UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHRISTOPHER HUDSON,

Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL, *et al.*,

Defendants.

Civ. Action No. 18-CV-4483-(GHW) (RWL)

ORAL ARGUMENT REQUESTED

PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

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Plaintiff respectfully objects to the Report & Recommendation of Magistrate Judge Robert W. Lehrburger dated September 5, 2019 (ECF No. 90) (the "Report" or "R&R") recommending that Defendants' motions to dismiss Counts I, II, III, and V be granted.

INTRODUCTION

Plaintiff Christopher Hudson, a former, disabled NFL football player, brings this action under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.,* on behalf of a Class of participants in and beneficiaries of the Bert Bell/Pete Rozelle NFL Player Retirement Plan against the fiduciaries of the Plan. Count I alleges that the Retirement Board violated ERISA § 102(a), 29 U.S.C. § 1022(a) by failing to provide participants with an SPD that made proper disclosures about the terms of the Plan. Count II alleges that the Retirement Board breached their fiduciary duties under ERISA § 404(a)(1)(A) & (B), 29 U.S.C. § 1104(a)(1)(A) & (B), in failing to make sufficient disclosures to participants about their benefits regardless of whether they were required to do so under ERISA § 102. Count III alleges that the Management Council and Players Association are fiduciaries because they had the power to appoint and remove members of the Board and a duty to monitor their appointees and that they failed to properly monitor their respective appointees. Count V seeks a determination that the Plan's statute of limitations provision which contradicts ERISA is void.[1]

FACTUAL ALLEGATIONS

This action involves an ERISA plan that offers both retirement and disability benefits to its participants. Compl. ¶ 1.[2] Many former NFL players who are participants in this Plan suffer

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[1] Plaintiff does not object to the dismissal of Count IV as Defendants represented that the Plan Amendment at issue did not apply to Plaintiff. ECF No. 75 at 8.

[2] The written instrument of the Plan within the meaning of ERISA § 402(a) (a.k.a. "the Plan Document") was most recently amended and restated in 2009. Class Action Complaint ("Compl.") ¶ 21. This Plan applies to disability benefits for claims filed prior to January 1, 2015. *Id.* There is no dispute that Plaintiff is a participant in this Plan and this Plan governs his disability benefits.

from debilitating neurological conditions from their years of play in the NFL and these conditions impact their cognitive abilities and render them unable to work. *Id.* ¶¶ 3, 54. Despite the vulnerable condition of the participants, Defendants failed to ensure that the players were provided adequate disclosures about critical Plan terms in language that they could understand so that they could take adequate steps to protect their rights to receive the appropriate level of disability benefits. *Id.* ¶ 4. Specifically, the Complaint alleges that Defendants adopted undisclosed interpretations of key terms of the Plan, which are contrary to the plain meaning of those terms as understood by the average participant. *Id.* This undermined players' attempts to obtain a classification for a different category of benefits. *Id.* ¶ 5.

The Benefits Provided by the Plan

The Plan provides different benefit levels with divergent compensation rates depending on whether the player's injuries are related to playing football. Compl. ¶ 2. Article 5.1 of the Plan provides for four categories of benefits that offer substantially different monthly benefit rates depending on which of the benefit criteria are met. *Id.* ¶ 25. Of most concern is the difference between the Inactive and Football Degenerative levels of disability under the Plan. "Inactive" Total & Permanent Disability (T & P) benefits will have (as of 2016) monthly payments of $4,166.50 a month versus $10,250.00 a month for disability related to football under the Football Degenerative level. *Id.* ¶ 25. The Plan allows for players to seek benefits for a one benefit level and then later apply for a different benefit level through Reclassification. *Id.* ¶ 28. Benefits determination are made by an Initial Claims Committee and adverse decisions are appealed to the Retirement Board, which makes the final administrative determination. *Id.* ¶¶ 28, 36.

The Fiduciaries of the Plan

The Retirement Board is the designated Plan Administrator within the meaning of ERISA

§ 3(16)(A), 29 U.S.C. § 1002(16)(A), under Article 1.3 of the Plan Document and a named fiduciary of the ESOP within the meaning of ERISA § 402, 29 U.S.C. § 1102. Compl. ¶ 13. Under Article 8.2 of the Plan Document, the Retirement Board was responsible for: defining the terms of the Plan; construing the Plan; reconciling any inconsistencies in the definition or interpretation of the Plan and Trust; deciding claims for benefits; adopting procedures, rules, and forms; and delegating authority as necessary in administration of the Plan. *Id.* ¶ 13. As a result of these positions and responsibilities, the Retirement Board and its members (the "Board Defendants") are fiduciaries under ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). *Id.* ¶ 13-19.

The National Football League Players Association (the "Association") is the labor organization representing professional American football players in the National Football League. Compl. ¶ 12. The National Football League Management Council (the "Council") is a non-profit association of clubs of the National Football League. *Id.* ¶ 11. The Association had the authority to and did appoint three of the six members of the Retirement Board and also had the authority to remove and replace any of those three members. *Id.* ¶¶ 12 13. Likewise, the Council had the authority to and did appoint the other three members of the Retirement Board, and the authority to remove and appoint a replacement for any member of the Retirement Board that the Council has appointed. *Id.* ¶¶ 11, 13. As a result of their authority to remove and replace their respective appointees on the Retirement Board, the Complaint alleges that the Council and the Association were fiduciaries of the Plan within the meaning of ERISA. Compl. ¶¶ 11-12.

The Summary Plan Description & Disclosures About The Plan Terms

The SPD serves as the primary document designed to communicate information to the player-participants about the Plan. *Id.* ¶ 13. As the Plan Administrator, the Retirement Board was responsible for ensuring that the SPD met the requirements of ERISA § 102. *Id.* ERISA § 102 and

the DOL Regulations set forth specific requirements about how the Plan terms need to be communicated to participants. *Id.* ¶¶ 68-69. ERISA § 102 and the DOL Regulations, 29 C.F.R. § 2520.102-2(a), require that the SPD "be written in a manner calculated to be understood by the average plan participant and shall be sufficiently comprehensive to apprise the plan's participants and beneficiaries of their rights and obligations under the plan." *Id.* ¶¶ 68-69. The DOL Regulations further specify that the plan administrator must "tak[e] into account such factors such as the level of comprehension and education of the *typical participants in the plan* and the complexity of the terms of the plan." *Id.* ¶ 69. The DOL Regulations also require that in order to make the SPD understandable to the average participant, the SPD "will usually require the limitation or the elimination of technical jargon and of long, complex sentence. . .[and] the use of clarifying examples and illustrations." *Id.* The Complaint alleges that the SPD did not meet these requirements. *Id.* ¶¶ 68-79. Specifically, the Complaint alleges that the SPD failed to define or explain terms, used legal jargon, and adopted an undisclosed interpretation of these terms that was contrary to the plain and ordinary definitions as understood by the average participant in this Plan. *Id.* ¶¶ 70-77. Additionally, the Board Defendants had fiduciary duties under ERISA § 404(a)(1)(A) and (B) to make disclosures beyond those specifically required by ERISA. *Id.* ¶¶ 81-88.

