IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

Harold A. McElroy,

Plaintiff,

v.

Lockheed Martin Corporation Salaried Retirement Program, et al.,

Defendants.

_____/

NO. C 04-02852 JW

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; GRANTING PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Harold A. McElroy ("Plaintiff") filed this suit under ERISA § 5032, 29 U.S.C. § 1132 seeking modification of his monthly pension benefits. Plaintiff names the Lockheed Martin Corporation Salaried Retirement Program ("Plan") and Lockheed Martin Corporation ("Lockheed Martin") as defendants (collectively "Defendants"). Presently before this Court are cross-motions for summary judgment. Defendants seek summary judgment on the issues that (1) Lockheed is not a proper defendant in this case, and (2) the Plan Administration's calculation of Plaintiff's monthly pension benefits was a proper exercise of its discretion which should be upheld by this Court. Plaintiff moves for summary judgment on grounds that Defendants incorrectly calculated Plaintiff's pension benefits. For the reasons stated below, Defendants' motion for summary judgment is DENIED and Plaintiff's cross-motion for summary judgment is GRANTED.

II. BACKGROUND

The material facts are largely uncontested. Plaintiff began work on February 15, 1971 at Lockheed Missiles and Space Company ("LMSC") and immediately enrolled in the Lockheed Retirement Plan for Certain Salaried Employees ("Lockheed Plan"). On February 9, 1990, Plaintiff voluntarily left his employment at LMSC in order to work in the restaurant business. Eighteen months later, on July 1, 1991, Plaintiff left the restaurant business and was rehired by LMSC. Upon resuming his employment with LMSC, Plaintiff again participated in the Lockheed Plan. The Lockheed Plan in effect during the period of Plaintiff's 18-month hiatus was as amended and restated effective December 25, 1989. Under that version of the Lockheed Plan, "break in service" was defined as "a Plan Year in which an Employee fails to complete more than eleven (11) Weeks of Service." (Lockheed Plan, Section 1.06). Plaintiff did not complete more than eleven weeks of service in 1990.

In 1995, Lockheed merged with Martin Marietta to form Lockheed Martin which became the parent company of LMSC. Lockheed Martin amended the Lockheed Plan as described in the Summary Plan Description ("SPD") of the Lockheed Martin Corporation Salaried Retirement Program, effective July 1, 1997 ("Plan"). The SPD discusses the calculation of periods of employment, stating: "Breaks in Service: When you are credited with less than 190 hours in a plan year, you have incurred a Break in Service, and therefore have interrupted your Period of Employment." Plaintiff did complete more than 190 hours of service in 1990. Lockheed Martin also issued the Lockheed Martin Corporation Retirement Program Salaried Plan Annex ("Annex") effective July 1, 1997. The Annex grandfathered in some of the terms of the Lockheed Plan, including a provision that an early retiree may receive a normal retirement benefit if the sum of credited service since the employee's most recent break in service and the participant's age is 85 or more ("Rule of 85"). Specifically, Section 1(e) of the Annex states: "Rule of 85 Service: The amount of Credited Service...of a Transition Salaried Participant since such Participant's most recent Break in Service, as defined in Article III(3)(c)." Article III(3)(c) of the operative plan when Plaintiff retired effective January 1, 2001 states: "A one year Break in Service for vesting purposes shall be incurred if the Participant completes less than 190 Hours of Service during a Vesting Computation Period." (Lockheed

Martin Corporation Salaried Retirement Program Master Plan Document as amended and restated effective January 1, 2000 ("MPD").) The parties agree that the Rule of 85 is beneficial to the Plaintiff only if the time period between February 1990 and July 1991 when Plaintiff resigned and was then rehired is not considered a break in service.

At his retirement, Plaintiff began receiving payments of $2035 per month. He contested the amount, arguing that under the definition "break in service" in the Annex, SPD, and MPD, he did not have a break in service in 1990-1991, and therefore, his benefits should be calculated under the Rule of 85. On March 29, 2001, Donald R. Remsch, the Manager of Pension Support denied Plaintiff's request for recalculation because "the Plan document, as amended and restated effective December 25, 1989, contains the provisions that govern how your service at that time is to be treated." Plaintiff appealed Mr. Remsch's decision to the Lockheed Martin Pension Plan Administrative Committee. ("Committee"). In its letters of May 24, 2001 and February 19, 2002, the Committee also applied the definition of "break in service" in effect in 1990-91 and found that Plaintiff did not qualify for a recalculation of pension benefits under the Rule of 85. The Committee supported its position by referring to the first paragraph of the Annex as stating the intent of the Annex as merely to preserve and not change certain features of prior plans.

