APPENDIX

APPENDIX A

21-993
United States v. Greebel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2021

(Argued: April 28, 2022 | Decided: August 24, 2022)

Docket No. 21-993

UNITED STATES OF AMERICA,

Appellee,

v.

MARTIN SHKRELI,

Defendant,

EVAN GREEBEL,

Defendant-Appellant.

Before: WESLEY, BIANCO, and PÉREZ, *Circuit Judges*.

Defendant was convicted of conspiracy to commit wire fraud and conspiracy to commit securities fraud and ordered to pay restitution. The United States District Court for the Eastern District of New York (Matsumoto, *J.*) granted the Government's application for writs of garnishment seeking access to defendant's 401(k) retirement accounts. Defendant appealed.

We hold that the Mandatory Victims Restitution Act authorizes garnishment of defendant's 401(k) retirement funds. We remand to the district court, however, to determine whether the ten-percent early withdrawal tax will be imposed upon garnishment, limiting the Government's access to defendant's retirement funds. We also hold that the Consumer Credit Protection Act's 25-percent cap on garnishments does not apply to limit the Government's garnishment.

We **VACATE** and **REMAND** for further proceedings consistent with this opinion.

THOMAS R. PRICE, Assistant United States Attorney (Varuni Nelson, Rachel G. Balaban, Beth P. Schwartz, *on the brief*), *for* Breon Peace, United States Attorney for the Eastern District of New York, Brooklyn, New York, *for Appellee*.

REED BRODSKY, Gibson, Dunn & Crutcher LLP, New York, NY, *for Defendant-Appellant*.

WESLEY, *Circuit Judge*:

Evan Greebel was ordered to pay $10,447,979 in restitution to his victims following his convictions for conspiracy to commit wire fraud and conspiracy to commit securities fraud. The United States Government sought to enforce Greebel's restitution order under the Mandatory Victims Restitution Act ("MVRA") by garnishing approximately $921,000 contained in Greebel's retirement accounts. The United States District Court for the Eastern District of New York (Matsumoto, *J.*) granted the Government's application for writs of garnishment seeking access to defendant's 401(k) retirement accounts.

This appeal requires us to decide whether the district court properly granted the Government's application for garnishment. Like the district court, we hold that the MVRA permits the Government to garnish Greebel's retirement funds to compensate the victims of his crimes, notwithstanding the Employee Retirement Income Security Act of 1974 ("ERISA")'s anti-alienation provision.

We further agree with the district court that the plan documents provide Greebel the right to withdraw the funds in his retirement accounts. At the same time, we reiterate that the Government, in seeking garnishment to enforce restitution under the MVRA, steps into the defendant's shoes, acquiring whatever rights the defendant himself possesses to the balance of the 401(k) accounts. Thus, here, the Government's right to Greebel's retirement funds may be limited by the ten-percent early withdrawal tax to which Greebel would be subject. The district court did not consider whether Greebel would be subject to the early withdrawal tax upon seizure of funds by the Government or determine what property interest remains in

Greebel's retirement accounts. Accordingly, we remand to the district court to address those questions in the first instance.

Finally, we reject Greebel's argument that the Consumer Credit Protection Act ("CCPA") limits the Government from garnishing more than 25 percent of the funds in his accounts.

BACKGROUND

A. Factual Background

In 2017, Evan Greebel was convicted of Conspiracy to Commit Wire Fraud, 18 U.S.C. § 1349, and Conspiracy to Commit Securities Fraud, 18 U.S.C. § 371, as a result of his conspiring with co-defendant Martin Shkreli and others to defraud investors in Retrophin, Inc. At the time Greebel so conspired, he was a partner at the law firm Katten Muchin Rosenman LLP ("Katten") and served as Retrophin's outside counsel. In August 2018, the district court sentenced Greebel to, *inter alia*, pay restitution to his victims in the amount of $10,447,979, which was "due and payable immediately from available assets . . . until paid in full," in accordance with the MVRA. J. App'x 73.[1]

This appeal arises out of the Government's effort to garnish two of Greebel's retirement accounts to enforce his restitution order under the MVRA.

1. Greebel's 401(k) from Fried Frank

The Government sought to garnish Greebel's interest in his 401(k)-retirement account at Merrill Lynch from the time he worked as an associate at the law

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[1] Greebel appealed his conviction, and this Court affirmed the district court's judgment. *United States v. Greebel*, 782 F. App'x 72 (2d Cir. 2019).

firm Fried, Frank, Harris, Shriver & Jacobson LLP ("Fried Frank"). Greebel's 401(k) is sponsored by Fried Frank and governed by the "Amendment and Restatement of Fried, Frank, Harris, Shriver & Jacobson LLP 401(k) Incentive Savings Plan" (the "Fried Frank Plan"). The relevant section of the Fried Frank Plan is Article VI (Payment of Benefits and Withdrawals; Loans).