Neither the SPD nor any other communication (until the final denial on a request for reclassification) explained the process of Reclassification under the Plan. Compl. ¶¶ 30, 71-77. Article 5.5(b) of the Plan addresses reclassification: "A Player who becomes totally and permanently disabled and who satisfies the conditions of eligibility for benefits under Section 5.1(a), 5.1(b), 5.1(c), or 5.1(d) will be deemed to continue to be eligible only for the category of benefits for which he first qualifies, unless the Player shows by evidence found by the Retirement Board or the Disability Initial Claims Committee to be clear and convincing that, because of

changed circumstances, the Player satisfies the conditions of eligibility for a benefit under a different category of total and permanent disability benefits. *Id.* ¶ 28. Neither Article 5.5(b) of the Plan nor any part of the SPD provides any definition or explanation as to what is meant by "clear and convincing evidence" or "changed circumstances." Compl. ¶¶ 28, 30, 71-77. The SPDs provide no explanation, at least in terms that the average participant would understand, as to what the Board means by "changed circumstances," offering only:

> As long as you remain totally and permanently disabled, you will continue to receive total and permanent disability benefits under the category for which you first qualify, unless you present evidence for reclassification that the Disability Initial Claims Committee or the Retirement Board finds to be clear and convincing. You must be able to demonstrate that, because of change of circumstances, you satisfy the conditions of eligibility for a benefit under a different category of total and permanent disability benefits.

Id. ¶ 30. The Board does not disclose its definition of "changed circumstances" to the players until the end of the administrative process, in their final decision as follows:

> Section 5.55(b) governs requests for reclassification such as yours, and it permits reclassification of T&P benefits only where a Player provides "clear and convincing" evidence of "changed circumstances" warranting "a different category of total and permanent disability benefits." In this and all other instances, the Retirement Board interpret Section 5.5(b)'s "changed circumstances" requirement to mean a change in Player's physical condition—such as a new or different impairment—that warrants a different category of benefits.

Id. ¶¶ 38-39. Further, 5.2(b) of the Plan establishes on method of creating a presumption of T&P benefits is through the award of Social Security Disability benefits within 15 years of a player's last year of League play. Compl. ¶ 26. But the SPD does not explain the effect that could occur if they seek Social Security benefits after having sought T&P benefits under the Plan. *Id.* ¶¶ 29-30.

<u>Chris Hudson's Experience Applying for Benefits</u>

After 8 years playing in the League, Mr. Hudson sustained numerous head injuries. Compl. ¶ 31. Mr. Hudson applied for benefits under the Plan and, ultimately, in a May 20, 2011 letter the

Retirement Board reversed its prior denial of Hudson's T & P benefits for Inactive T & P benefits. *Id.* ¶ 32. In so doing, the Board determined that Mr. Hudson's injuries were "not related to League football activities." *Id.* ¶ 33. Mr. Hudson then sought Social Security Disability benefits and was awarded these benefits with a disability date of December 31, 2009. *Id.* ¶ 34. After receiving the SSDI decision, Mr. Hudson sought reclassification under the Plan claiming that his SSDI award and other new medical documentation established changed circumstances by clear and convincing evidence. *Id.* ¶ 35. The Initial Claims Committee denied his claim but did not explain its definition of "changed circumstances" or how it weighed the evidence submitted by Hudson. *Id.* ¶ 36. Hudson appealed this decision and on May 21, 2015, the Board issued a Final Decision, received by Hudson on May 27, 2015. *Id.* ¶37-38. For the first time, in this final decision the Board notified Hudson of its interpretation of "changed circumstances" under the Plan. *Id.* ¶¶ 38-39.

ARGUMENT

I. COUNT I STATES A TIMELY CLAIM UNDER ERISA § 102

Count I alleges that the Board Defendants violated ERISA § 102, 29 U.S.C. § 1022, by creating and distributing an SPD that did not adequately explain the standard for reclassification under the Plan. Compl. ¶¶ 67-80. Count I alleges that the SPD used legal jargon to describe the standard—"clear and convincing evidence" of "changed circumstances"—and failed to explain that seeking reclassification needed to establish a change in their physical condition, and that new evidence relating to the character of an existing impairment would not qualify. *Id.* ¶¶ 38-39, 86. The Complaint alleges that this usage differed from the ordinary definition of those terms as understood by the average participant in this Plan. *Id.* ¶¶ 71-72, 74-76. Count I further alleges that Hudson did not discover that the Board was "not using the plain and ordinary definition[s] for the[se] terms" until he received a denial of his claim for reclassification on May 27, 2015. *Id.* ¶¶

73, 77.

The Report concludes that Count I fails both because the Plan Administrator had no statutory obligation under ERISA § 102 to "disclose discretionary interpretations of plan terms," and because Hudson had constructive knowledge of the standard for reclassification under the Plan more than three years prior to the filing of this case – *i.e*., before May 21, 2015. R&R at 44, 49. Both recommendations should be rejected. First, the DOL regulations and case law interpreting ERISA § 102 make clear that where, as here, a policy of interpretation or administration of the Plan erects a barrier that may lead to a participant's disqualification from, ineligibility for, or denial or loss of benefits, the SPD must disclose that policy. Second, the statute of limitations runs six years, not three, and in any a single out of circuit court decision did not place Hudson on constructive notice of the Board's its interpretations of the Plan.

