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I. INTRODUCTION

Defendant Edward M. Liddy (“Liddy”), the former Chairman, President and Chief Executive Officer of Defendants Allstate Insurance Company and its parent, The Allstate Corporation (together, “Allstate”), once again seeks dismissal of two claims brought against him under section 510 (29 U.S.C. § 1140) of the Employee Retirement Income Security Act, as amended (“ERISA”), 29 U.S.C. §§ 1001 *et seq.* Misreading the law and Plaintiffs’ Second Amended Complaint, Liddy incorrectly contends that he is not a “person” within the meaning of Section 510 and that Plaintiffs seek to hold him liable because of his status as a corporate officer. Liddy’s motion to dismiss fails for multiple reasons.

As an initial matter, the law of the case doctrine precludes Liddy’s motion. At the outset of this litigation, Liddy filed a motion to dismiss for lack of jurisdiction, contending that pursuant to the Third Circuit’s decision in *Solomon v. Klein*, 770 F.2d 352 (3d Cir. 1985), he cannot be held liable under Section 510 for actions taken as a corporate officer. (*See* Liddy Mem. of Law in Support of Motion to Dismiss, Doc. No. 12, at 8-9; Liddy Reply Br., Doc. No. 31, at 2-6). Judge Fullam rejected this legal argument in his February 28, 2002 Memorandum and Order (Doc. No. 48), which denied Liddy’s motion to dismiss without prejudice to re-file after the completion of discovery. Tellingly, Liddy offers no basis for the Court to revisit Judge Fullam’s decision at this time, particularly when Plaintiffs have yet to obtain any “merits” discovery relating to their specific factual allegations that Liddy violated Section 510. For this reason alone, Liddy’s motion should be denied.¹

¹ Liddy contends that his prior attempt to obtain dismissal from this action on personal jurisdiction grounds “was rendered moot by the Court when it ruled on defendant Allstate’s motion for summary judgment.” (Liddy Br. In Support Of August 27, 2010 Motion To Dismiss (“Liddy Br.”), Doc. No. 227, at 2 n.2 (citing “Docket # 48”). He is mistaken. The prior motion was not “rendered moot.” Rather, as the record demonstrates, Judge Fullam not only denied the motion to dismiss, but he considered and addressed the argument that Liddy was not amenable to suit under Section 510 in his February 28, 2002 Memorandum and Order. Moreover, at the time Judge Fullam denied Allstate’s own motion to dismiss, Allstate had yet to file a motion seeking summary judgment pursuant to

Liddy’s motion also fails on its merits. In remarkably contending that he is not subject to liability under Section 510 because he is not a “person” within the meaning of ERISA, Liddy ignores the plain language of this provision and the numerous decisions that have properly interpreted Section 510 (and similar federal statutes) to impose liability on individual officers who authorize adverse employment action for the purpose of interfering with the rights and benefits of a plan participant under ERISA. Although Liddy once again relies exclusively upon *Solomon* and its progeny for his tortured interpretation of Section 510, this reliance is misplaced because these decisions interpreted a separate provision of ERISA—Section 515 (29 U.S.C. § 1145)—applicable only to “employers,” and merely held that a corporate officer could not be held responsible for the *corporation’s* own legal and contractual obligations arising under the terms of a collective bargaining agreement.²

Furthermore, it is clear Plaintiffs do not seek to hold Liddy liable under Section 510 solely because of his status as a corporate officer. Plaintiffs have alleged specifically that Liddy helped design, authorize, and implement the “Preparing for the Future” Group Reorganization Program (the “Mass Termination Program”), which improperly ended Plaintiffs’ employment with Allstate, and the rehiring moratorium, which barred for one-year the rehiring of any former agents who were subject to the Mass Termination Program, with the intent to interfere with and end the accrual of

Federal Rule of Civil Procedure 56(c). Judge Fullam therefore did not have occasion to rule on a “motion for summary judgment” in his February 28, 2002 opinion.