Section 6.01 of Article VI states that "[u]pon a Participant's Separation from Service, other than by reason of his death, *he shall be entitled to a distribution of his interest in his Account balance in a single lump sum* or shall be entitled to effect a no-load transfer of the Investment Fund share held in his Account to an Individual Retirement Account ["IRA"] established by [Merrill Lynch]." J. App'x 220 (emphasis added). Section 6.02(a) provides that "the distribution of a Participant's Account balance shall occur upon the earliest practicable date after the Investment Date of the Plan Year in which his Separation from Service occurs" except as provided in the following subsections 6.02(b) and (c). *Id*. Section 6.02(b) establishes that "if the value of the Participant's vested Account balance is more than $1,000, then his vested Account balance shall not be distributed until he reaches his sixty-second (62nd) birthday *unless he elects* within the period between thirty (30) days and one hundred and eighty (180) days after he receives the notice required by Treasury Regulation Section 1.411(a)-11(c) to receive his benefits prior to that date." *Id.* (emphasis added). Section 6.02(c) provides that "a Participant may consent to postpone the distribution of his Account balance beyond the date specified in Subsection (a) or (b) by filing a written statement with the Pension Committee stating the date upon which he desires the distribution to be made." *Id.*

2. Greebel's 401(k) from Katten

The Government also sought to garnish Greebel's interest in his 401(k)-retirement account at Charles Schwab from his time working as an associate and partner at Katten. Greebel's account is governed by the "Katten Muchin Rosenman LLP Defined Contribution Plan, as Amended and Restated Effective January 1, 2007" (the "Katten Plan"). The relevant section of the Katten Plan is Article VII (Withdrawals).

Section 7.4, governing Partial Withdrawal by Inactive Participants,[2] provides that "[b]y applying to the Applicable Administrative Named Fiduciary ["AANF"][3] in the form and manner prescribed by the [AANF], an Inactive Participant may make a withdrawal from all Accounts of any amount, *up to the entire value*, of his Accounts." J. App'x 306 (emphasis added). Section 7.5 (Withdrawal Processing Rules) establishes the procedure for requesting a withdrawal of funds. Section 7.5(a) provides that "[t]here is no minimum for any type of withdrawal," and Section 7.5(b) provides that "[t]here is no maximum number of withdrawals permitted in any Plan Year." *Id.* "A Participant must submit a withdrawal request in accordance with the procedures established by the [AANF]." *Id.* at 307 (Section 7.5(c)).

B. Procedural History

To enforce Greebel's restitution order under the MVRA, the Government applied under 28 U.S.C. § 3205 for writs of continuing garnishment ("writs")

[2] Inactive Participant is defined as "a Participant who is not an Active Participant", J. App'x 282, and an "Active Participant" is defined as a "Participant who is also an Employee," *id*. at 273.

[3] The AANF is Charles Schwab.

for Greebel's interest in his retirement accounts under the Fried Frank Plan and Katten Plan. Greebel objected pursuant to 28 U.S.C. § 3205(c)(5) of the Federal Debt Collection Procedures Act, 28 U.S.C. § 3001 *et seq.*, seeking to vacate both writs. He argued that he does not have a current, unilateral right to withdraw funds from either retirement account, and thus the accounts are protected by ERISA's anti-alienation provision and not subject to garnishment. In the alternative, Greebel contended the CCPA limits the Government from garnishing more than 25 percent of the funds in the accounts.

Greebel requested a hearing on the motion for writs of garnishment. The district court granted Greebel's request for a hearing over the Government's objection. At the hearing, three witnesses testified about the two retirement plans. Each of the witnesses testified that former employees of their respective firms, such as Greebel, can withdraw the funds in their retirement accounts at any time after leaving the firm.[4] Following the hearing, the district court granted the Government's request for writs of garnishment. Greebel appealed.

[4] *See* J. App'x 527-28 (29:20-30:4, 33:12-14) (Berge); *id*. at 553 (55:6-11), 548 (50:22-2 (Broutman: "An inactive participant, someone who is terminated from the firm can fully access any amount in their Schwab defined contribution plan account"); *id*. at 578 (80: 19-20) (Groskaufmanis: "[F]ormer participants are able to and have been able to withdraw the assets from their accounts at the firm."); *id*. at 580 (82:12-14) (Groskaufmanis: "I don't understand the plan to impose an age restriction, or put another way, a former participant can effect a withdrawal at any point after the person has left.").

