IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

US AIRWAYS, INC. in its capacity as Fiduciary and Plan Administrators of the US Airways, Inc. Employee Benefits Plan,	)	
Plaintiff,	)	
vs.	)	2:08cv1593
	)	**Electronic Filing**
JAMES E. MCCUTCHEN and ROSEN, LOUIK & PERRY, P.C.,	)	
Defendants.	)	

MEMORANDUM ORDER

March 17, 2014

Plaintiff, US Airways, Inc. ("US Airways"), filed this action in its capacity as fiduciary and administrator of the US Airways, Inc. Health Benefit Plan (the "Plan"), against Defendants, James E. McCutchen ("McCutchen") and the law firm of Rosen, Louik and Perry, PC ("RL&P")(collectively "Defendants"), seeking equitable relief under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974, as amended, ("ERISA"), 29 U. S. C. § 1132(a)(3), to enforce certain subrogation/reimbursement provisions of the Plan. This Court, based on the provisions of the Summary Plan Description ("SPD"), granted summary judgment in favor of US Airways. The Third Circuit vacated this Court's order and remanded for consideration of Defendants' equitable defenses. *US Airways, Inc. v. McCutchen*, 663 F.3d 671 (3d Cir. 2011).

The United States Supreme Court granted US Airways' petition for writ of certiorari to determine whether ERISA "authorizes courts to use equitable principles to rewrite contractual language and refuse to order participants to reimburse their plan for benefits, even where the Plan's terms give it an absolute right to reimbursement." McCutchen Brief, Ex. 2. Defendants

contend that they were not provided with a copy of the Plan until US Airways agreed to produce the Plan during a meeting requested by the Office of the Solicitor General of the United States and the Department of Labor. The purpose of the meeting was to assist the Government's attorneys in deciding whether to file an *amicus curiae* brief in the United States Supreme Court.

US Airways produced the actual Plan with numerous amendments, and Defendants contend that they then learned for the very first time that the Plan differed in material respects from the SPD, neither providing for a right to reimbursement nor mentioning the right to reimbursement from a recovery from one's own insurance policy, *i.e.*, underinsured motorist benefits. The Defendants provided the Supreme Court with the Plan and the amendments provided by US Airways, but the Court did not use the documents in its analysis, stating:

> the parties litigated this case, and both lower courts decided it, based solely on the language quoted above. . . Only in this Court, in response to a request from the Solicitor General, did the plan itself come to light. . . That is too late to affect what happens here. Because everyone in this case has treated the language from the summary description as though it came from the plan, we do so as well.

US Airways, Inc. v. McCutchen, 133 S. Ct. 1537, 1543 n.1 (U.S. 2013). The Supreme Court then remanded this case holding as follows:

> First, in an action brought under §502(a)(3), based on an equitable lien by agreement, the terms of the ERISA plan govern. Neither general principles of unjust enrichment nor specific doctrines reflecting those principles—such as the double-recovery or common-fund rules—can override the applicable contract. We therefore reject the Third Circuit's decision. But second, the common-fund rule informs interpretation of US Airways' reimbursement provision. Because that term does not advert to the costs of recovery, it is properly read to retain the common-fund doctrine. We therefore also disagree with the District Court's decision. In light of these rulings, we vacate the judgment below and remand the case for further proceedings consistent with this opinion.

Id. at 1551.

Defendants now seek leave to file an amended Answer, including amended affirmative defenses and an amended counterclaim contending that (1) the Plan documents, not the SPD,

control US Airways' claim for reimbursement, and (2) US Airways, as Plan Administrator, has breached its fiduciary duties and comitted statutory violations for non-disclosure, warranting relief based upon equitable estoppel and penalties. US Airways has responded asserting that Defendants waived this issue, and further, Defendants "never requested the Plan document."

