added):

> To the extent plaintiffs seek equitable relief as a remedy, plaintiffs' claims are subject to the six-year omnibus statute of limitations. Where adequate legal and equitable remedies co-exist, the legal statute of limitations controls both – **a plaintiff may not extend the limitations period on its damages claims by requesting equitable remedies**. But if legal remedies alone provide an incomplete or imperfect remedy, equitable claims remain separate and subject to their own limitations period.

For these reasons, it would have been premature for defendants to raise the statute of limitation defense at the partial summary judgment stage. Plaintiff, who still has not set out the legal basis for his damages claim, cannot be said to have done so on the prior motion. In fact, his claims for compensation – not only for moneys that, per the "benefit of the bargain," "should have been" invested, but for imagined high-flying returns on them, plus interest – can only be viewed as demands for monetary damages, not equitable relief. Having established that a plaintiff "may not extend the limitations period on its damages claims by requesting equitable remedies," *id*., it would certainly amount to the ultimate distortion of the law for plaintiff to effect the same end (i.e., extending the limitations period) merely by labeling a demand for money damages as "equitable remedies" – thus creating an exception that would completely swallow the rule. If the Court rules, then, contrary to the conclusion of Section (I), that plaintiff is entitled to damages (as opposed to restitution of any funds currently in the trust fund of the Plan), the proper statute of limitations is the three-year time-bar of N.Y. C.P.L.R. 214.

<u>ERISA limitations pursuant to 29 U.S.C. § 1113</u>

Although *Patterson-Priori* remains good law, there is also authority in this Circuit to the effect that the ERISA statute of limitations does, in fact, apply to cases such as this one. The limitations provisions for ERISA claims is set forth in 29 U.S.C. § 1113, which provides as follows (emphasis added):

> No action may be commenced under this title with respect to a fiduciary's breach

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> of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of – (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or (2) **three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation**; except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

See, e.g., *Caputo v. Pfizer, Inc.* 267 F.3d 181 (2d Cir. 2001) (applying 29 U.S.C. sec. 1113) to fiduciary claim).[12] Under these cases, then, there is either a six- or a three-year statute also. What, then, are the facts to which the Court should apply the question of the statute of limitations as to the only remaining claim here, plaintiff's second cause of action for breach of fiduciary duty? By all lights, the last "breach or violation" by defendants in connection with the plan took place far more than six years prior to the May 1, 2003 filing of this action. Defendant therefore must rely on subsection (2) of § 1113, which counts three years from the time plaintiff had actual knowledge of that breach of violation, absent "fraud or concealment," of which there is no evidence in this record nor even any allegation claim by plaintiff that would meet the standard of Fed. R. Civ. P. 9(b).[13] This is the standard that must be met to qualify for the fraud or concealment exception to the three-year statute, as the Second Circuit explained in *Caputo*, 267 F.3d at 191 (internal quotes and citations omitted):

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[12] We note that the Second Circuit's holding in *Kulzer v. Pittsburgh-Corning Corp***.,** 942 F.2d at 125 to the effect that in this Circuit, the mere pleading of the statute of limitations in a defendant's answer – even in mid-trial – absolutely preserves that defense regardless of what proceedings short of final judgment have taken place. This rule does not depend on the consideration, as addressed above under the previously-considered statute of limitations approach, that defendants could not know on which legal basis (equity or law) plaintiff's remedy demand would be based until this stage of the proceedings.

[13] **Fed. R. Civ. P. 9 (b) Fraud, Mistake, Condition of the Mind.** In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

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> To get the advantage of the six-year statute of limitations, the plaintiffs must plead fraud with the requisite particularity. Fed. R. Civ. P. 9(b). To satisfy this requirement, a plaintiff should specify the time, place, speaker, and content of the alleged misrepresentations. In addition, the complaint should explain how the misrepresentations were fraudulent and plead those events which give rise to a strong inference that the defendant had an intent to defraud, knowledge of the falsity, or a reckless disregard for the truth.

Clearly nothing plaintiff has submitted in this case, either in terms of specific factual pleadings or proof, meets this standard. Thus, if the Court applies § 1113, the three-year period would apply – the same three years available under the "state borrowing" statute as well.

Applying the three-year statute of limitations

The next question, obviously, is when the three-year period begins to run. The Second Circuit also addressed this question in *Caputo*:

> [A] plaintiff has "actual knowledge of the breach or violation" within the meaning of ERISA § 413(2), 29 U.S.C. § 1113(2), 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. While a plaintiff need not have knowledge of the relevant law, he must have knowledge of all facts necessary to constitute a claim. Such material facts could include necessary opinions of experts, knowledge of a transaction's harmful consequences, or even actual harm.