DISCUSSION

We review the district court's decision de novo because Greebel's arguments on appeal sound in statutory and contractual interpretation.[5] We begin by laying out the statutory provisions at issue in this case: the MVRA's restitution requirement and procedure for enforcement, ERISA's prohibition on disbursing retirement funds to third parties, and the CCPA's cap limiting garnishment of earnings. The answer to whether the Government may enforce Greebel's restitution obligations against his ERISA-protected funds, and the appropriate amount subject to garnishment, lies in the interplay between these provisions.

I. The MVRA Permits Garnishment of Funds Otherwise Protected by ERISA's Anti-Alienation Provision

"The [MVRA] is one of several federal statutes that govern federal court orders requiring defendants convicted of certain crimes to pay their victims restitution." *Lagos v. United States*, 138 S. Ct. 1684, 1687 (2018). Section 3613(a) provides the procedures available to the Government for collecting unpaid restitution. The relevant provision of the MVRA states:

> The United States may enforce a judgment imposing a fine in accordance with the practices and procedures for the enforcement of a civil judgment under Federal law or State law. *Notwithstanding any other Federal law (including section 207 of the Social Security Act), a*

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[5] *See Hayward v. IBI Armored Servs., Inc.*, 954 F.3d 573, 575 (2d Cir. 2020) (per curium) (applying de novo review to issues of statutory interpretation); *Oscar Gruss & Son, Inc. v. Hollander*, 337 F.3d 186, 198-99 (2d Cir. 2003) (reviewing de novo district court's interpretation of a contract).

> *judgment imposing a fine may be enforced against all property or rights to property* of the person fined, except that—
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> (1) property exempt from levy for taxes pursuant to [certain enumerated sections] of the Internal Revenue Code of 1986 shall be exempt from enforcement of the judgment under Federal law;
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> (2) [Federal Debt Collection Procedures Act procedures for exempting certain property] shall not apply to enforcement under Federal law; and
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> (3) the provisions of section 303 of the Consumer Credit Protection Act (15 U.S.C. [§] 1673) shall apply to enforcement of the judgment under Federal law or State law.

18 U.S.C. § 3613(a) (emphasis added).

The government may enforce restitution orders arising from criminal convictions under the MVRA "using the practices and procedures for the enforcement of a civil judgment under federal or state law as set forth in the Federal Debt Collection Procedures Act." *United States v. Cohan*, 798 F.3d 84, 89 (2d Cir. 2015). Section 3205 of the Act, in turn provides that "[a] court may issue a writ of garnishment against property . . . in which the debtor has a substantial nonexempt interest and which is in the possession, custody, or control of a person other than the debtor, in order to satisfy the judgment against the debtor." 28 U.S.C. § 3205(a); *see also Cohan*, 798 F.3d at 89.

Meanwhile, ERISA "broadly protects covered retirement benefits from dissipation through payment to third parties," *United States v. Novak*, 476 F.3d 1041, 1045 (9th Cir. 2007), employing what is known

as its "anti-alienation" provision requiring pension plans to provide that their benefits "may not be assigned or alienated," 29 U.S.C. § 1056(d)(1). In *United States v. Irving*, 452 F.3d 110, 126 (2d Cir. 2006), we concluded that the MVRA permits courts to consider ERISA-protected assets when imposing criminal fines. Two other courts of appeals have similarly held that the MVRA permits the garnishment funds otherwise covered by ERISA's anti-alienation provision. *See Novak*, 476 F.3d at 1045; *United States v. Frank*, 8 F.4th 320, 325–26 (4th Cir. 2021).

The statutory text of the MVRA makes clear that criminal restitution orders can be enforced by garnishing ERISA-protected retirement funds. The MVRA expressly states that criminal restitution orders may be enforced against "*all* property or rights to property," 18 U.S.C. § 3613(a) (emphasis added), making "'quite clear' that absent an express exemption, all of a defendant's assets are subject to a restitution order." *Frank*, 8 F.4th at 327 (quoting *Novak*, 476 F.3d at 1046). The Supreme Court has emphasized in a different context that the phrase "'all property and rights to property' . . . is broad and reveals on its face that Congress meant to reach every interest in property." *United States v. Nat'l Bank of Com.*, 472 U.S. 713, 719–20 (1985) (quoting 26 U.S.C. § 6321).