III. STANDARDS FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact...and the moving party is entitled to judgment as a matter of law" Fed. R. Civ. P. 56(c). Lessard v. Applied Risk Management, 307 F.3d 1020, 1023 (9th Cir. 2002). The central inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986).

A party moving for summary judgment on the ground that there is no genuine issue of material fact as to some matter on which the opposing party would have the burden of persuasion at trial still has both the initial burden of production and the ultimate burden of persuasion on the motion. Nissan Fire & Marine

Ins. Co., v. Fritz Cos., 210 F.2d 1099, 1102 (9th Cir. 2000). The moving party may carry its burden of production on summary judgment either by (1) negating an essential element of the opposing party's claim or defense, or (2) demonstrating that the opposing party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial. Id.

Once the movant meets this burden, the opposing party must respond by affidavit or otherwise setting forth specific facts showing there is a genuine issue of material fact. Fed. R. Civ. P. 56(e). It is the non-moving party's burden to show a triable issue of fact as to matters on which it will bear the burden of persuasion at trial: "A complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex v. Catrett, 477 U.S. 317, 317 (1986). The non-moving party's evidence must be sufficiently probative to permit a reasonable trier of fact to find in favor of the opposing party. Anderson v. Liberty Lobby, 477 US 242, 249-50 (1986). Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 US 574 (1986) ("when the moving party has carried its burden under rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts").

In ruling on a motion for summary judgment, the court must draw all inferences in the light most favorable to the nonmoving party. Ford v. MCI Comm. Corp. Health and Welfare Plan, 299 F.3d 1076, 1079 (9th Cir. 2005). Conclusory or speculative testimony in affidavits and moving papers are insufficient to raise genuine issues of fact. See Thornhill Publ'g Co., v. GTECorp., 594 F.2d 739 (9th Cir. 1979).

IV. DISCUSSION

A. Lockheed Martin as a Defendant in this Case

Defendants contend that Lockheed is not a proper party to this lawsuit. In support of their proposition, Defendants cite Gelardi v. Pertec Computer Corp., 761 F.2d 1323 (9th Cir. 1985). However, disagreement has arisen since Gelardi, regarding whether limiting suits to the plan as an entity is overly restrictive. Indeed, presently, there are "two lines of cases in our circuit on the question of whether ERISA permits suits to recover benefits against plan administrators." Carter v. Health Net of Calif., 374 F.3d 830, 839 n.5 (9th Cir. 2004). In Gelardi, the employer/sponsor was not also named as a plan

administrator. In this case, Lockheed is initially named as Plan Administrator in Plan documents. (MPD, Art. X(4)(a).) Since ERISA defines a plan administrator as "the person specifically so designated by the terms of the instrument under which the plan is operated," even if a person designated as plan administrator subsequently delegates discretion regarding plan administration to another party, the initially named plan administrator is still the proper party to sue in § 1132(a)(1)(B) suits. See Ford v. MCI Comm. Corp. Health and Welfare Plan., 399 F.3d 1076 (9th Cir. 2005); Everhart v. Allmerica Financial Life Ins., 275 F.3d 751, 954 n.3 (9th Cir. 2001). Also, because Lockheed is identified as a plan administrator in plan documents, there is at the very least a triable issue of fact as to whether Lockheed is the "plan administrator" under ERISA. Therefore summary judgment on dismissing Lockheed as a defendant in this case is denied. See Leung v. Skidmore, Owings & Merrill, LLP, 213 F. Supp. 2d 1097, 1101-02 (N.D. Cal. 2002).

Defendants' argument that the status of the plan as a defined pension benefit plan precludes suits against Lockheed is also unpersuasive. Defendants cite as support, the lines in their Plan documents stating that Plan assets are held in trust for exclusive benefit of participants and beneficiaries and releasing the Plan Administrator for liability to the extent allowed by law. Distinguishing § 1132 liability based on the type of plan at issue has been expressly rejected: "Nowhere does § 1132 explicitly distinguish plan types." Everhart v. Allmerica Financial Life Ins., 275 F.3d 751, 756 (9th Cir. 2001) (declining to distinguish between self-funded plans and plans utilizing outside insurance carriers). Furthermore, Defendants cite no authority, whether in employee welfare benefit situations or defined pension plans, that a plan provision excluding a Plan Administrator from liability to the extent of the law would trump the law recognizing the ability of a plaintiff to sue a plan administrator to recover benefits under the plan.