Id. at 193 (citations omitted). What, then, are the operative facts here?

In December of 1997, at the request of the plaintiff, Airline Software provided the plaintiff with a statement of accrued pension benefits through December 31, 1996. This statement was provided to the plaintiff because he was applying for a mortgage and wanted to include the pension benefit as an asset on this application. Plaintiff certainly knew that Airline Software had financial problems for several years; he was one of a small sales staff, and was well aware that new customers were not entering into contracts with Airline Software. He also knew that all technical employees of Airline Software had left Airline Software's employment by 1992 and had not been replaced. He had a clear opportunity, and – given what he knew about Airline

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Software, every reason in the world to be concerned about the obvious problems in the pension information provided by Airline Software – to ask for further documentation, investigate the investment mix and the state of the trust fund, and, if dissatisfied with the information he was provided, to file a timely legal claim, as he did belatedly on May 1, 2003.

December 1997, then, is the time that the plaintiff had actual knowledge of the plan being under-funded. He needed merely to look at the information provided to him by Airline Software and, indeed, it is those same facts, and not a single additional one, on which he based this law suit not three, or four, but over five years later, in May of 2003. If we juxtapose these facts with the claim in paragraph 23 of the Complaint that plaintiff repeatedly requested that Airline Software provide additional information along with allegation made on information and belief that defendants has failed to pay into the Money Purchase Plan or the Pension Trust or both Plan Payroll Deductions, this date starts the running of ERISA's three-year statute of limitations, 29 USC 1113, as well as the identical three-year statute under New York State law. Obviously, from December 1997 through May 2003 is far more than five years and, for this reason, plaintiff's claims for affirmative relief are barred under either approach to measuring the statute of limitations. An erroneously calculated award of benefits under an ERISA plan can trigger the statute of limitations, as long as it is (1) a repudiation (2) that is clear and made known to the beneficiary. *Miller v Fortis*, 475 F.3d at 521. As the Circuit Court in *Miller* explained further, in language clearly applicable to the facts here:

> Regarding the first requirement, an underpayment can qualify as a repudiation because a plan's determination that a beneficiary receive less than his full entitlement is effectively a partial denial of benefits. Like a denial, an underpayment is adverse to the beneficiary and therefore repudiates his rights under a plan. . . . Regarding the second requirement, repudiation by underpayment should ordinarily be made known to the beneficiary when he first receives his miscalculated benefit award. See *Gluck*, 960 F.2d at 1180-81 ("[A]n employee's receipt of diminished payment gives immediate, obvious notice to an employee

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> that something is amiss....”). At that point, the beneficiary should be aware that he has been underpaid and that his right to a greater award has been repudiated. See Cotter, 898 F.2d at 429 (suggesting that benefit award can constitute a repudiation of further benefits for purposes of accrual). The beneficiary should exercise reasonable diligence to ensure the accuracy of his award.

Id. at 521-522. *See also*, *Carey v. IBEW*, 201 F.3d 44, 48 (2d Cir. 1999) (in calculating when the statute begins to run in an ERISA claim, “a plaintiff's claim accrues when he discovers, or with reasonable diligence should discover, the injury that gives rise to his claim”)

Once the plaintiff received a statement of his accrued benefits in December 1997 he should have taken action within three years if the plan fiduciary continued with his course of action, namely, failing to provide similar statements to the one that was given to the plaintiff in December of 1997 and documentation such as a statement from the custodian of the Pension Trust Assets. Based on the above, it is submitted that the three-year statute of limitation under ERISA ran in December of 2000, and plaintiff’s present claims are barred under the statute. Certainly any claim he might make – for which there is no apparent legal basis – based on dissatisfaction with the investment formula utilized by Airline Software is certainly barred under the law and policy of the limitations rules. Similarly, the other relief sought by plaintiff here, including the demand for penalties below, is also barred by the statute of limitations.

(III) PLAINTIFF’S CALCULATION OF THE AMOUNT DUE UNDER THE PLAN AS DAMAGES IS GROSSLY OVERSTATED.

Defendants have, in response to plaintiff’s submission as well as their further development of information and data in the last year, submitted herewith a supplementary accounting as part of the Second Declaration of Stanley Rand. As set forth above, plaintiff is not entitled to any funds beyond the monies currently in the Plan trust fund. His calculation of the amount he believes he is due under his “contractual” claim for money damages, however, is

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wildly inaccurate.