Further, § 3613(a) instructs us on how to resolve any conflict between competing statutory provisions by specifying that all property is covered "[n]otwithstanding any other Federal law." *Frank*, 8 F.4th at 327; *Novak*, 476 F.3d at 1046–47. The Supreme Court has indicated that "the use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section." *Cisneros v.*

Alpine Ridge Group, 508 U.S. 10, 18 (1993). That principle applies here. Congress's directive providing for enforcement against "all property or rights to property," 18 U.S.C. § 3613(a), *notwithstanding* any other federal law, makes clear that ERISA's anti-alienation provision does not prohibit garnishment of funds in 401(k) accounts to satisfy restitution orders under the MVRA.

The MVRA's statutory context lends further support to the conclusion that restitution orders may be enforced against ERISA-protected 401(k) accounts. The MVRA specifically carves out four types of federally authorized pensions—Railroad Retirement Act pensions, Railroad Unemployment Insurance Act benefits, pensions received by those on the Armed Forces Medal of Honor rolls, and certain pensions paid to military servicemembers in lieu of retirement pay—but not ERISA-protected 401(k) accounts. 18 U.S.C. § 3613(a)(1). Each of the four exempted pensions already contain anti-alienation provisions like ERISA's. *See* 10 U.S.C. §§ 1440, 1450(i) (specified military pensions); 38 U.S.C. § 1562(c) (Medal of Honor pensions); 45 U.S.C. § 231m(a) (Railroad Retirement Act pensions); *id.* § 352(e) (Railroad Unemployment Insurance Act benefits). Congress's express exclusion of these retirement plans from § 3613(a) signals that the anti-alienation provisions in those federal pension statutes would not have otherwise operated to protect retirement benefits from garnishment under the MVRA. *See Novak*, 476 F.3d at 1048.

If the general anti-alienation provisions were sufficient to bar garnishment enforcing restitution orders under the MVRA, there would be no reason to carve-out the referenced retirement pensions in § 3613(a)(1). *See Novak*, 476 F.3d at 1048 ("Except on

this understanding the explicit exclusion of the referenced pensions was unnecessary, as the exclusion would have been accomplished by the anti-alienation provisions in the statutes establishing the pension plans."). ERISA's general anti-alienation provision, like the anti-alienation provisions found in the statutes establishing the exempted pensions, is not sufficient to protect retirement accounts from garnishment to enforce restitution under the MVRA. *See id.*

Finally, as this Court recognized in *Irving*, the MVRA demands that restitution orders are enforced in the same manner as tax levies, which can be enforced against ERISA-protected assets. *See Irving*, 452 F.3d at 126; *see also Frank*, 8 F.4th at 328–29 (noting that "courts uniformly have held that under § 6334(c), tax levies may be enforced against assets otherwise protected by anti-alienation provisions, including ERISA's" and explaining that "when two statutes addressing a similar subject matter use similar language, [courts] generally will construe that language consistently").[6]

That the MVRA permits the Government to garnish ERISA-protected retirement funds does not end the inquiry. The relevant question becomes, what is the defendant's "property" interest in his 401(k) account? In the tax levy context, the Government "steps

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[6] The language of § 3613(a) of the MVRA mirrors that of 26 U.S.C. § 6334, the tax levy statute. *Compare* 18 U.S.C. § 3613(a) ("Notwithstanding any other Federal law (including section 207 of the Social Security Act), a judgment imposing a fine may be enforced against all property or rights to property of the person fined . . .") *with* 26 U.S.C. § 6334(c) ("Notwithstanding any other law of the United States (including section 207 of the Social Security Act), no property or rights to property shall be exempt from levy other than the property specifically made exempt . . .").

into the taxpayer's shoes" and acquires "whatever rights the taxpayer himself possesses." *Nat'l Bank of Com.*, 472 U.S. at 725 (internal citation omitted); *cf. Irving*, 452 F.3d at 126 (MVRA restitution orders are enforced in the same manner as tax levies). It follows that the same principle applies here: the Government, in seeking garnishment, steps into the defendant's shoes, "acquir[ing] whatever rights the [defendant] himself possesses." *Nat'l Bank of Com.*, 472 U.S. at 725. And thus, the Government's right to Greebel's 401(k) retirement accounts is the same as those of Greebel himself. *See Frank*, 8 F.4th at 331; *United States v. Sayyed*, 862 F.3d 615, 618–19 (7th Cir. 2017); *Novak*, 476 F.3d at 1062–63.

A. Greebel's Retirement Accounts are Subject to Garnishment

In the face of this straightforward statutory construction, Greebel clings to language in *Novak* that restitution orders can be enforced by garnishing ERISA-protected retirement funds only "when the defendant has a current, *unilateral* right to receive payments under the terms of the retirement plan." Appellant Br. 19–20 (emphasis added). From this premise, Greebel offers a series of tortured contract interpretations to argue that he does not have a current unilateral right to withdraw his ERISA-protected funds and thus, his accounts are not subject to garnishment by the Government. Neither the relevant statutory provisions nor the plan documents support Greebel's argument that he currently lacks the right to withdraw a lump-sum distribution from his retirement accounts.