Whether the parties wished to stipulate to a dismissal of Lockheed as a party would not be a matter for this Court to referee. (See Plaintiff's Opp. to Mot. for Summ. J.) In light of the Plan documents designating Lockheed as a Plan Administrator, and the authority allowing suits against a plan administrator for the recovery of benefits, this Court will not dismiss Lockheed as a defendant in this case.

B. Plan Administrator's Calculation of Pension Benefits

Defendants argue that the Plan Administrator's decision to consider the 18-month period in 1990-91 a "break in service" was within the proper exercise of the Plan Administrator's discretion. In response, Plaintiff contends that the Plan Administrator abused its discretion by not implementing this definition when computing the amount of monthly pension benefits to which Plaintiff is entitled because the definition of "break in service" in the Plan was unambiguous in relating back the July 1, 1997 definition to prior situations. In the alternative, Plaintiff argues that if the Plan Administrator's interpretation of the definition of "break in service" in the Plan was plausible and reasonable, the Administrator abused its discretion by implementing a break in service different from the one contained in the SPD. Both parties have presented this issue as a question of law because the material facts are largely uncontested.

1. Standard of Review

A district court faced with a motion for summary judgment reviewing a plan administrator's determination must first determine the proper standard of review. Kearney v. Standard Ins. Co., 175. F.3d 1084. If the standard of review in the case is de novo, then a reviewing court should follow the summary judgment standard outlined above, and may then decide the case by summary judgment only if there are no genuine issues of material fact in dispute. If however, the standard of review is abuse of discretion, the court may not review or consider any evidence not submitted to the administrator, and the court's role is limited to determining if the decision was supported by evidence in the administrative record. See Taft v. Equitable Life Assurance Soc., 9 F.3d 1469, 1472 (9th Cir. 1993). An ERISA administrator abuses its discretion only if it (1) renders a decision without explanation, (2) construes provisions of the plan in a way that conflicts with the plain language of the plan, or (3) relies on clearly erroneous findings of fact. Boyd v. Bert Bell / Pete Rozelle NFL Players Retirement Plan, 410 F.3d 1173, 1178 (9th Cir. 2005).

The Supreme Court has held that denials of benefits under ERISA are reviewed de novo by the district court "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989). In Kearney v. Standard Ins. Co., 175 F.3d 1084, 1090 (9th Cir. 1999), the Ninth

Circuit held that plan documents must grant this discretionary authority unambiguously --if a plan fails to do so, then the district court must review a committee's decision de novo. Also, even if a plan provides discretionary authority, a court will apply a heightened standard of review of a plan administrator has a serious conflict of interest. See Atwood v. Newmont Gold Co., 45 F.3d 1317, 1322-23 (9th Cir. 1995).

In this case, the language in the Plan documents unambiguously grants discretionary authority to the Plan Administrator. In the Lockheed Plan, Section 13.03 (B) states: "The Benefit Plan Committee shall have the responsibility, authority, and discretion necessary to control the operation and administration of the Plan in accordance with the terms of the Plan and Trust Agreement." Similarly, the current Plan, Article X, Section (4)(b) also clearly grants discretion to the Plan Administrator: "The Plan Administrator shall be responsible for, and have the necessary authority and discretion to carry out the following: (I) determination of benefit eligibility and amount of benefits payable." Plaintiff here does not allege conflicts of interest between the Plan Administrator and the Plan which would require de novo review of the Plan Administrator's decision.[1] Thus, in order to grant Defendants' motion, this Court must find that no genuine issue of material fact exists as to whether the Committee abused its discretion in calculating Plaintiff's monthly pension benefits under the Plan. See Bergt v. Retirement Plan for Pilots Employed by Markair, Inc., 293 F.3d 1139, 1142-43 (9th Cir. 2002).

2. Annex and MPD

Plaintiff contends that break in service is unambiguously defined in the Annex and MPD and that the Plan Administrator must adopt this definition of break in service in determining the applicability of the Rule