A. The SPD Failed to Disclose a Prerequisite to the Receipt of Promised Benefits

"SPDs are central to ERISA." *Frommert v. Conkright*, 738 F.3d 522, 531 (2d Cir. 2013). The SPD serves as an "employee's primary source of information regarding employment benefits and employees are entitled to rely on the descriptions contained in the summary." *Burke v. Kodak Ret. Income Plan,* 336 F.3d 103, 110 (2d Cir. 2003). ERISA § 102 and DOL regulations govern the contents of SPDs. *Id.* ERISA § 102 requires that the SPD must explain the plan's eligibility requirements as well as "the circumstances which may result in disqualification, ineligibility or denial or loss of benefits." *Id.* (citing 29 U.S.C. § 1022(b) and 29 C.F.R. § 2520.102–3(*l*)). To comply with ERISA, these explanations in "[t]he SPD must be written in a manner calculated to be understood by the average plan participant and must be sufficiently accurate and comprehensive to apprise participants and beneficiaries of their rights and obligations under the plan." *Id.* (quoting 29 U.S.C. § 1022(a)). The standard is not a *hypothetical* "average plan participant" but needs to "account" for "the level of comprehension and education of *typical participants in the plan* and

the complexity of the terms." 29 C.F.R. § 2520.102–2(a) (emphasis added). The SPD also must limit or avoid "technical jargon" and include "clarifying examples and illustrations" of how the plan works in practice. *Id.* Count I alleges that the SPD failed to comply with these standards. Compl. ¶¶ 68-69, 79. Count I alleges the specific language in the SPD that constituted legal jargon, how the ordinary definition of these terms differed from Defendants' interpretation, and that the SPD failed to provide any examples or illustrations of these standards in practice. *Id.* ¶¶ 71-77. These allegations sufficiently state a claim of ERISA § 102.

The Report concludes only that the Retirement Board need not disclose its interpretation of the "changed circumstances" language of the Plan, because "[n]o part of 29 U.S.C. § 1022 requires plan fiduciaries to disclose discretionary interpretations of plan terms, or requires that summary plan descriptions must summarize every standard under which plan terms may be evaluated…." R&R at 44-45. The Report asserts that ERISA § 102 only applies to "more drastic situations where a summary plan description fails to disclose the actual material terms of the plan." *Id.* at 45. But this assertion contradicts Second Circuit precedent, which has held that policies not contained in the plan document must be disclosed. In *Wilkins v. Mason Tenders District Council Pension Fund*, 445 F.3d 572 (2d Cir. 2006), the Second Circuit considered a policy – not contained in the plan document – requiring pension participants seeking additional benefits to provide certain documentation as required disclosure. *Id.* at 582. The *Wilkins* defendants argued and the district court held that disclosure was not required because this policy "was not a plan term, but 'merely a statement as to how the Pension Fund administers claims for benefits.'" *Id.* at 581. Rejecting this argument, the Second Circuit reversed and held that the fiduciaries were "required under ERISA to state its Policy in the SPD." *Id.* at 583–84. "It seems to us obvious that the Policy, by erecting an additional, mandatory prerequisite to the receipt of promised benefits, may result in

disqualification, ineligibility, or a denial or loss of benefits [and] must, therefore, be disclosed in the SPD." *Id.* at 584; *Koehler v. Aetna Health Inc.,* 683 F.3d 182, 188-189 (5th Cir. 2012) (failing to clearly disclose policy about submission of pre-authorization request violated ERISA § 102). Count I similarly alleges that the Board Defendants had a policy or practice to interpret certain terms related to reclassification requiring certain kinds of evidence but failed to disclose this policy. Compl. ¶¶ 75, 77.

The Report relies on *McCarthy v. Dun & Bradstreet Corp*, 482 F.3d 184, 194 (2d Cir. 2007) to conclude that SPDs need not disclose interpretation of plan terms. R&R at 44-45. But the nondisclosure in *McCarthy* was the *method* by which a policy of actuarially adjusting early retirement benefits reduced those benefits. *McCarthy*, 482 F.3d at 194. The policy of reducing early retirement benefits itself was disclosed. *Id*. First, unlike *McCarthy,* but like *Wilkins,* the SPD did *not* disclose the policy at issue: requiring proof of a new or changed impairment to qualify for reclassification. Second, unlike *McCarthy* but like *Wilkins,* this action involves an "additional, mandatory prerequisite to the receipt of promised benefits [that] may result in disqualification, ineligibility, or a denial" of benefits—as in *Wilkins*, by an undisclosed evidentiary requirement. *Wilkins*, 445 F.3d at 584; *see Frommert*, 738 F.3d at 533 (distinguishing *McCarthy*).

The Second Circuit has repeatedly held that the SPD needs to do more than simply repeat the terms of the plan that appear in the formal, legalistic written instrument, but instead "an SPD must explain the 'full import' of a plan term." *Frommert,* 738 F.3d at 532 (affirming finding that SPD failed to provide adequate notice of the plan's offset method); *Layaou v. Xerox Corp.,* 238 F.3d 205, 210-11 (2d Cir. 2001) (reversing summary judgment because "SPD failed to provide adequate notice" about the retirement formula); *Amara v. CIGNA Corp.,* 534 F. Supp. 2d 288, 345 (D. Conn. 2008) ("[I]n addition to describing the individual provisions of the retirement

plan and their import, an employer must also describe the interaction among those provisions if the result is likely to be material to plan participants."); *see Chambless v. Masters, Mates & Pilots Pension Plan,* 772 F.2d 1032 (2d Cir. 1985) (finding notice failed to disclose how employees' benefits would be affected by plan amendment); *see also Koehler,* 683 F.3d at 188-189 (explaining that SPD should use different language than the Plan to explain terms). The DOL regulations impose an "affirmative duty to make participants clearly 'see' circumstances under which they will *not* receive the benefits described in the summary that they might otherwise reasonably expect to receive." *Osberg v. Foot Locker, Inc*., 138 F. Supp. 3d 517, 554 (S.D.N.Y. 2015), *aff'd,* 862 F.3d 198 (2d Cir. 2017). To provide a sufficient explanation in an SPD, the plan administrator must "exercise considered judgment and discretion by taking into account such factors as the level of comprehension and education of typical participants in the plan and the complexity of the terms of the plan." *Frommert*, 738 F.3d at 532 (quoting 29 C.F.R. § 2520.102–2(a)). The Report suggests that this would require the SPD the include "interpretations of all conceivable disputes or ambiguities." R&R at 48. The Second Circuit previously rejected a similar argument. *Frommert*, 738 F.3d at 533. Likewise here, the Complaint adequately alleges that the Board Defendants failed to draft an SPD with specific attention to policies and plan provisions to apprise a participant about the benefits they might reasonably expect to receive or with an eye to the complexity of the issues and the capacities of the average plan participant. Compl. ¶¶ 67-80.