² The reason for this is obvious: corporate officers typically do not assume the personal responsibility to make pension contributions on behalf of the corporation because they do not sign a collective bargaining agreement in their individual capacities. See, e.g., *Cement & Concrete Workers Dist. Council Welfare Fund v. Lollo*, 35 F.3d 29, 37 (2d Cir. 1994) (“[Section 515] does not impose a duty to make pension contributions, even on one who qualifies as an ‘employer’ under the general definition provided in 29 U.S.C. § 1002(5), if the duty to contribute did not previously exist.”). Indeed, as Justice Breyer previously explained, there is no basis to hold the owner of the corporate “employer” liable under Section 515 because he does “not *himself* promise[] to make the relevant pension contributions.” *Massachusetts Laborers’ Health & Welfare Fund v. Starrett Paving Corp.*, 845 F.2d 23, 24-25 (1st Cir. 1988) (Breyer, J.); see also *Scarborough v. Perez*, 870 F.2d 1079, 1083 (6th Cir. 1989) (holding that there was “no showing that [defendant] ever personally assumed any obligation to make contributions to the plans on behalf of [his company]”); *Int’l Bhd. of Painters v. George A. Kracher, Inc.*, 856 F.2d 1546, 1550 (D.C. Cir. 1988) (“[t]here is nothing in the legislative history that suggests that Congress meant to expand that liability beyond parties who in a plan or collective bargaining agreement obligated themselves to make those contributions”).

Plaintiffs' employment benefits, including their retirement benefits. Under well-established case law, these factual allegations are sufficient to state claims under Section 510 against Liddy.

Accordingly, Liddy's motion to dismiss must be denied—yet again.

II. FACTUAL BACKGROUND

Plaintiffs allege that Liddy personally engaged in discriminatory and retaliatory conduct proscribed by Section 510 with the specific intent to interfere with the attainment of employee benefits and rights protected by ERISA. Shortly after being installed as Chairman and Chief Executive Officer, Liddy directed his senior management team to find a way to save millions of dollars annually at the expense of the employee agents whose years of service had allowed Allstate to become the nation's second largest property and casualty insurance company. (Second Am. Compl., Doc. No. 223, ¶¶ 73-74, 78-80, 161-67, 168-73.) He did so, at least in part, to curry favor on Wall Street and convince investors to purchase and hold Allstate stock. (*Id.* ¶ 78.)

After “discuss[i]ons at the highest levels of Allstate's senior management team,” Liddy “approve[d] a program under which employee agents would be required to leave the company unless they converted to [a program under which they were denominated ‘independent contractors’] and thereby relinquished” the “superior package” of pension and other benefits they had enjoyed for many years. (*Id.* ¶ 73; *see also id.* ¶¶ 58, 65). The conversion was projected to improve the company's *annual* “bottom line” to the tune of some \$325 million, a significant percentage of which would be achieved through the discontinuation of those benefits. (*Id.* ¶ 79.) Liddy's decision to rid the company of those benefit costs resulted in the termination *en masse* of Plaintiffs and more than 6,200 other long-time employee agents. (*Id.* ¶¶ 75-76.)

In Count II of their Amended Complaint, Plaintiffs claim that Liddy and Allstate each violated Section 510 by perpetrating this Mass Termination Program with the “specific intent of interfering with the attainment of rights to which class members were entitled or may become

entitled under the Plans.” (*Id.* ¶ 164.) Further, in Count III of their Second Amended Complaint, Plaintiffs claim that Liddy and Allstate each violated Section 510 by discharging and otherwise retaliating against employee agents who did not succumb to the pressure of having to sign the General Release and Waiver Agreement (“Release”), in part, by depriving them of their contractual right to continue in the service of Allstate as “captive” employee agents and confiscating their books of business and other investments. (*Id.* ¶ 172.)