[1]A number of courts in this Circuit impose a more stringent version of the abuse of discretion standard to the administrator's denial of benefits finding that an apparent conflict of interest exists whenever a plan administrator is responsible for both funding and paying claims, i.e. where the plan administrator was also the employer. E.g., Stoyko v. Kemper Ins. Co., No. 03-16988, 124 Fed. Appx. 534, 535 (9th Cir. Feb. 25, 2005). However, in McDaniel v. Chevron Corp., the court rejected the more stringent abuse of discretion standard as the ultimate standard of review, determining instead that the more stringent version of the abuse of discretion standard is only an intermediate step in determining whether the conflict of interest is serious. 203 F.3d 1099, 1108 n.6 (9th Cir. 2000). In this case, Lockheed Martin is the Plan Administrator. (MPD, Art. X, Sec. 4.) This Court does not reach the issue of whether the review for abuse of discretion is heightened in this case because Plaintiff has not asserted any conflict of interest (serious or not) based upon the naming of Lockheed as a Plan Administrator. Furthermore this Court's ruling would be the same under both the ordinary and more stringent abuse of discretion standard.

of 85 service. Defendants respond that the first paragraph of the Annex unambiguously sets out the intent of the Annex as only affecting prospective benefits, and therefore the definitions do not relate back unless otherwise specified. Furthermore, Defendants argue, even if there is ambiguity in the definition of "break in service," the Plan Administrator's determination was a proper exercise of discretion. This Court finds that the Plan Administrator's determination that the use of break in service in the context of Rule of 85 service in the Annex and the MPD was a proper exercise of discretion.

a. Standards

As an initial matter, determining the ambiguity of plan provisions is reviewed de novo by this Court even if the Plan Administrator has discretion over interpreting such provisions. See Bergt v. Retirement Plans for Pilots Employed by MarkAir, Inc., 293, F.3d 1139, 1143 (9th Cir. 2002) (reviewing ambiguity of provisions in master plan document de novo). A pension plan is ambiguous when its "terms or words...are subject to more than one reasonable interpretation." McDaniel v. Chevron Corp., 203 F.3d 1099, 1110 (9th Cir. 2000).

In evaluating plan provisions for ambiguity where the plan administrator has discretion to construe plan provisions, there are four possible outcomes. First, and most obvious, if the provision is unambiguous, and the plan administrator interprets the provision in accordance with the plain language, then the plan administrator's decision will be upheld. The second possible outcome arises if the provision is unambiguous, but the plan administrator interprets the provision contrary to the plain language. In such situations, the plan administrator may be held to have abused its discretion. Atwood v. Newmont Gold Co., 45 F.3d 1317, 1323-24 (9th Cir. 1995). Third, if the relevant plan provision is ambiguous, the abuse of discretion standard articulated above applies and consequently certain classic contract doctrines do not apply. Generally, the doctrine of contra proferentum would require that an ambiguous contract provision be interpreted against the drafter. But, contra proferentum is explicitly rejected where there is an unambiguous grant of discretion to a Plan Administrator. Winters v. Costco Wholesale Corp., 49 F.3d 550, 554 (9th Cir. 1994). Similarly, although ambiguity may ordinarily be resolved by reviewing extrinsic evidence, a court is limited to reviewing the administrative record presented to it in cases where a Plan

Administrator had clear discretion. Taft v. Equitable Life Assurance Soc'y, 9 F.3d 1469, 1471 (9th Cir. 1993) ("the abuse of discretion standard permits the district court to review only the evidence presented to plan trustees")(internal quotation and brackets omitted). The fourth possible outcome when reviewing the ambiguity of provisions arises when two different provisions of the plan are each unambiguous, but are in conflict when applied to the case of a plan participant. In such cases, a plan administrator can be held to have abused its discretion because such conflicts should be resolved in favor of plan participants. See Bergt v. Retirement Plans for Pilots Employed by MarkAir, Inc., 293 F.3d 1139, 1145 (9th Cir. 2002).

b. Analysis

To determine a starting point for its analysis, this Court is persuaded by the reasoning in Schendel v. Pipe Trade Dist. Council No. 36 Pension Plan, that "when a plan has been amended, eligibility is generally determined using the plan in effect at the time the employee's application is filed." 880 F. Supp. 710, 716 (N.D. Cal. 1995) (citing, with approval, Snyder v. Titus, 513 F. Supp. 926, 935 (E.D. Va. 1981) (allowing trustees to pick and choose provisions from prior versions would "open the door to a shell game in the administration of pension plans, fraught with potential abuse and caprice")). Accordingly, the following analysis begins with the plain language of the MPD. In referencing the Plan's definitions, this Court is not independently construing the Plan terms. This Court is merely reporting the definitions as have been provided in the Plan for a determination of whether the terms are ambiguous, and, if they are not, whether the Plan Administrator has abused its discretion in construing provisions of the plan in a way that conflicts with the plain language of the plan.