1. Fried Frank Account

Greebel contends that Section 6.02(b) of the Fried Frank Plan prohibits a distribution until he reaches his 62nd birthday unless he makes an election within 180 days of termination. The text will not do the work he asks of it. Section 6.01 clearly states that Greebel's right to withdraw his entire account balance accrues upon his separation from employment. Nothing in Section 6.01 limits the time within which he is entitled to a distribution.

Greebel's right to withdraw is unchanged by Section 6.02, which instead restricts Merrill Lynch from unilaterally distributing the funds if the value of the vested account is more than $1,000 unless Greebel elects to do so. *See also* 26 C.F.R. § 1.411(a)-11(a)(1) ("Section 411(a)(11) restricts the ability of a plan to distribute any portion of a participant's accrued benefit without the participant's consent."). That Greebel has not "elected" to withdraw his retirement funds upon termination does not mean that he does not have the right to do so. Instead, Section 6.02 means that Merrill Lynch cannot distribute the balance of his Fried Frank retirement account if its value is more than $1,000 until Greebel reaches age 62 absent his consent and receipt of a notice of his rights—requirements that comport with the applicable Treasury Regulations governing distributions.[7] Greebel's

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[7] Treasury Regulations provide that a plan may not distribute accrued benefits without participant consent if the value exceeds the cash-out limit. 26 C.F.R. § 1.411(a)-11(b)-(c). The regulations further provide that consent to distribution must not be made before the participant receives the notice of his or her rights, *id*. at § 1.411(a)-11(c)(2), and "[p]articipant consent is required for any distribution while it is immediately distributable, i.e., prior

contention that the district court's interpretation of the plan renders Section 6.03 meaningless is wrong. If a participant has elected to postpone distributions beyond age 62 as permitted by Section 6.02(c), Section 6.03 requires that distributions start by age 70½—and thus, is not rendered "meaningless."

2. Katten Account

Greebel's arguments regarding the Katten Plan also come up short. Greebel attempts to expand the Ninth Circuit's holding in *Novak* by claiming that the plan's provisions requiring that he apply to have his funds distributed, and submit a request in accordance with certain procedures, negate his unilateral right to receive payments. We disagree. The "unilateral right to receive payments" language in *Novak* stemmed in part from the Ninth Circuit's observation that "because the government's right is to step into the *defendant's* shoes, it will not be able unilaterally to cash out a retirement plan when ERISA requires that lump sum payments be made payable only with spousal consent." *Novak*, 476 F.3d at 1063. That limitation—intended to protect blameless dependents—does not support the argument Greebel advances here: that the government's ability to garnish his ERISA-protected accounts is precluded by the existence of an administrative process for effectuating withdrawals under the plan's terms.

The unambiguous plain language of the plan documents confirms Greebel's rights to withdraw his funds "*up to the entire value*," of his accounts. *See* J. App'x 306 (Section 7.4) (emphasis added). Greebel's

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to the later of the time a participant has attained normal retirement age (as defined in section 411(a)(8)) or age 62," *id*. at § 1.411(a)-11(c)(4).

right to the interest in his retirement accounts does not exist only when he is able to single-handedly receive money immediately upon verbal command—and such an interpretation would entirely ignore the realities of any retirement system. That the plan designates the AANF responsible for determining that a withdrawal request conforms to the requirements does not negate Greebel's right to those funds.

Greebel further contends the district court erred in not considering the plan summary document. He claims that the plan summary states that he cannot withdraw until he is age 59½. Appellant Br. 31–32. Even if we considered the plan summary, it does not support Greebel's argument. The plan summary provides that "[a]t the time of retirement or after you otherwise leave the Firm, you may receive your Plan Account . . . [i]f you elect to receive distribution of your Plan Account, you may request one total distribution or you may make multiple, partial distribution requests." J. App'x 440. Nothing in the summary purports to eliminate Greebel's right to withdraw a lump-sum distribution of his account.