Although Liddy self-servingly characterizes the allegations made against him as seeking to hold him liable “solely because of his involvement as a corporate officer in Allstate’s group reorganization program” (Liddy Br., Doc. No. 227, at 5), the Second Amended Complaint continues to make clear that Plaintiffs seek to hold him individually liable for the unlawful and discriminatory acts in which he personally engaged.

III. ARGUMENT

A. The Court Should Decline To Reconsider Judge Fullam’s Previous Decision Rejecting Liddy’s Legal Argument That He Cannot Be Liable Under Section 510 Of ERISA.

In filing his motion, Liddy ignores the “law of the case” doctrine, which, in order to promote finality, consistency, and judicial economy, “‘limits relitigation of an issue once it has been decided’ in an earlier stage of the same litigation.” *Hamilton v. Leavy*, 322 F.3d 776, 786-87 (3d Cir. 2003) (quoting *In re Continental Airlines, Inc.*, 279 F.3d 226, 232 (3d Cir. 2002)). Indeed, absent extraordinary circumstances,³ “when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.” *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (internal quotations and citations omitted); *see also In re Pharmacy Benefit Managers Antitrust Litig.*, 582 F.3d 432, 439 (3d Cir. 2009). This

³ Such “extraordinary circumstances” exist when new evidence becomes available, when there is supervening new law, or when “the earlier decision was clearly erroneous and would create manifest injustice.” *In re: City of Philadelphia Litig.*, 158 F.3d 711, 720 (3d Cir. 1998).

interest in “finality” exists “even when interlocutory orders are involved.” *Johnson v. Twp. of Bensalem*, 609 F. Supp. 1340, 1342 n.1 (E.D. Pa. 1985); *see also cf. Blunt v. Lower Merion Sch. Dist.*, 559 F. Supp. 2d 548, 574 (E.D. Pa. 2008) (holding that a motion for reconsideration is improper when it is used to relitigate matters already argued and disposed of).

At the outset of this litigation, Judge Fullam rejected the argument that, as a corporate officer, Liddy could not be subject to liability under Section 510. Indeed, in response to Plaintiffs’ Amended Complaint, which was filed back in 2001, Liddy filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(2), contending that the Court lacked personal jurisdiction, in part, because he could not be held liable as a matter of law under Section 510. (*See* Liddy Mem. of Law in Support of Motion to Dismiss, Doc. No. 12, at 8-9).

On February 28, 2002, Judge Fullam denied the motion,⁴ noting that the factual record was not sufficiently developed to determine Liddy’s liability under Section 510. (Feb. 28, 2002 Order, Doc. No. 48, at 2-3). By doing so, Judge Fullam necessarily rejected the very *legal* argument that is the subject of the pending motion to dismiss and held that a corporate officer could be personally liable for his own violations of Section 510. (*Id.*). Because Liddy can point to no extraordinary circumstance for relitigating this issue, the Court should once again deny Liddy’s motion to dismiss.

B. Liddy May Be Held Liable Under Section 510 For Actions Taken With The Specific Intent To Interfere With ERISA Rights And The Attainment Of Pension And Other Employee Benefits.

Liddy argues Plaintiffs cannot bring an action against him under Section 510 “[b]ecause [he] is not a ‘person’ for purposes of ERISA” (Liddy Br., Doc. No. 227, at 5). This argument fails as a matter of law.

⁴ Although Judge Fullam denied the motion without prejudice for Liddy to argue that there was not sufficient evidence to hold him liable under Section 510 through a properly-supported summary judgment motion, no such motion was filed, nor could have been filed, given the absence of a factual record.