Defendants argue that the Court need not reach the plain language of the Plan terms because the issue may be resolved by their interpretation of the intent of the Annex. According to Defendants, the definitions in the Annex are meant only to apply prospectively as reflected in the plain language of the Annex's first paragraph: “This Annex is included in the Plan in order to allow certain employees of the Corporation to continue after June 30, 1997 to accrue certain benefits under terms similar to those of the Plan in effect on June 30, 1997.” While it may be within the Plan Administrator's discretion to interpret these lines as supporting an intent to merely continue benefits, the general and somewhat vague language in

the paragraph is not strong enough to alone justify ignoring the language of the Plan and supporting the Plan Administrator's calculation of Plaintiff's monthly pension benefits. Defendants do not cite to this Court any case which gives the Plan Administrator such discretion to interpret the intent of an introductory paragraph in a plan document that would contradict the plain language of the remainder of the plan documents. See Boyd v. Bert Bell / Pete Rozelle NFL Players Retirement Plan, 410 F.3d 1173, 1178 (9th Cir. 2005) (construing provisions of the plan in a way that conflicts with the plain language of the plan is an abuse of discretion). At best, the lines from the Annex cited above provide a weak indication of intent by using the word "similar." On the other hand, the use of the word "similar" instead of the word "same" or "identical" indicates the opposite –that the intent of the Annex was to give employees such as Plaintiff benefits which were not identical, but merely similar and perhaps more generous. This Court favors looking to the readily available plain language of plan provisions actually addressing the particular terms at issue.

The definition of "break in service" in the MPD effective when Plaintiff retired is unambiguous. Article III(3)(c) of the MPD states: "A one year Break in Service for vesting purposes shall be incurred if the Participant completes less than 190 Hours of Service during a Vesting Computation Period." Article III(3)(c) is not open to additional reasonable interpretations other than that mandated by its plain language.

At the actual center of the parties' controversy is the reference to Article III(3)(c) of the MPD in the Annex extension of the Rule of 85. Section 1(e) of the Annex states: "Rule of 85 Service: The amount of Credited Service...of a Transition Salaried Participant since such Participant's most recent Break in Service, as defined in Article III(3)(c)." The plain language of the Annex extension of the Rule of 85 read with the unambiguously referenced Article of the MPD clearly mandates that the Plan Administrator calculate "Credited Service" since the last time the "Participant completed less than 190 Hours of Service." The parties agree that under the Article III(3)(c) definition of break in service, Plaintiff did not have a "break in service" in 1990-1991. Thus the operative year for starting calculation of Credited Service would be the year in which Plaintiff was hired, or 1971. This Court is not able to see how the plain language of the Annex and its reference to Article III(3)(c) would be open to additional interpretations still within the realm of reason.

The Plaintiff wishes this Court to end our analysis at this stage. Plaintiff argues that the unambiguous definition of break in service in the MPD and referenced in the Annex must be applied retroactively in all situations. We disagree. Assuming that the operative year from which "Credited Service" is to be calculated under 1(e) of the Annex is 1971, the Annex also provides a further definition of "Credited Service." Under the plain language of Article III (4)(c) of the Plan: "Years of Credited Service: A Participant's total Credited Service shall be the amount of Credited Service in the Plan as of June 30, 1997, plus the amount of Credited Service earned after June 30, 1997 under the Plan." The calculation of Credited Service as directed by the plain language of Article III(4)(c) requires two steps: (1) the amount of Credited Service in the Plan as of June 30, 1997, plus (2) the amount of Credited Service earned after June 30, 1997 under the Plan. Therefore, as to (1) the amount of Credited Service in the Plan as of June 30, 1997, Plaintiff is subject to the definition of break in service in the "Plan as of June 30, 1997" which would be defines break in service as "a Plan Year in which an Employee fails to complete more than eleven (11) Weeks of Service." (Section 1.06). It would be nonsensical to calculate "the amount of Credited Service in the Plan *as of* June 30, 1997" using a plan provision that does not exist until after June 30, 1997. Thus, the Plan Administrator was within its discretion in applying the definition of break in service as of June 30, 1997, as required by the plain language of Plan provisions.

3. Summary Plan Document

Plaintiff also argues that the Plan Administrator abused its discretion by implementing a Break in Service definition different from the one contained in the SPD. This Court finds this argument persuasive.