The Report relies on *Boyd v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, 796 F. Supp. 2d 682, 693 (D. Md. 2011), and *Bryant v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, No. 12 CV 936 (N.D. Ga. March 23, 2015) (filed at Dkt. 56-9). R&R 47-48. Neither case involved an SPD claim brought under ERISA § 102, but rather both were benefit claims challenging the denial of benefit reclassification under the "changed circumstances" standard of

the Plan. The holding of both cases—that the Board's interpretation of that language was reasonable (and consistent with prior application)—is different than the question here: whether the SPD provided adequate disclosure. *See Harte v. Bethlehem Steel Corp.*, 214 F.3d 446, 448 (3d Cir. 2000) (holding a plan interpretation reasonable but finding a question of fact as to whether there was a duty to disclose that interpretation); *see King v. Blue Cross and Blue Shield of Ill.,* 871 F.3d 730, 744 (9th Cir. 2017) (finding whether a disclosure violates ERISA § 102 is distinct from the issues in a benefits claim); *Koehler,* 683 F.3d at 191 (upholding interpretation of the plan, but finding violation of ERISA § 102). Those cases also address past undisclosed practices as of the date of those decisions.

B. Count I is Not Barred by the Statute of Limitations

The Report finds that Count I is untimely, by concluding that "Hudson had constructive knowledge of the Retirement Board's interpretation of the evidentiary standard" based on the out-of-circuit district court *Boyd* decision in 2011. R&R at 49. Yet this contradicts the Complaint, which alleges that Hudson learned of the interpretation for the first time on May 27, 2015. Compl. ¶¶ 38-39. And the Report erroneously applies a three year, not six year, statute of limitations.

1. Hudson Did Not Have Constructive Knowledge of the Retirement Board's Plan Interpretation Before May 21, 2015.

The Second Circuit has held that an ERISA cause of action accrues and the statute of limitations does not begin to run until "there has been 'a repudiation by the fiduciary which is *clear* and made known to the beneficiaries.'" *Miles v. N.Y. State Teamsters Conf. Pension & Ret. Fund Emp. Pension Ben. Plan*, 698 F.2d 593, 598 (2d Cir. 1983) (quoting *Valle v. Joint Plumbing Indus. Bd.,* 623 F.2d 196, 202 n.10 (2d Cir. 1980)). Here, the Complaint alleges that the May 21, 2015 denial of Plaintiff's appeal on reclassification was the first time that the Board had provided an explanation to Hudson of how the Board interprets "changed circumstances" and that

explanation was "never conveyed to Hudson in any way prior to the final denial." Compl. ¶ 39. As this Complaint was filed within three years of that appeal denial, Plaintiff's ERISA § 102 claim is timely even under a three year statute of limitations.

In all events, "(t)he statute of limitations is an affirmative defense as to which defendants bear the burden of proof." *Trs. of the N.Y. City Dist. Council of Carpenters Pension Fund v. Lee*, No. 15 CV 8081, 2016 WL 1064616, at *9 (S.D.N.Y. Mar. 14, 2016) (citing *Harris v. City of N.Y.*, 186 F.3d 243, 251 (2d Cir. 1999) and denying motion to dismiss in ERISA case on statute of limitations grounds). As a complaint does not need to anticipate and rebut a statute of limitations defense, "dismissal is appropriate only if a complaint clearly shows the claim is out of time." *Harris*, 186 F.3d at 250-51. To obtain dismissal based on this defense, defendants must "identify, from the face of the complaint and taking all inferences in [plaintiff's] favor, the precise moment at which the [] limitations began to run" because plaintiff had sufficient information "to state his own viable claims." *Charles Schwab Corp. v. Bank of Am. Corp.,* 883 F.3d 68, 95 (2d Cir. 2018) (reversing dismissal). An allegation in the complaint denying that plaintiff had knowledge defeats dismissal on statute of limitations grounds even when defendants submit purportedly contrary extraneous material. *Lee*, 2016 WL 1064616, at *10-11 (relying on *Harris*); *see Sachdev v. Singh*, No. 15 CV 7114, 2016 WL 768861, at *9 (S.D.N.Y. Feb. 26, 2016) (denying motion to dismiss based on "constructive knowledge" where complaint did not allege when plaintiff acquired knowledge).

The Report relies on extraneous material to contradict the allegations of the Complaint. The Complaint alleges that Plaintiff "discovered that the Board Defendants were not using the plain and ordinary definition for the terms" in the Plan, "but were using legal jargon," when on March 27, 2015, he received a letter from the Retirement Board denying his reclassification.

Compl. ¶¶ 73, 77. But the Report finds that Plaintiff should be charged with *constructive* knowledge of the fact that a decision was issued in another case, in a different out of circuit jurisdiction, involving another player even in the absence of any allegation that the *Boyd* decision was disclosed to Hudson. R&R at 49-51 (citing *Boyd*, 796 F. Supp 2d at 692-93).

The Report does not cite a single case where the existence of a single district court decision provided participants with constructive notice of plan interpretation and started the statute of limitations on ERISA disclosure claims. R&R at 50-51. The cited cases are distinguishable. First, *United States v. Regan*, 713 F. Supp. 629 (S.D.N.Y. 1989) did not involve a statute of limitations or ERISA: it was a case about whether criminal defendants had constitutionally adequate fair notice that their federal tax fraud could constitute crimes. *Id*. at 634-35 (citing cases). The "chorus of judicial opinions" referenced in *Regan* was more than the single opinion cited by the Report, and the *Regan* court applied the more minimal standard for constitutional fair notice that expressly contemplates constructive knowledge of law: whether "the law give[s] sufficient warning that men may conduct themselves so as to avoid that which is forbidden." *Id*. at 639-40. Second, in *Weber v. Geffen Records*, 63 F. Supp. 2d 458 (S.D.N.Y. 1999), the court found the plaintiff had constructive knowledge of the contents of a copyright registration which the plaintiff knew was infringing, but narrowed its holding: "[t]his court is not holding that awareness of some number of violations necessarily yields constructive knowledge of all other violations by the same parties." *Id*. at 465. And *Hutton v. Deutsche Bank AG*, 541 F. Supp. 2d 1166 (D. Kan. 2008) held that under Kansas law a plaintiff alleging his financial advisors had invested his money in erroneous tax strategies that the IRS eventually announced it viewed as undisclosed tax shelters had a claim running from the IRS disclosure. *Id*. at 1171. Both these cases involved federal publications integral to the claims, where the document itself provided notice of the relevant facts.