The Court’s first task is to “determine whether [Section 510] has a plain and unambiguous meaning.” *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 222 (3d Cir. 2009) (quoting *Dobrek v. Phelan*, 419 F.3d 259, 263 (3d Cir.2005)). Under well-settled principles of statutory construction, “[w]here, as here, the statute is clear and unambiguous, courts have no choice but to interpret it as written.” *Christopher v. Davis Beach Co.*, 15 F.3d 38, 42 (3d Cir. 1994) (citing *United States v. Clark*, 454 U.S. 555 (1982) (the court need not consult other indicia of intent or meaning when the literal meaning of the statute is plain or clear and unambiguous); *see also Caminetti v. United States*, 242 U.S. 470, 485 (1917) (if the statutory language “is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion”).

Unless literal application of the statutory language would produce a result demonstrably at odds with Congressional intent, courts should not stray beyond the plain language of an unambiguous statute. *See, e.g., United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242-43 (1989). Thus, in the absence of clearly expressed Congressional intent, courts must assume that the statutory language conveys its ordinary meaning. *See, e.g., Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (“[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive”); *United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501, 506 (2d Cir. 1991) (“[t]he words of a statute should be given their normal meaning and effect in the absence of a showing that some other meaning was intended.”); *United States v. Stokley*, 881 F.2d 114, 116 (4th Cir. 1989) (“[i]n the absence of a contrary indication, the court must assume the drafters of a statute intended to convey the ordinary meaning attached to the language”).

On its face, the plain language of Section 510 of ERISA makes it unlawful for “**any person**” to “discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary

for exercising any right to which he is entitled under the provisions of an employee benefit plan [or] this subchapter . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan [or] this subchapter . . .” 29 U.S.C. § 1140 (emphasis added). The term “person” is defined to mean, among other things, “an *individual* . . .” 29 U.S.C. § 1002(9) (emphasis added). Thus, while some provisions of ERISA impose duties and liability on an “employer” (*e.g.*, 29 U.S.C. § 1145), and a “fiduciary” (*e.g.*, 29 U.S.C. § 1109), Section 510 imposes duties and liability on “person[s]”—and, hence, “individual[s].” *See, e.g., Custer v. Pan American Life Ins. Co.*, 12 F.3d 410, 421 (4th Cir. 1993) (Section 510 applies to more than just “employers” because Section 510 uses not only the more expansive verb “discriminate” to describe proscribed actions, but also the more expansive noun “person” to prescribe “by whom such actions would be illegal”); *Place v. Abbott Labs., Inc.*, 938 F. Supp. 1373, 1377 (E.D. Ill. 1996) (relying upon plain language of statute to hold that “[u]nder Section 510 of ERISA, a claimant is not limited to bringing suit against his or her employer”).

It is clear that Liddy is an “individual” within the ordinary meaning of the word. Indeed, Liddy has not identified, and cannot point to, any statutory language or legislative history that clearly expresses Congress’s intent to exclude an “individual” acting as a corporate officer from the definition of “person” within the meaning of Section 510. Therefore, based on the plain language of Section 510, Liddy, like any other “individual,” may be held personally liable under ERISA for actions taken by him with the specific intent to interfere with the attainment of pension and other employee benefits, even if such actions were committed in his capacity as a corporate officer. *See, e.g., Simons v. Midwest Tel. Sales & Serv., Inc.*, 433 F. Supp. 2d 1007, 1013 (D. Minn. 2006) (a corporate officer can be held liable under Section 510 because this provision “is directed at the ‘person’ who fires an employee in retaliation for exercising a right under an employee benefit plan” and “[u]nder ERISA, a ‘person’ can be an individual”).