Rule 15 of the Federal Rules of Civil Procedure provides that a party may amend its pleading once before a responsive pleading is served, or thereafter "with the opposing party's written consent or the court's leave. The court should freely give leave if justice so requires." FED. R. CIV. P. 15 (a)(1) & (2). "[M]otions to amend pleadings should be liberally granted," *Long v. Wilson*, 393 F.3d 390, 400 (3d Cir. 2004), and "[l]eave to amend must generally be granted unless equitable considerations render it otherwise unjust," *Arthur v. Maersk, Inc.*, 434 F.3d 196, 204 (3d Cir. 2006). This liberal right to amend extends to an answer to the complaint. *See Long v. Wilson*, 393 F.3d at 400. Among the factors that may justify denial of leave to amend are undue delay, bad faith, and futility. *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1414 (3d Cir. 1993) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). The Court of Appeals for the Third Circuit has consistently recognized, however, that "prejudice to the non-moving party is the touchstone for the denial of an amendment." *Arthur v. Maersk, Inc.*, 434 F.3d at 204.

Under normal circumstances, this Court would be loath to allow amendment of the pleadings and a reopening of discovery nearly six (6) years after commencement of the case. Here, however, the Court is troubled by US Airways' untimely production of the Plan documents and its disingenuous contention that Defendants failed to request the Plan document. Because the Plan document was never at issue before this Court, Defendant's did not waive its right to defend based upon the terms therein. Moreover, any prejudice to US Airways at this point of the litigation is a direct result of its failures, whether deliberate or not, during the discovery stage of

the litigation.

Prior to the close of discovery, Defendants issued a Rule 30(b)(6) deposition notice seeking copies of the Plan and the SPD including "all changes to the language and/or terms of the U.S. Airways, Inc.'s Health Benefit Plan and the Plan's Summary Plan Description" in the 10 years preceding 2007, pertaining to "the Plan's rights of subrogation and reimbursement." Despite its obligations under Rule 26 of the Federal Rules of Civil Procedure and its statutory obligation pursuant to 29 U.S.C. § 1024(b)(4), US Airways sought a protective order, arguing that Defendants were seeking information that was irrelevant to the dispute and representing to this Court that the Plan expressly provided for its right to reimbursement. Though the Court denied the request for a protective order, US Airways did not produce the Plan contending there were never any "changes" to the controlling subrogation/reimbursement language.

The Court finds no need in this instance to do a comprehensive analysis of the factors that may justify denial of leave to amend. The Court finds US Airways' reasons for its failure to produce the Plan to be woefully inadequate. Justice, therefore, requires that Defendants' be granted leave to amend to allow a determination regarding whether the Plan documents allow for reimbursement, and whether US Airways, as the Plan Administrator, breached its fiduciary duty to Mr. McCutchen. The Third Circuit has expressly stated:

> [A]n ERISA "fiduciary may not, in the performance of [its] duties, 'materially mislead those to whom the duties of loyalty and prudence are owed.'" . . . This responsibility encompasses "not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful." . . In short, "when a fiduciary speaks, it must speak truthfully, and when it communicates with plan participants and beneficiaries it must convey complete and accurate information that is material to their circumstance."

Unisys Corp. Retiree Med. Benefits Erisa Litig. v. Unisys Corp., 579 F.3d 220, 228 (3d Cir.

2009), *cert. denied sub nom. Unisys Corp. v. Adair*, 559 U.S. 940 (2010)(internal citations omitted). The Court would be remiss in failing to allow such inquiry.

Accordingly,

ORDER OF COURT

AND NOW, upon consideration of Defendants' Motion for Leave to File Amended Answer, Amended Affirmative Defenses & Counterclaim (**Document No. 57**), the Plaintiff's response thereto, and the briefs filed in support thereof, in accordance with the accompanying Memorandum,

IT IS HEREBY ORDERED that Defendants' motion to amend is **GRANTED**. Defendants shall file their Amended Answer, Amended Affirmative Defenses & Counterclaim on or before **Friday, March 28, 2014**. Plaintiff shall respond within twenty-one (21) days from the filing of the amended pleading.

IT IS FURTHER ORDERED that on or before **April 17, 2014**, the parties meet and file with the Court a proposed case management plan regarding discovery matters and dispositive motions.

s/ David Stewart Cercone
David Stewart Cercone,
United States District Judge

cc: Shannon H. Paliotta, Esquire
Noah G. Lipschultz, Esquire
Jon R. Perry, Esquire
Tybe A. Brett, Esquire
Matthew W.H. Wessler, Esquire

(*Via CM/ECF Electronic Mail*)