As set forth in the accounting and the Second Declaration of Stanley Rand, Airline Software's plan, which was intended to be a contributory plan, was frozen in 1992. The company froze the plan in 1992, consistent with the rules of *Beck v. Pace International Union*, -- U.S. --, 127 S.Ct. 2310, 75 USLW 4399 (June 15, 2007), *Lockheed Corp. v. Spink,* 517 U.S. 882 (1996) and *Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432 (1999). The decrease in plan participants from seven to one represents a "significant" decrease in the number of plan participants and in turn meets the Internal Revenue Service (IRS) standard that when there is such a decrease, a plan can be frozen or terminated in accordance with U.S. Treasury Regulation 1.411(d)(2)(b)(2)(i), set forth in Exhibit 3 of the Supplementary Accounting.

The Supplementary Accounting, taking the freezing process into account, establishes a valuation of $54,999.80, an amount which can be paid out of the current balance of the Plan's trust fund and which is the maximum amount plaintiff should be entitled to recover, if any. Airline Software's consultant, in providing this accounting, sets forth the basis of her analysis in the exhibits. This valuation, as set forth in greater detail in the exhibits, is based on the default investment approach because plaintiff failed or refused to direct his Plan investment account. The specific blend of investments utilized is set forth in the Supplementary Accounting and is in accordance with 29 CFR 2550.404a-1 Investment Duties and 29 CFR 2550.404c-1-ERISA 404(c) plans.

(IV) THE COURT SHOULD NOT IMPOSE STATUTORY PENALTIES ON DEFENDANTS.

Plaintiff relies, for its argument as to penalties, on *McDonald v. Pension Plan of NYSA-ILA Pension Trust Fund*, 320 F.3d 151 (2d Cir. 2003). In *McDonald*, the Court awarded $15 a day for the delays resulting mainly from incompetence and the fact that, like here, the plan

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administrator simply did not have up to date documents to provide, despite its obligation to do so. *Id.* at 163. The court relied in large part on the lack of bad faith on the administrator's part, as well. *Id.* at 164. Here, plaintiff insists that far greater penalties – more than six times greater than the $15 per day imposed in *McDonald*, and multiplied over a seemingly endless number of days – because, he says more than a little conclusorily, "this case bristles with the defendants' bad faith and prejudice to Stolarz." What are the indicia of the supposed "bristling bad faith"? The unsourced claim that defendants' "failure to provide … documents served their interest in concealing their fiduciary breaches" – a failure that is every bit as consistent with rank incompetence, and with the testimony in the first Certification of Stanley Rand. And what else?

There is nothing else. This completely subjective characterization – in a case that has been active since 2003, in which the plaintiff had the full opportunity to take any discovery he wished, and in which he did in fact depose defendant Rosen; this overheated, undocumented claim that defendants' utter incompetence at managing something as esoteric as an ERISA plan even as their company's finances and operations, and the outside service supposedly administering the plan (*see* the first Declaration of Stanley Rand, filed previously) collapsed all around them for years on end – can only be interpreted as a wicked scheme to conceal known fiduciary breaches by defendants. This is the basis of plaintiff's claim that "this case bristles with the defendants' bad faith," when in fact the case seems as plain vanilla failure of fiduciary duty as could be imagined.

And, we are told, these "bristles" extend as well to the alleged "prejudice" suffered by plaintiff. What was the prejudice? The alleged delay in plaintiff finding out the status of his pension. This same Stolarz had requested a calculation of his balance under the plan in 1997, which was provided to him on December 18, 1997 (see Rosen Declaration). When provided with

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this calculation, Stolarz raised no issues as to how investment results were determined until the commencement of this cause of action. **Four years later** – on or about February 16, 2001 – Stolarz wrote a letter to Airline Software requesting an additional copy of the Summary Plan Description and a statement showing the balance in his Plan account. In three days, on February 19, 2001, Airline Software responded to Stolarz's letter and told him that his request was being forwarded to New England Life, which, regrettably, (mis)managed the Plan. Airline Software did not hear anything else from Stolarz afterwards regarding this request.

On or about November 6, 2001, Stolarz sent a letter to Airline Software stating that he was resigning immediately from his employment at Airline Software. In his letter plaintiff's only reference to the Plan was a brief statement that he was resigning in part because he claimed that Airline Software had failed to provide a statement of the balance in his account. Significantly, plaintiff did not claim that he was owed, nor that he had reason to believe he was owed, any benefits pursuant to the Plan. On or about November 16, 2001, Airline Software replied to plaintiff by stating that it was unaware of any failure to provide him a statement of the balance in his account and that it would look into any possible oversight.