This interpretation comports the underlying purpose of Section 510, which is to “prevent persons and entities from taking actions which might cut off or interfere with a participant’s ability to collect present or future benefits or which punish a participant for exercising his or her rights under an employee benefit plan.” *Tolle v. Carroll Touch, Inc.*, 977 F. 2d 1129, 1134 (7th Cir. 1992); *see also Becker v. Mack Trucks, Inc.*, 281 F.3d 372, 381 (3d Cir. 2002). By contrast, construing Section 510 to exclude an “individual” such as Liddy, who was responsible for making the ultimate decision to discharge thousands of employees so that they could no longer attain pension and other benefits, does nothing to “promote the interests of employees and their beneficiaries in employee benefit plans,” *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983), or safeguard them from the very sort of “abuse” that ERISA was intended to put to an end. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990) (quoting S. Rep. No. 93-127, p. 36 (1973)).⁵

Applying the plain meaning of Section 510, courts within the Third Circuit have held that a corporate officer may be held personally liable for his own violations of Section 510. For instance, in *Tobin v. General Electric Co.*, No. 95-4003, 1995 WL 603155 (E.D. Pa. Oct. 6, 1995), Judge VanArtsdalen declined to dismiss a Section 510 claim brought against Jack Welch, the CEO of defendant General Electric. *Id.* at *4. The Court reasoned that plaintiffs would be able to state a claim against Mr. Welch as a “person” under Section 510 if, after discovery, they were able to

⁵ The legislative history likewise demonstrates that Section 510 is to be liberally construed to provide broad protections for participants and beneficiaries: “the enforcement provisions have been designed specifically to provide . . . participants and beneficiaries with broad remedies for redressing or preventing violations [of ERISA].” S. Rep. No. 127, 93d Cong., 1st Sess. 35 (1973); *see also* 29 U.S.C. § 1001(b) (stating that the policy of ERISA is “to protect interstate commerce and interests of participants in employee benefit plans and their beneficiaries, . . . by providing for appropriate remedies, sanctions, and ready access to the federal courts.” In fact, Senator Javits characterized Section 510 as “provid[ing] a remedy for any person fired such as is provided for a person discriminated against because of race or sex . . .” 119 Cong. Rec. 30044 (1973).

establish that he made certain statements with the specific intent to interfere with their entitlement to enhanced severance benefits. *Id.*⁶

Many other courts have reached a similar outcome, based upon the plain language of Section 510. *See, e.g., Simons*, 433 F. Supp. 2d at 1013 (rejecting argument that president of company cannot be held liable for directly violating Section 510 of ERISA and denying officer's summary judgment motion because he was the "person who directly fired" the plaintiff); *Valentine v. Carlisle Leasing Int'l Co.*, No. 97CV1406, 1998 WL 690877 *6 (N.D.N.Y. Sept. 30, 1998) (holding that Section 510 applies to the actions of any "person," including a corporate officer, "who has the ability to affect a plaintiff's employment relationship"); *Swanson v. U.A. Local 13 Pension Plan*, 779 F. Supp. 690, 702 (W.D.N.Y. 1991) (Section 510 "reaches conduct which directly affects the employer-employee relationship in a fundamental way . . . so as to interfere with . . . pension rights"), *aff'd*, 953 F.2d 636 (2d Cir. 1991)); *Boesl v. Suburban Trust & Sav. Bank*, 642 F. Supp. 1503, 1513-14 (N.D. Ill. 1986) (Section 510 imposes liability on any "person" who interferes with employee benefit rights, regardless of whether the "person" is an individual, corporation, or fiduciary); *see also Maguire v. Level Sights, Inc.*, No. 03-CV-2294, 2004 WL 1621187, at *2 (S.D.N.Y. July 19, 2004) (recognizing that liability under Section 510 is not limited to "employers")

⁶ This interpretation of Section 510 comports with authorities such as *Donsco, Inc. v. Casper Corp.*, 587 F.2d 602 (3d Cir. 1978), which hold that corporate officers cannot be allowed to hide behind the corporate shield when they personally engage in a wrongful act or if they specifically direct other officers, agents or employees of the corporation to commit such act. *See id.* at 606. *Accord, Donner v. Tams-Witmark Music Library, Inc.*, 480 F. Supp. 1229, 1233 (E.D. Pa. 1979) (analogizing statutory claim for trademark infringement under the Lanham Act to a "tort"). As the Third Circuit has explained, "[t]he fact that an officer is acting for a corporation . . . does not . . . relieve the individual of his responsibility." *Donsco*, 587 F.2d at 606 (citing *Zubik v. Zubik*, 384 F.2d 267, 275 (3d Cir. 1967)); *see also cf. Al-Khazraji v. Saint Francis Coll.*, 784 F.2d 505, 518 (3d Cir. 1986) (finding that individual directors, officers, and employees of company may be personally liable when they intentionally cause an infringement of rights protected by 42 U.S.C. 1981, or if they authorized, directed, or participated in the discriminatory conduct, regardless of whether the corporation may also be held liable), *aff'd*, 481 U.S. 604 (1987).