The provision cited by Greebel noting that "[o]nce you reach age 59½, you may withdraw all or part of your Plan Account for any reason," *id.* at 439, follows an explanation of other withdrawal circumstances that *may* subject a participant to a ten-percent early withdrawal tax and outlines circumstances (i.e., hardship withdrawals) that would not be subject to the ten-percent early withdrawal tax. In context, the provision is intended to make clear that any withdrawals

after age 59½ do not similarly trigger the ten-percent early withdrawal tax.[8]

3. The Effect of the Ten-Percent Early Withdrawal Tax

Finally, Greebel asserts that the district court "disregarded the tax penalty for early withdrawal," which in his view "precludes a current, unilateral right to withdraw" the funds from his accounts. Appellant Br. 28–29. The district court did not address the ten-percent early withdrawal tax, under 26 U.S.C. § 72(t) of the Internal Revenue Code,[9] or its impact on Greebel's

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[8] Greebel requested a hearing pursuant to 28 U.S.C. § 3205(c), to which the Government objected on the grounds that the retirement plan documents were unambiguous. The district court granted Greebel's request over the Government's objection. Curiously, despite requesting the hearing and calling witnesses, Greebel now disavows the testimony he sought. He contends that the district court erred in acknowledging that the parol evidence (i.e., the hearing testimony) confirmed its finding that Greebel currently has the right to withdraw his retirement funds under the plain language of the Fried Frank Plan and Katten Plan. We need not determine whether the district court erred in considering the hearing testimony because, even if there was error, it was harmless.

[9] This opinion refers to the ten-percent additional tax imposed under 26 U.S.C. § 72(t) of the Internal Revenue Code as the "early withdrawal tax." The ten-percent early withdrawal tax is sometimes characterized as a tax penalty by the parties and other courts. *See e.g., Murillo v. Comm'r*, 75 T.C.M. (CCH) 1564 (T.C. 1998) ("The purpose of the early withdrawal penalty [section 72(t)] is to prevent the diversion of IRA funds to nonretirement uses and to recapture a measure of the tax benefits that have been provided.") (citing S. Rep. No. 99–313 1986–3 C.B. (Vol.3) 1, 612–613; H. Rep. No. 99–426,1986–3 C.B. (Vol.2) 1, 728–729); *Rousey v. Jacoway*, 544 U.S. 320, 327 (2005) (explaining the right to the balance of an IRA "is restricted by a 10–

property interest in his retirement funds. The Government posits that Greebel "will likely not have to pay a 10% penalty" citing *Murillo v. Comm'r*, 75 T.C.M. (CCH) 1564 (T.C. 1998), *acq. in result*, 1999–1 C.B., at xix, a Tax Court's ruling that the ten-percent early withdrawal tax is not owed when a defendant forfeits his retirement plan as part of the terms of a criminal plea.[10] Gov't Br. 35. The Government, however, when asked at oral argument, refused to commit to forgoing the ten-percent early withdrawal tax against Greebel following seizure of his funds.[11]

We agree with the Government's contention that the ten-percent early withdrawal tax does not prevent it from garnishing the retirement funds, but the question remains as to whether the early withdrawal tax

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percent tax penalty that applies to withdrawals from IRAs made before the accountholder turns 59½ . . . this tax penalty is substantial"). For clarity, although not at issue here, Section 72(t) imposes a tax, not a penalty. *See Grajales v. Comm'r*, No. 21-1420, —F.4th— (2d Cir. 2022).

[10] In *Novak*, the Ninth Circuit concluded "it does not appear that the [ten-percent] tax applies to retirement plan proceeds garnished to satisfy MVRA restitution orders either." 476 F.3d at 1063 n.25 (citing IRS Priv. Ltr. Rul. 200426027, at 12–13, 2004 PLR LEXIS 315, at *24–25). The IRS Private Letter Request provided:

> With respect to your fourth ruling request, we conclude as follows:
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> > 4. That payments made from either Plan X or Plan W pursuant to the above-referenced orders of garnishment obtained pursuant to 18 U.S.C. § 3613(c) are not subject to the 10-percent additional income tax imposed under Code § 72(t)(1) pursuant to Code § 72(t)(2)(A)(vii).

IRS Priv. Ltr. Rul. 200426027 (June 25, 2004).

[11] Oral Arg. 16:00–16:36.

limits Greebel's right to his retirement funds and thus, the Government's parallel right of access. We agree with the Seventh Circuit's conclusion in *Sayyed*: the ten-percent early withdrawal tax does not preclude the Government from garnishing the defendant's retirement funds, but, if imposed, it would qualify as a limit on the defendant's right to payment of the balance of those funds. *See* 862 F.3d at 619 (holding "the government may clearly access [Sayyed's retirement] funds, *subject to the tax penalties faced by Sayyed for early distribution of his retirement funds*") (emphasis added); *cf. Rousey v. Jacoway*, 544 U.S. 320, 327 (2005) (explaining the right to the balance of an IRA "is restricted by a 10–percent tax penalty that applies to withdrawals from IRAs made before the accountholder turns 59½"). Accordingly, we remand so that the district court may consider these issues in the first instance.