That Mr. Hudson was represented by counsel on his request for reclassification does not provide him with constructive knowledge of every court decision involving the plan in which he participates. The Report cites *Soto v. Barnitt*, No. 00 CV 3453, 2000 WL 1206603, at *2 (S.D.N.Y. Aug. 23, 2000), which held that a procedural default in was not be excused due to attorney ignorance of the appropriate deadline. Likewise, a footnote in *GMA Accessories, Inc. v. BOP, LLC*, 765 F. Supp. 2d 457, 467 n.2 (S.D.N.Y. 2011) chastises counsel for not disclosing contrary authority (where the attorney was counsel in the prior case). Both of these non-ERISA cases involve errors by attorneys (not the knowledge imputed to their clients), and neither involves constructive knowledge or a statute of limitations.

The implication of the Report's conclusions is that Plaintiff was on constructive notice of the Board's interpretation from the moment of the *Boyd* decision and that Plaintiff's claim expired three years from the date of the *Boyd* decision (*i.e*., May 24, 2011), or by May 24, 2014. R&R at 49-50. On this theory, the statute of limitations on Plaintiff's ERISA § 102 claim expired even before he filed his own claim for benefits seeking reclassification on September 16, 2014. That improperly imputes to plan participants an awareness of the contents of the Federal Reporter and "would place the burden on the party less likely to have a clear understanding of the terms of the pension plan." *Osberg v. Foot Locker, Inc.*, 862 F.3d 198, 208 (2d Cir. 2017) (holding constructive notice of claim not provided by documents provided directly to participants).

2. The Applicable Statute of Limitations for Count I Six Years

Where "ERISA does not prescribe a limitations period for actions under § 1132, the controlling limitations period is that specified in the most nearly analogous state limitations statute" and for cases filed in New York, "the six-year limitations period prescribed by New York's C.P.L.R. § 213 controls." *Miles,* 698 F.2d at 598. As the Second Circuit referenced the failure of

ERISA to "prescribe a limitations period," the reference to N.Y. C.P.L.R. § 213 is best understood as referring to N.Y. C.P.L.R. § 213(1). *See id.* at 598. N.Y. C.L.P.R. § 213(1) provides a six-year statute of limitations for "an action for which no limitation is specifically prescribed by law."

The Report ignores this Second Circuit authority to apply a three year statute of limitations to Count I, without analysis, but citing to *Osberg v. Foot Locker, Inc.,* 907 F. Supp. 2d 527, 533 (S.D.N.Y. 2012) [hereinafter *Osberg II*]. The *Osberg* court held that after *CIGNA Corp. v. Amara,* 563 U.S. 421, 437 (2011), the proper limitations period was the three year term for "an action to recover upon a liability, penalty or forfeiture created or imposed by statute except as provided in sections 213 and 215."[3] N.Y. C.P.L.R. § 214(2); *see Osberg II*, 907 F. Supp. 2d at 533. But *Osberg II* ignores that NY CLPR 213(1) provides a *six-year* statute of limitations for "an action for which no limitation is specifically prescribed by law," N.Y. C.P.L.R. § 213(1). *Osberg II* also cites *Romero v. Allstate Corp.,* 404 F.3d 212 (3d Cir. 2005) to justify its decision to depart from long-standing six-year statute of limitations set by the Second Circuit. *Osberg.,* 907 F. Supp. 2d at 533. But *Romero* held the Pennsylvania catchall statute of limitations—one similar to N.Y. C.P.L.R. § 213(1)—applied to a disclosure violation. *Romero,* 404 F.3d at 221-22. As the statute of limitations applied by the Third Circuit was similar to N.Y. C.P.L.R. § 213(1), the analogous statute of limitations for the ERISA § 102 is the six-year catchall limitations in N.Y. C.P.L.R. § 213(1).

II. COUNT II ALLEGES VALID AND TIMELY BREACHES OF FIDUCIARY DUTY UNDER ERISA § 404(a)(1)(A) & (B)

Count II alleges the Board Defendants breached their fiduciary duties under ERISA § 404(a)(1)(A) & (B), 29 U.S.C. § 1104(a)(1)(A) & (B), in failing to make sufficient disclosures to participants about their benefits. Compl. ¶¶ 81-88. Specifically, the Board failed to sufficiently

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[3] On appeal, the Second Circuit did not address the question of the limitations period for ERISA § 102 claims. 555 Fed. App'x 77 (2d Cir. 2014*)* (unpublished). The six-year statute of limitations for actions under ERISA remains binding authority in this Circuit.

communicate information about the standard for participants to obtain reclassification under the Plan. *Id.* The Report recommends dismissal, finding that if the SPD satisfies ERISA § 102, then there is no violation of ERISA § 404(a) and that Count II is untimely. R&R at 53.

A. Compliance with ERISA § 102 does not Exhaust ERISA Fiduciaries' Disclosure Obligations under ERISA § 404

The Report concludes that if a disclosure is not required under ERISA § 102, then there is not duty to disclose under ERISA § 404. R&R at 52. But in *Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76 (2d Cir. 2001), the Second Circuit found a viable "fiduciary duty claims under ERISA §§ 404(a)(1)(A) & (B)" based on defendant's communications with participants about their benefits, including in SPDs that did not "describe[] the plan accurately." *Id.* at 87. "[W]hen a plan administrator affirmatively misrepresents the terms of a plan *or fails to provide information when it knows that its failure to do so might cause harm,* the plan administrator has breached its fiduciary duty to individual plan participants and beneficiaries." *Id.* at 88 (adopting the standard in *In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.,* 57 F.3d 1255, 1264 (3d Cir. 1995) (emphasis added)). The Restatement of Trusts explains that a fiduciary has "a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection." Restatement (Second) of Trusts § 173, comment d (1959).[4] The Second Circuit has "endorsed theories of liability" under ERISA § 404(a)(1) "that rest on material omissions as well as affirmative misstatements" and a breach of fiduciary can be "based on *un*intentional misrepresentations." *In re DeRogatis*, 904 F.3d 174, 194 (2d Cir. 2018) (citing *Estate of Becker v. Eastman Kodak Co.*, 120 F.3d 5 (2d Cir. 1997)

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[4] "[A]n ERISA fiduciary's duty is 'derived from the common law of trusts'" and "[i]n determining the contours of an ERISA fiduciary's duty, courts often must look to the law of trusts." *Tibble v. Edison Int'l,* 135 S. Ct. 1823, 1828 (2015) (citations omitted).

and finding sufficient evidence that the Welfare Fund fiduciaries breached their duties).[5] Indeed, a violation of ERISA § 102 can also be a violation of ERISA § 404. *E.g.*, *Osberg*, 138 F. Supp. 3d at 550-55 (analyzing claims under ERISA § 102 and 404 together and finding violations of both); *see King*, 871 F.3d at 745 (reversing summary judgment of ERISA § 404(a) claims "[b]ecause the SPD" did "not comply with [ERISA § 102]").