and “applies equally to an individual whose conduct directly alters, in a fundamental way, the employer-employee relationship so as to interfere with pension rights.”⁷

Ignoring the clear statutory language, legislative history, and underlying purpose of Section 510, Liddy mistakenly relies upon *Solomon v. Klein*. This decision is inapposite.⁸ The Third Circuit did not interpret Section 510 of ERISA in *Solomon*, but held merely that consistent with the traditional legal distinction between a corporation and its officers, a corporate officer could not be held directly liable as an “employer” under Section 515 of ERISA based solely upon the **corporation’s** failure to make payments pursuant to a collective bargaining agreement between the corporation and a union. 770 F.2d at 353-54. Without addressing Section 510 of ERISA, the

⁷ Additionally, corporate officers can be a “fiduciary” subject to personal liability under ERISA when they fail to act “solely in the interest of the plan participants and beneficiaries.” *Carpenters Combined Funds, Inc. v. Lyons Contr., Inc.*, 2009 No. 09-0842, 2009 WL 3874344 *4 (W.D. Pa. Nov. 18, 2009) (quoting 29 U.S.C. § 1104(a)(1)). *Accord Laborers’ Combined Funds of W. Pa. v. Parkins*, No. 01-cv-79, 2002 U.S. Dist. LEXIS 20035, *5-6 (W.D. Pa. June 5, 2002); *PMTA-ILA Containerization Fund v. Rose*, No. 94-5635, 1995 WL 461269 (E.D. Pa. Aug. 2, 1995); *Galgay v. Gangloff*, 677 F. Supp. 295, 301 (M.D. Pa. 1987), *aff’d*, 932 F.2d 959 (3d Cir. 1991). Thus, in the Third Circuit, as elsewhere, corporate officers and other “individuals” are not excluded from the definition of “person” when acting as an ERISA “fiduciary.” *Confer v. Custom Eng’g Co.*, 952 F.2d 34 (3d Cir. 1991). *Cf. General Dynamics Land Sys, Inc. v. Cline*, 540 U.S. 581, 595-96 (2004) (“identical words used in different parts of the same act are intended to have the same meaning”) (quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)); *Rowan Cos, Inc. v. United States*, 452 U.S. 247 (1981) (recognizing that it would be extraordinary if Congress, without ever saying so, intended to have the identical definition interpreted differently).