Specifically, the district court should determine whether the Government's garnishment would trigger the ten-percent early withdrawal tax, and, if so, the amount subject to garnishment by the Government. *See Frank*, 8 F.4th at 332–33 (remanding to the district court to determine whether the government's proposed lump-sum distribution would trigger an early withdrawal tax and to determine the limit on defendant's right of access). To the extent the parties do not provide clarity on whether Greebel will be subject to the early withdrawal tax, the district court may wish to direct the liquidation of the retirement account and order the clerk to reserve a portion of the funds in escrow for the potential additional tax consequences of the early withdrawal.

II. The CCPA's Garnishment Cap Does Not Apply

Finally, Greebel contends that the funds in his retirement accounts meet the CCPA's definition of "earnings" and thus, are subject to the 25-percent garnishment cap. We reject Greebel's argument that the CCPA's garnishment restrictions limit the Government's right to a lump-sum distribution of his retirement funds.

Under the CCPA there is a cap of 25 percent on the portion of an individual's weekly "aggregate disposable earnings" that may be garnished. 15 U.S.C. § 1673(a). The CCPA defines "earnings" as "compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program." 15 U.S.C. § 1672(a). The Supreme Court has cautioned that the terms "earnings" and "disposable earnings" under the CCPA are "limited to periodic payments of compensation and do not pertain to every asset that is traceable in some way to such compensation." *Kokoszka v. Belford*, 417 U.S. 642, 651 (1974) (internal citations and alterations omitted).

Greebel argues that a lump-sum 401(k) payment qualifies as earnings because the definition of earnings is not based on the timing of the payment but rather "the compensatory nature of the payment." Appellant Br. 35. The statute, however, plainly covers *periodic* payments pursuant to a retirement program. It is "silent as to lump-sum distributions of retirement funds, suggesting that such distributions do not qualify as 'earnings.'" *Sayyed*, 862 F.3d at 619; *Frank*, 8 F.4th at 334 ("[W]e think that statutory text clearly excludes from the definition of 'earnings' a one-time,

lump-sum distribution from a retirement fund."). Congress limited the type of retirement payments that qualified as earnings to periodic payments. That statutory text is rendered superfluous if Congress intended to cover non-periodic payments, like single lump-sum distributions from retirement accounts, as Greebel claims.[12] We agree with the decisions of our sister circuits, which reflect judicial consensus that the CCPA's garnishment cap does not apply to lump-sum distributions from contributory 401(k) accounts at issue here. *See Sayyed*, 862 F.3d at 619; *Frank*, 8 F.4th at 334; *cf. United States v. DeCay*, 620 F.3d 534,544–45 (5th Cir. 2010).[13]

[12] In support of his argument, Greebel relies on *United States v. Ashcraft*, 732 F.3d 860 (8th Cir. 2013), which held that certain disability payments were earnings within the meaning of the CCPA. The court relied, *inter alia*, on the fact that the disability payments were designed to function as wages and noted that the clause of the Act regarding wages, salary, bonus, etc., was not restricted to payments that are periodic. *Id*. at 864 n.4. The CCPA, however, treats retirement payments differently. And the Court made clear that cases determining whether retirement payments constitute earnings within the meaning of the CCPA "deal with a different question than the one Ashcraft's case presents." *Id*. at n.3.

[13] Greebel contends that the district court erred in not considering the United States Department of Labor Letter, *see* J. App'x 455, which explains, *inter alia*, that whether a lump-sum payment qualified as earnings under the CCPA depends on the compensatory nature of the payment rather than the frequency. That may be true for payments other than those pursuant to retirement accounts—like bonuses, commissions, relocation payments, termination pay, etc., but the statute treats retirement payments differently singling out for inclusion only periodic payments from such accounts. In any event, the letter did not conclude the CCPA's definition of earnings applies to lump-sum payments from pension or 401(k) plans.

Contrary to Greebel's claim, our interpretation is consistent with Congress's intent. In enacting the CCPA, Congress intended to protect "periodic payment of compensation needed to support the wage earner and his family on a week-to-week, month-to-month basis." *Kokoszka*, 417 U.S. at 651. Nothing suggests Congress intended the CCPA to protect lump-sum liquidations of retirement accounts, which are often invested for decades, from being used to cover restitution obligations arising out of criminal convictions.

Greebel does not contend he is currently receiving periodic distributions from his retirement accounts to support his family.[14] Accordingly, on remand, the district court need not account for the CCPA's garnishment cap in determining what portion of funds the Government may garnish to enforce Greebel's restitution order.