The existence of a claim under ERISA § 102 does not preclude a claim under ERISA § 404. The Second Circuit has twice rejected the argument that "there is no private action for breach of fiduciary duty under ERISA when another remedy is available under 29 U.S.C. § 1132." *Devlin,* 274 F.3d at 89; *N.Y. State Psychiatric Ass'n, Inc. v. UnitedHealth Grp.,* 798 F.3d 125, 134 (2d Cir. 2015) (reversing district court's dismissal of claim on that basis). In both cases, the Second Circuit held that a plaintiff can proceed on both claims, and if the plaintiff succeeds on both, then merely the "*remedy* is limited to such equitable relief as is considered appropriate." *N.Y. State Psychiatric Ass'n, Inc.*, 798 F.3d at 134 (quoting *Devlin,* 274 F.3d at 89-90). Thus, a claim for violating ERISA § 102 and ERISA § 404 can be based on the same conduct.

The Report's contrary conclusion is based on the general proposition that "ERISA's fiduciary duties provision does not create new or different responsibilities than the responsibilities described elsewhere in the statute." R&R at 51. But its cases do not support this conclusion. The discussion in *Weiss v. CIGNA Healthcare, Inc.*, 972 F. Supp. 748 (S.D.N.Y. 1997), is dicta as the court found that the claim could not be brought against CIGNA because it was not the plan administrator. *Id.* at 753. In *Board of Trustees of the CWA/ITU Negotiated Pension Plan v.*

[5] Multiple Circuits have held that fiduciaries have "an affirmative duty to inform when the trustee knows that silence might be harmful" or disclose "material facts known to the fiduciary but unknown to the beneficiary, which the beneficiary must know for its own protection." *Jordan v. Fed. Express Corp.,* 116 F.3d 1005, 1015 (3d Cir. 1997); *Krohn v. Huron Mem'l Hosp.,* 173 F.3d 542, 548 (6th Cir. 1999); *Kenseth v. Dean Health Plan, Inc.*, 610 F.3d 452, 466 (7th Cir. 2010); *Kalda v. Sioux Valley Phys. Partners, Inc.,* 481 F.3d 639, 644 (8th Cir. 2007).

Weinstein, 107 F.3d 139 (2d Cir. 1997), the court held only that documents not available upon request pursuant to ERISA § 104(b)(4) were not required to be provided on demand pursuant to ERISA § 404(a)(1). *Id.* at 146. In *Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 657 (4th Cir. 1996), the Fourth Circuit recognized that fiduciaries had a duty "to disclose information to beneficiaries when the trustee knows that failure to disclose might be harmful." *Id.* at 658 (citing and discussing cases). Thus, a fiduciary's duty of disclosure is *not* limited to the specific requirements of ERISA § 102.

B. Count II Is Not Barred By The Statute Of Limitations In ERISA § 413

The Complaint alleges that the Board Defendants hid the standard for reclassification from Plaintiff Hudson until the Board's "final decision denying Hudson's appeal for reclassification." Compl. ¶ 38; *see also id.* ¶ 30. The Complaint explains that the ordinary meaning of terms in the SPD are contrary to the legal jargon of these terms as interpreted by the Board and that Plaintiff only discovered that the Board Defendants were not using the plain and ordinary definitions for those terms until May 2015 (less than 6 years from filing the Complaint). *Id.* ¶¶ 72-73, 76-77. Thus, the Complaint adequately alleges both a self-concealing scheme of deception and concealment that was discovered less than six years before the Complaint was filed.

Unlike some Circuits, the Second Circuit concluded that the "fraud or concealment" provision should not be fused into a single concept "fraudulent concealment" but instead refers to two distinct concepts: fraud or fraudulent concealment. *Caputo v. Pfizer, Inc.*, 267 F.3d 181, 189, 190 (2d Cir. 2001). Fraud includes not only "false representations of fact, whether by words or conduct," but also *"concealment of that which should have been disclosed."* *Id.* (emphasis added). Concealment means a "withholding of something which one knows and which one, in duty, is bound to reveal." *Id.* As a result, this "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 to act to his detriment *or* (2) engaged in acts to hinder the discovery of a breach of fiduciary duty." *Id.* (bold and underlying emphasis added). As concealment incorporates the fraudulent concealment doctrine, the Second Circuit has long held that the wrong itself was of such a nature as to be self-concealing. *State of N.Y. v. Hendrickson Bros., Inc.,* 840 F.2d 1065, 1083 (2d Cir. 1988) (finding that a bid-rigging scheme was inherently self-concealing that fraudulent concealment doctrine applied to statute of limitations); *see Caputo*, 267 F.3d at 190 n.3. When a defendant engages in "deceptive conduct [that] may prevent a plaintiff from even *knowing* that he or she has been defrauded," and the plaintiff "remains in ignorance of [the fraud] without any fault or want of diligence or care on his part, the bar of the statute [of limitations] does not begin to run until the fraud is *discovered*." *Merck & Co. v. Reynolds*, 559 U.S. 633, 644–45 (2010). Here, the Complaint alleges omissions that were self-concealing and that these omissions kept Hudson ignorant of the Board's interpretation. Compl. ¶ 5 ("undisclosed terms and hidden interpretations of key provisions create a trap for the unwary"). Thus, the statute of limitations in ERISA § 413(1) did not start to run until Plaintiff discovered Defendants' deceptive acts.

The Report does not specify the date on which the statute of limitations began to run, but suggests one of: (1) an unspecified date when Hudson had access to the SPD and Plan, (2) his initial benefit application date, or (3) the date of the Retirement Board's final determination on his initial benefit application. R&R at 53. By contrast, the Second Circuit has held that "no part of plaintiffs' claim is time-barred [where defendant's] conduct in breach of his fiduciary duties 'was in furtherance of a single scheme,'" and because "numerous of [defendant's] breaches occurred within the limitations period," the action was "timely under ERISA § 413(1)(A)." *LaScala v.*

Scrufari, 479 F.3d 213, 220 n.1 (2d Cir. 2007) (affirming and adopting the rationale of *LaScala v. Scrufari*, 330 F. Supp. 2d 236, 256 (W.D.N.Y. 2004)). The *LaScala* "action was timely since it was commenced 'within six years of 'the last action [] which constituted a part of the breach or violation.'" *LaScala,* 330 F. Supp. 2d at 256. Here, the Complaint pleads Defendants' breaches as an ongoing scheme through at least November 2015. Compl. ¶ 74. At the earliest, the last action constituting a part of the breach or violation as to Plaintiff occurred in May 2015 (*i.e.*, denial of *reclassification*, not denial of the initial benefit claim). *Id.* ¶ 38. As the Complaint was filed less than 6 (in fact less than 3) years later, Count II is timely.