⁸ *Solomon* likewise can be readily distinguished from Third Circuit authorities which hold that corporate officers and managers are subject to personal liability for unpaid wages under the Fair Labor Standards Act (“FLSA”) in their individual, not representative capacities. *See Dole v. Haulaway Inc.*, 723 F. Supp. 274, 286-87 (D.N.J. 1989), *aff’d*, 914 F.2d 242 (3d Cir. 1990) (“[a] corporate officer with operational control is an ‘employer,’ along with the corporation, jointly and severally liable under the [FLSA] for unpaid wages”); *Reich v. PTC Career Ins. of Pa., Inc.*, No. 94-647, 1994 WL 283681, at *1 (E.D. Pa. June 24, 1994) (a person who dominates the acts of a corporation or who has the power to act on behalf of a corporation “‘vis-a-vis its employees,’” is an “employer” under the FLSA) (quoting *Donovan v. Savine Irrigation Co.*, 695 F.2d 190, 194-95 (5th Cir. 1983)); *Dole v. Solid Waste Servs., Inc.*, 733 F. Supp. 895, 923 (E.D. Pa. 1989) (quoting same), *aff’d*, 897 F.2d 521 (3d Cir. 1990). *See also Burroughs v. MGC Servs.*, No. 08-1671, 2009 WL 959961 (W.D. Pa. Apr. 7, 2009); *Reich v. PTC Career Inst.*; *Cf. Scholly v. JMK Plastering, Inc.*, No. 07-cv-4998, 2008 WL 2579729, at *4 (E.D. Pa. June 25, 2008) (finding that potential for individual liability under the FLSA applied to the Pennsylvania Minimum Wage Act because the two statutes define “employer” in substantially similar terms); *Kilvitis v. County of Luzerne*, 52 F. Supp. 2d 403, 412-13 (M.D. Pa. 1999) (finding individual liability under the Family Medical Leave Act (“FMLA”) in accord with FLSA individual liability decisions because FMLA and FLSA provide the same definition of “employer”). In other words, courts have had no difficulty in routinely holding that a person who has operational control of a corporation is subject to personal liability for the corporation’s violations of the FLSA. *Montalvo v. Larchmont Farms, Inc.*, No. CIV-06-2704, 2009 WL 4573279 (D.N.J. Dec. 3, 2009) (president and owner may be personally liable for corporation’s violations of the FLSA). *Accord, Boucher v. Shaw*, 572 F.3d 1087 (9th Cir. 2009); *Chao v. Hotel Oasis, Inc.*, 493 F.3d 26 (1st Cir. 2007); *Donovan v. Agnew*, 712 F.2d 1509 (1st Cir. 1983). The result should be no different under ERISA, which utilizes virtually identical definitional provisions to those in the FLSA.

Solomon Court observed that Congress never intended “to impose a personal liability on a shareholder or high-ranking officer of a corporation **for ERISA contributions owed by the corporation.**” *Id.* at 354 (emphasis added); *see also Trustees of Nat’l Elevator Indus. Pension, Health Benefit & Educ. Funds v. Lutyk*, 332 F.3d 188, 192 n.4 (3d Cir. 2003) (recognizing that its holding in *Solomon* was limited to whether a corporate shareholder or officer was an “‘employer,’ as that term is defined for purposes of ERISA”).

The remaining decisions cited by Liddy, including *Lutyk*, also are inapposite, because they did not address the scope of liability under Section 510 of ERISA. (*Liddy Br.*, at 3-5). Instead, they merely followed the unremarkable and limited holding in *Solomon*—that corporate officers do not fall within the statutory definition of “employer” and are therefore not subject to personal liability under Section 515 of ERISA for pension contributions owed by the corporation under the terms of a collective bargaining agreement, unless the corporation is found to be the “alter ego” of the officer or there are grounds for piercing the corporate veil. *See, e.g., Minnesota Laborers Health & Welfare Fund v. Scanlan*, 360 F.3d 925, 929 (8th Cir. 2004) (holding that corporate officer who signs collective bargaining agreement as “officer” of corporation cannot be held liable under Section 515, but that corporate officer who signs collective bargaining agreement as “owner” of corporation may be); *Plumbers’ Pension Fund, Local 130 v. Niedrich*, 891 F.2d 1297, 1300-01 (7th Cir. 1989) (holding that former president and secretary of statutory “employer” were not personally liable for unpaid contributions because they were not parties to the collective bargaining agreement or pension plan); *Laborers Combined Funds of W. Pa. v. Ruscitto*, 848 F. Supp. 598, 599 (W.D. Pa. 1994) (holding only that a defendant corporate officer “was not personally liable under ERISA for unpaid contributions due to a retirement fund . . .”).