Under ERISA, the SPD is the "statutorily established means of informing participants of the terms of the plan and its benefits and it is the employee's primary source of information regarding employment benefits." Pisciotta v. Teledyne Indus., 91 F.3d 1326, 1329 (9th Cir. 1996). Furthermore, "[c]ourts will generally bind ERISA defendants to the more employee-favorable of two conflicting documents -even if one is erroneous." Banuelos v. Construction Laborers' Trust Funds for S. Cal., 382 F.3d 897, 904 (9th Cir. 2004).

In this case, the plain language of the SPD in defining "break in service" is unambiguous: "When you

are credited with less than 190 hours in a plan year, you have incurred a Break in Service, and therefore have interrupted your Period of Employment."[2] There is no clear indication that the definition is to be applied only prospectively.

Defendants argue that there is also no clear indication that the definition of "break in service" would apply retroactively. We disagree. The SPD continues with a chart at the bottom of the following page entitled "Breaks in Service for Employees in Pension Group L." The chart lists a number of dates, including "December 25, 1985," and states: "If you have a break in service that occurs after December 25, 1985, and the break period is less than five years, you will get credit for the service before the break." Whether Plaintiff belongs to Pension Group L is irrelevant for the purposes of determining the plain language of "break in service" as used. Similarly, although there is no provision in the SPD discussing the Rule of 85, in illustrating the break in service rule and applying break in service to a date clearly prior to June 30, 1997, the only reasonable inference is that the SPD definition of "break in service" is intended to apply retroactively. While we agree with Defendants that the law does not require an exhaustive listing of what a plan does not do, in this case, the SPD clearly implies that it will be applied to breaks in service occurring prior to June 30, 1997.

The conflict between the only reasonable application of break in service in the MPD and the plain language of the SPD, combined with the retroactive application by way of example in the SPD is beyond ambiguity, amounts to a "substantially more egregious ambiguity arising from an inconsistency between the plan master document and plan summary." Bergt, 293 F.3d 1139. In such cases, the law of this Circuit requires that "the provision more favorable to the employee [control]." Id. Thus, a plan administrator will be held to have abused its discretion when it does not resolve conflicts between the SPD and MPD in favor of the employee because "the law should provide a strong an incentive as possible for employers to write SPDs so that they are consistent with the ERISA plan master documents, a relatively simple task." Id. In

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[2]This definition includes language that is generally viewed as backwards-looking past-tense such as "have incurred," and "have interrupted" instead of clearly prospective language such as "will have occurred" or "will have interrupted." This Court, however, does not base its decision on this parsing of the language because drafters may have simply wanted to avoid the somewhat awkward sentence construction necessary to fully clarify their intent.

this case, the unambiguous definition of break in service in the SPD as retroactively applied by way of example apply to Plaintiff's calculation of the Rule of 85.

In Defendants' reply to Plaintiff's cross-motion for summary judgment, Defendants raised the existence of additional provisions in the "complete SPD for the 1997 Plan and the Annex which are contained in separate documents, as Plaintiff is aware," which would contradict Plaintiff's position. Even assuming that Defendants' interpretation of these documents is accurate or within its discretion, such documents would not create a genuine issue of material fact because the evidence was not in the administrative record provided to the Plan Administrator as presented to this Court. This Court is barred from reviewing evidence outside of the administrative record where the Plan Administrator has discretion. See Banuelos, 382 F.3d at 904; Taft, 9 F.3d at 1471. The prohibition against reviewing extrinsic evidence should apply equally whether the extrinsic evidence is in favor of the plaintiff or the defendant. In Banuelos, Plaintiff's attorney received a copy of a new pension plan in a case involving another worker. A footnote to the new plan rendered it retroactive to the date of Plaintiff's retirement. The Trust alleged that the new plan Plaintiff's attorney received was never actually adopted by the Board, and mailed mistakenly. In finding for the Plaintiff, the Ninth Circuit determined that the district court inappropriately reviewed extrinsic evidence to resolve the conflict between the mistakenly mailed plan and the actual plan, and that the trustees abused their discretion not resolving the conflict in favor of the Plaintiff. Id. at 906. Accordingly, based upon the administrative record as presented to this Court, there is no genuine issue of material fact raised by Defendants' assertions regarding additional documents.

V. CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment is DENIED and Plaintiff's cross-motion for summary judgment is GRANTED. On or before December 12, 2005, Plaintiff shall submit a proposed Judgment setting forth the relief to which he claims he is entitled.

Dated: November 2, 2005

/s/ James Ware
JAMES WARE
United States District Judge

04cv2852sj

THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

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Dated: November 2, 2005

Richard W. Wieking, Clerk

By: /s/ JW Chambers
Ronald L. Davis
Courtroom Deputy