III. COUNT III PROPERLY ALLEGES A BREACH OF THE DUTY TO MONITOR BY THE COUNCIL AND THE ASSOCIATION

Count III alleges that the Council and the Association breached their duty to monitor the Board Defendants. Compl. ¶¶ 89-95. Count III alleges that these Defendants each had the power to appoint and remove three members of the Retirement Board. *Id.* ¶ 92. Count III explains that this power also obligates them to undertake an appropriate investigation "at reasonable intervals to ensure" that their respective appointed fiduciary "is acting in compliance with the terms of the Plan and in accordance with ERISA." *Id.* ¶ 91. Count III then identifies specific items that the Council and the Association would have known if they had properly monitored the Board. *Id.* ¶ 93. Count III also identifies specific actions that these Defendants should have taken if they had "properly monitored the Board Defendants." *Id.* ¶ 94.

A. The Council & Association Are Fiduciaries of the Plan

The Report asserts that neither the Council nor the Association are "named in the Plan Document as a fiduciary." R&R at 33, 39. A "named fiduciary" is simply one named in the written instrument, and ERISA § 402(a) contemplates "one or more named fiduciaries" 29 U.S.C. § 1102(a)(1). The Complaint alleges that Article 8.1 of the Plan Document specifically names the

both the Council and the Association as the entities that each had the authority to appoint and remove three members of the six-person Retirement Board. Compl. ¶ 92. "An appointing fiduciary's duty to monitor his appointees is well-established." *Lutz v. Kaleida Health,* 18 CV 01112, 2019 WL 3556935, at *4 (W.D.N.Y. Aug. 5, 2019) (citing *In re Polaroid ERISA Litig.*, 362 F. Supp. 2d 461, 477 (S.D.N.Y. 2005) (collecting cases) and denying motion to dismiss). Even when a person only has oversight of its appointees, the appointing fiduciary still has a "fiduciary duty" to monitor its appointees. *Id.*; *Vellali v. Yale Univ.*, 308 F. Supp. 3d 673, 691 (D. Conn. 2018) (citing numerous cases to hold that "ERISA law imposes a duty to monitor appointees on fiduciaries with appointment power.").[6] Thus, the Report engages in an unnecessary discussion of whether the Council and the Association are "de facto" fiduciaries. *See* R&R at 33.[7]

B. The Report Misconstrues the Allegations of Count III

The Report assumes that the Complaint alleges that the Council and the Association had fiduciary duties beyond their ability to appoint, remove, and monitor, and alleges that they needed to micro-manage the Retirement Board. R&R at 38. But the title of Count III explains that the alleged breaches are "For Failure to Monitor" and specifically alleges that these Defendants should have removed their appointees unless the Board Defendants took actions to remedy their breaches. Compl. ¶¶ 94-95. Thus, the Report discusses whether the Council and the Association breached

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[6] Every Circuit addressing the issue has recognized that persons with the power to appoint and/or remove other fiduciaries (either from the Plan Document ***or*** actual exercise of such power) are themselves fiduciaries who have an ongoing duty to monitor those fiduciaries. *Johnson v. Couturier,* 572 F.3d 1067, 1077 (9th Cir. 2009); *Coyne & Delany Co. v. Selman*, 98 F.3d 1457, 1465-66 (4th Cir. 1996); *Martin v. Feilen*, 965 F.2d 660, 669-70 (8th Cir. 1992); *Leigh v. Engle,* 727 F.2d 113, 134-35 (7th Cir. 1984). As does the DOL: 29 C.F.R. § 2509.75-8 at FR-17.

[7] The Report suggests that a union cannot be an ERISA fiduciary and asserts that Plaintiff only cited cases involving single-employer plans. R&R at 40 & n.14. Contrary to the Report's assumption, the Association's fiduciary status is *not activity arising* out of its collective bargaining activity, but its appointment and removal power. *See id.* And Plaintiff cited cases involving multi-employer plans. *E.g.* Dkt No. 72 at 41 & n.25 (citing *Whitfied v. Tomasso*, 682 F. Supp. 1287, 1305 (E.D.N.Y. 1988) (finding a Union breached its fiduciary duty in failing to monitor and remove its appointees)). Nothing in ERISA supports the finding that the Association is excluded from being an ERISA fiduciary.

their duties in connection with the initial appointment of the Board members, R&R at 37, whether they are "liable for every alleged act or omission of those trustees," R&R at 35, and requiring "a substantive decision not to upgrade Hudson's benefits," R&R at 38. That discussion is irrelevant Count III merely alleges that the Council and Association should have required the Board to correct their breaches or remove them. Compl. ¶ 94.[8]

C. Count III Adequately Alleges Breaches of the Duty to Monitor

The Report expends one paragraph addressing whether Count III adequately alleges a breach of the duty to monitor and cites a single case. R&R at 38, 42. The sole authority cited, decided *on summary judgment*, found that an appointing fiduciary was liable for his appointees' breaches where he had knowledge of and then failed to take steps to remove the non-performing fiduciary. *Liss v. Smith,* 991 F. Supp. 278, 311 (S.D.N.Y. 1998).[9] Count III meets this standard by alleging what the Council and Association knew or should have known and that they failed to remove their respective appointees (or take other steps). Compl. ¶¶ 94-95.

The Report assumes, without authority, that unless the "appointees failed to attend meetings, cast votes, or otherwise execute functions as [fiduciaries]," there is no breach of the duty to monitor. R&R at 38, 42. But courts in this Circuit have found that "[a]llegations of inadequate performance by *appointee fiduciaries* support a claim of breach of the duty to monitor." *In re Fannie Mae 2008 ERISA Litig.,* No. 09 CV 1350, 2012 WL 5198463, at *7 (S.D.N.Y. Oct. 22,

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[8] This analysis appears fixated on a sub-clause in one sentence of one paragraph, Paragraph 94(e), which Plaintiff explained inadvertently omits "require the Board to," and like Paragraphs 94(a) through (d), it should have begun with "require the Board to." Dkt. No. 72 at 40 n.24.