Indeed, even the Third Circuit itself has acknowledged the limited holdings of *Solomon* and its progeny. For example, in *Antol v. Esposito*, 100 F.3d 1111 (3d Cir. 1996), a case brought against

corporate officers under Pennsylvania’s Wage Payment and Collection Law for recovery of wages owed by the statutory “employer,” the Third Circuit acknowledged that “in an analogous situation, we held that individual corporate officers were not liable under ERISA *for delinquent contributions owed by the corporate employer.*” *Id.* at 1118 (emphasis added) (“imposing liability for unpaid pension benefits on persons who have not contractually agreed to make the payments seems a harsh result”) *Id.*

Put simply, no court has applied the logic of *Solomon* to hold, as a matter of law, that corporate officers cannot be liable under Section 510 of ERISA. Indeed, the narrow holdings in *Solomon* and its progeny simply do not apply to Section 510 and other ERISA provisions that are not concerned with the unpaid pension plan contributions owed by an “employer.” Because the plain language of ERISA and controlling case law make clear that a corporate officer can be personally liable for violating Section 510, Liddy’s motion should be denied.

C. Plaintiffs Have Sufficiently Alleged Claims Under Section 510 Against Liddy.

It is clear that Liddy can be held personally liable for violations of Section 510. Contrary to Liddy’s position, it is also clear that Plaintiffs do not seek to hold Liddy liable merely because he was a corporate officer of Allstate, but, instead, have alleged sufficient facts to state claims against Liddy for his direct violations of Section 510.

To state a claim under Section 510 of ERISA, a party need only allege: (1) prohibited employer conduct, such as termination; (2) taken for the purpose of interfering; (3) with the attainment of any right to which the employee may become entitled. *Dewitt v. Penn-Del Directory Corp.*, 106 F.3d 514, 521 (3d Cir. 1997); *Gavalik v. Continental Can Co.*, 812 F.2d 834, 852 (3d Cir. 1987). Thus, Plaintiffs need allege only that Liddy “took some type of adverse employment action to interfere with the attainment of their benefit rights under the plan.” *Maguire*, 2004 WL

1621187, at *2; *Richardson v. CSS Industries, Inc.*, No. 08-3900, 2009 WL 1383310, at *2 (E.D. Pa. May 13, 2009).

Here, Plaintiffs have alleged that Liddy played an integral role in the design, approval and implementation of the Mass Termination Program and rehiring moratorium (Second Am. Compl., at ¶¶ 21, 73-80), which resulted in the improper and unlawful termination of each Plaintiff's employment with Allstate and the end of their right to accrue pension and other employee benefits, including the ability to continue to earn credit toward early retirement. (*Id.*; *see also id.* at ¶¶ 108-111, 118-119). Plaintiffs have further alleged that Liddy personally authorized and approved the Mass Termination Program and the rehiring moratorium with the specific intent to interfere with, and prevent, the attainment of pension and other ERISA benefits and to otherwise retaliate against employee agents who refused to sign the Release. (*Id.* at ¶¶ 73-80, 164-167, 170-173). Indeed, Liddy even concedes that Plaintiffs have alleged facts showing his involvement in and approval of the Mass Termination Program. (Pl. Br., at 5). As a matter of law, therefore, Plaintiffs have sufficiently alleged claims against Liddy under Section 510.

Because Plaintiffs have sufficiently alleged that Liddy authorized and participated in the termination of Plaintiffs with the specific intent of avoiding the costs and ending the accrual of employee benefits protected by ERISA, Liddy's motion to dismiss should be denied.

IV. CONCLUSION

For all the foregoing reasons, the Court should deny Liddy's motion to dismiss Counts II and III of the Second Amended Complaint.

September 13, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2010, a true and correct copy of Plaintiffs' Opposition to Motion To Dismiss of Defendant Edward M. Liddy pursuant to Federal Rule of Civil Procedure 12(b)(6) was served via ECF on all counsel of record.

Date: September 13, 2010

/s/ Brian M. Ercole
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