Subsequent to plaintiff's resignation, Airline Software received a letter from plaintiff's counsel dated December 31, 2001, which requested information about plaintiff's Plan account, mentioning a "concern" about "possible under funding" of the Plan. On March 13, 2002, Airline Software received follow-up correspondence from plaintiff's counsel, in which no mention was made of any concerns regarding the Plan. The next contact between Airline Software and plaintiff came **more than one year later**, in May 2003, and consisted of this instant action being filed by plaintiff against Airline Software. At this point, as set out in the Rand Declaration, Airline Software was in the midst of attempting to organize its records, find out what happened

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with its defunct plan manager, and simply did not have up to date information to give to Stolarz until the provision of the accounting prepared in connection with this litigation. If there is prejudice here resulting from delay, it lays as much at the doorstep of the plaintiff, whose dilatoriness was a fine match for Airline Software's poor record-keeping. But ERISA is not meant to make a fiduciary an insurer for a beneficiary who sleeps on his rights and follows up on inquiries in multi-month, and sometimes multi-year, increments.

It is a sad story, and one involving considerable sloppiness and incompetence, as well as the intercession of a plan management company that went out of business and took its books and records with it, also aggravated by the shipment of what information there was in defendants' hands to a location across the continent in anticipation of a merger that never took place. *See McDonald*, 320 F.3d at 163 (reducing number of days in penalty calculation due to error by third-party data entry firm). But notwithstanding plaintiff's heated rhetoric, there is no proof in the record to indicate bad faith or on which a fair inference of bad faith can be made on the issue of the provision of ERISA plan document; there is ample reason, not to excuse defendants' failure, but to find that it falls far short of the bad faith claimed by plaintiff; and to take into account the complete lack of proof of any prejudice, especially in the context of his own dilatoriness, to the plaintiff, one of the standards set out in *McDonald*.

(V) THE COURT SHOULD NOT AWARD ATTORNEYS' FEES TO PLAINTIFF.

Plaintiff correctly sets out the well-known factors in *Chambless v. Masters, Mates & Pilots Pension Plan,* 815 F.2d 869 (2d Cir.1987). The five *Chambless* factors are: "(1) the degree of the offending party's culpability or bad faith, (2) the ability of the offending party to satisfy an award of attorney's fees, (3) whether an award of fees would deter other persons from acting similarly under like circumstances, (4) the relative merits of the parties' positions, and (5)

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whether the action conferred a common benefit on a group of pension plan participants." *Id.* at 871. Plaintiff is incorrect, however, in its application of these factors here.

Bad faith. There is no proof of bad faith – merely proof that the personal animus between the two main principals here is sufficient to cause plaintiff to assert bad faith repeatedly. Plaintiff claims misrepresentations to Stolarz about the qualified status of the plan, but does not and cannot offer proof that defendants were not, under the circumstances, every bit as in the dark about its true status as plaintiff. Indeed, plaintiff relies on formulations such as "Rosen no doubt was aware," Plaintiff's Memorandum of Law at 20, when there is every reason on earth to doubt Rosen's awareness. Again, all the bases for the bad faith claim here are not only consistent with mere incompetence, but they are mirrored in plaintiff's own lackadaisical approach to monitoring his own account over an extended period of years. The fact that, under the heading of "bad faith," plaintiff simply repeats the sorry facts of the history of this case over and over again does not bring plaintiff any closer to proving bad faith.

Ability to pay. Plaintiff simply asserts that "defendants have the deeper pockets" as between them and plaintiff. Of course plaintiff once again submits no proof to this effect. The Court can see, as a result of the filings made herewith, what the financial status of the defendants is; it is not pretty. In contrast, the record is utterly devoid of any proof as to plaintiff's finances and, in fact, plaintiff's failure to submit any information on that topic, given his burden of proof, is at the very least grounds for considerable suspicion. On this record, there is simply no way the Court can count this *Chambless* factor in plaintiff's favor.

Deterrence. There is no particular reason an award of attorneys' fees in this case would provide more deterrence than in any other case. Most businesspeople do not need sanctions to be convinced not to grossly mismanage the finances and regulatory aspects of their businesses, as

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defendants have done here.

Merits. The plaintiff obtained a summary judgment of liability in this matter.

Conferring of broad benefit. Plaintiff admits in his brief that he cannot satisfy this factor.

Notwithstanding plaintiff's repeated use of the word "strongly" to indicate his belief to entitlement of attorneys' fees here, defendants urge the Court not to be swayed by plaintiff's recourse to repetition and unsubstantiated claims, especially as to defendant's bad faith and financial wherewithal. Based on the *Chambless* factors, which are neutral-to-favoring-defendants, plaintiff falls short of demonstrating any entitlement to attorneys' fees.

CONCLUSION

For all the reasons set forth above, and this Court should deny plaintiff's motion for punitive damages and attorney's fees.

Respectfully submitted,

By:__________/S/___________
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