[9] The cases that the Report cites in its legal standard section support a finding that these allegations are sufficient. *E.g. In re Morgan Stanley ERISA Litig.*, 696 F. Supp. 2d 345, 366 (S.D.N.Y. 2009) (finding that "monitoring Defendants did nothing" was sufficient because "it suggest[s] that no system was in place to review and evaluate the performance of their appointees or that potential breaches were otherwise going to be unaddressed"); *In re Polaroid ERISA Litig.*, 362 F. Supp. 2d at 477 (recognizing that the duty to monitor requires reviewing the performance of appointees); *In re Worldcom, Inc.*, 263 F. Supp 2d 745, 765 (S.D.N.Y. 2003).

2012) (emphasis added); *In re Am. Int'l Group, Inc. ERISA Litig. II,* No. 08 CV 5722, 2011 WL 1226459, at *10 (S.D.N.Y. Mar. 31, 2011) (same); *Veera v. Ambac Plan Admin. Comm.,* 769 F. Supp. 2d 223, 231 (S.D.N.Y. 2011) (finding allegations that "potential breaches [by the appointed fiduciaries] were otherwise going unaddressed" suffices "to state a claim against fiduciaries for violation of the duty to monitor."); *In re Morgan Stanley ERISA Litig*., 696 F. Supp. 2d at 366 (finding allegations that "the Monitoring Defendants did nothing" was sufficient to state a claim because it "suggest[s] that no system was in place to review and evaluate the performance of their appointees or that potential breaches were otherwise going unaddressed"); *see In re M&T Bank Corp. ERISA Litig.,* 2018 WL 4334807, at *11 (denying motion to dismiss monitoring claim).[10] Count III alleges six specific items of information about which Council and the Association knew or had they conducted a proper review on reasonable and regular intervals should have known. Compl. ¶ 93. And then alleges what the Council and the Association should have done to properly monitor the Board Defendants. Compl. ¶ 94.[11] Thus, Count III properly alleges a breach of the duty to monitor.

IV. COUNT V ALLEGES A CLAIM UNDER ERISA § 410 AND ERISA§ 404(A)(1)(A)

Count V alleges that Section 11.7(b) of the 2009 Plan Document attempts to impermissibly modify ERISA's statute of limitations for fiduciary claims as follows:

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[10] "Because the appropriate ERISA mandated monitoring procedures vary according to the nature of the plan at issue and other facts and circumstances, an analysis of the precise contours of the defendants' duty to monitor at this stage is premature." *In re M&T Bank Corp. ERISA Litig.,* No. 16 CV 375, 2018 WL 4334807, at *11 (W.D.N.Y. Sept. 11, 2018); *Yale,* 308 F. Supp. 3d at 692 (same); *In re Xerox Corp. ERISA Litig.*, 483 F. Supp. 2d 206, 215 (D. Conn. 2007) (same).

[11] Monitoring fiduciaries have liability under ERISA § 405(a)(2) and (3) if allow their appointees to commit a breach or if they know of and fail to remedy a breach. *See id.*; *see also Chesemore v. All. Holdings, Inc.,* 886 F. Supp. 2d 1007, 1057 (W.D. Wis. 2012) (finding entity with monitoring responsibility liable after trial as a co-fiduciary for its appointee's breach under both ERISA § 405(a)(2) and (3)), *aff'd,* 829 F.3d 803 (7th Cir. 2016).

ERISA § 413 Provides	**Section 11.7(b) of the Plan Provides**
No action may be commenced under this subchapter with respect to a fiduciary's breach 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.	[N]o action alleging an omission, violation, or breach of any responsibility, duty, or obligation imposed by this Plan (or any internal rule, guideline, or protocol) or any applicable law may be commenced after the earlier of – (l) six years after the date of the omission, violation, or breach, or (2) three years after the earliest date on which the plaintiff had actual ***or constructive*** knowledge of the omission, violation, or breach, except as provided in ERISA section 413 (but only where the fraud or concealment is ***separate from the offense and intended to conceal the existence of the offense***).

Compl. ¶ 104 (illustrating conflict with ERISA § 413 in bold). The Complaint alleges that the SPD, in a section entitled "Limitation on Actions" fails to adequately explain the Plan:

> With respect to all other types of claims [i.e. other than a benefit claim], you may not commence a legal action in a court after the earlier of
>
> - six years after the date of any omission, violation, or breach of any responsibility, duty, or obligation imposed by the Retirement Plan or applicable laws, or
>
> - three years after the earliest date that you knew ***or should have known*** of any such omission, violation, or breach, except that, depending on the facts, ***certain exceptions may apply***.
>
> If you do file a legal action after these limitation periods have expired, the court may dismiss your claim.

Id. ¶ 106.[12] The SPD fails to explain that the Plan *attempts to modify ERISA's statute of limitations*

[12] Congress specifically removed a constructive knowledge standard from the statute of limitations for actions as to a fiduciary's breach of any responsibility, duty, or obligation under Part IV of ERISA after January 1, 1988. *Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO, Dist. Lodge No. 157 by Roy v. Rome Cable Corp.,* 810 F. Supp. 402, 409 (N.D.N.Y. 1993). This Plan provision also significantly conflicts with the Second Circuit's standard for actual knowledge and the "fraud or concealment" exception. *Supra* Part I.B.1.

or explain how this impacts participants' rights. *Id.* ¶ 107. Nonetheless, the Report imputes knowledge of these provisions although nothing suggests that Hudson had the actual Plan Documents more than 3 years prior to May 2018. *See* R&R at 59.

Even though Count V alleges a claim under ERISA § 404(a)(1) and the statute of limitations is therefore governed by ERISA §413, the Report ignores that ERISA § 413 does not have a constructive knowledge provision under Part IV of ERISA. *Compare* R&R at 58-59 *with LaScala*, 479 F.3d at 220 n.1 (finding "ERISA § 413(2) requires 'actual knowledge'" and not merely constructive knowledge). Thus, Report's recommendation is premised on an assumption that if an improper provision appears in the Plan, that a participant would need to challenge the provision within 3 years of the Amendment even if they had no other claim and even if the SPD failed to provide them adequate knowledge about the Amendment.[13]

CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss Counts I, II, III, and V should be denied.

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[13] The Report does not address whether Hudson has standing to bring this claim. R&R at 59 n.22. In this Circuit, a participant has Article III standing to obtain injunctive relief related to ERISA's disclosure and fiduciary duty requirements without a showing of individual harm to the participant. *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC*, 433 F.3d 181, 199 (2d Cir. 2005). Certainly, once Hudson had the claims in Counts I-III that could be subject to the Plan's statute of limitations provision, then he had a cognizable harm.

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Respectfully submitted,

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