CONCLUSION

Accordingly, we **VACATE** the judgment of the district court and **REMAND** for further proceedings consistent with this opinion.

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[14] Outside the MVRA context, it is ERISA's anti-alienation provision that protects the corpus of retirement accounts, like Greebel's, from dissipation through payments to third parties.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,	**MEMORANDUM AND ORDER**
– against –	15-cr-637(KAM)
EVAN GREEBEL,	Apr. 16, 2021
Defendant.	

---------------------------------------X

MATSUMOTO, United States District Judge:

Evan Greebel ("Mr. Greebel") has objected, pursuant to 28 U.S.C. § 3205(c)(5), to the answers filed by two garnishees in response to the Government's writs of garnishment of two retirement accounts. The writs of garnishment were issued by the court, upon applications by the Government, to enforce a criminal judgment against Mr. Greebel, which ordered him to pay restitution to his victims in the amount of $10,447,979. The court held an evidentiary hearing on Mr. Greebel's objections on January 28, 2021, and the court has considered the parties' submissions. For the reasons herein, Mr. Greebel's objections are OVERRULED, and the Government's request for orders of garnishment is GRANTED.

Background

The court assumes familiarity with Mr. Greebel's criminal trial and conviction. In short, Mr. Greebel was convicted by a jury in December 2017 of two counts: conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349, and conspiracy to commit securities fraud in violation of 18 U.S.C. § 371. (ECF No. 501, Minute Entry.) In August 2018, this court sentenced Mr. Greebel: to 18 months of imprisonment on each count to run concurrently, to three years of supervised release with special conditions to follow his incarceration, including the payment of $10,447,979 in restitution pursuant to the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A, and to forfeit $116,462.03. (ECF No. 674, Judgment.) The Second Circuit affirmed Mr. Greebel's conviction. (ECF No. 719, Mandate.)

As relevant to the objections presently before the court, prior to his conviction, Mr. Greebel worked as an attorney at Fried, Frank, Harris, Shriver & Jacobson LLP ("Fried Frank") and Katten Muchin Rosenman LLP ("Katten"). During his tenure working at both firms, he made contributions to retirement accounts pursuant to the firms' respective retirement plans.

After Mr. Greebel was sentenced, in order to enforce the monetary aspects of the judgment, the Government filed two applications for writs of garnishment against Mr. Greebel's interest in the two retirement accounts, pursuant to 28 U.S.C. § 3205(b). (ECF Nos. 693, 694.) One writ was directed to Charles Schwab & Co., Inc., and the other to Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), as garnishees. (*Id.*) On November 19, 2019, the Clerk of Court approved the two writs. (ECF Nos. 695, 696.)

Subsequently, the Government asked the court to vacate the writ directed to Charles Schwab & Co., Inc., and to instead issue the writ to Charles Schwab Retirement Plan Services ("Charles Schwab"), which the court did. (*See* ECF Nos. 703, 704, 705, 706.) The writs of garnishment, notices, and instructions were duly served on the garnishees and on Mr. Greebel.

Merrill Lynch filed its answer to the writ on December 20, 2018, stating that it held a 401(k) plan related to Mr. Greebel's employment at Fried Frank, titled "Fried, Frank, Harris, Shriver & Jacobson LLP 401(k) Incentive Savings Plan Greebel, Evan" (the "Fried Frank plan"). (ECF No. 707, Answer of Merrill Lynch.) At the time of Merrill Lynch's answer, the value of Mr. Greebel's interest in the Fried Frank plan was $133,283.05. (*Id.* at 2.) On January 7, 2019, Charles Schwab filed its answer, stating that it held funds related to Mr. Greebel's employment at Katten in a plan titled, "Katten Muchin Rosenman LLP Defined Contribution Plan" (the "Katten plan"). (ECF No. 709-1, Letter from Charles Schwab.) At the time of the answer, Mr. Greebel's interest in the Katten plan was approximately $788,086. (*Id.*)

On June 12, 2020, Mr. Greebel filed written objections to the two answers pursuant to 28 U.S.C. § 3205(c)(5), and requested a hearing. (ECF No. 736, Written Objections ("Def. Obj.").) The Government responded (ECF No. 743, Government Opposition), and Mr. Greebel filed a reply (ECF No. 744, Reply).

On January 28, 2021, at the request of Mr. Greebel, the court held an evidentiary hearing by videoconference regarding Mr. Greebel's objections. (ECF Minute Entry Jan. 28, 2021; ECF No. 764, Transcript of Jan. 28, 2021 Hearing ("H'ring Tr.").) Three witnesses testified at the hearing regarding the two retirement

plans: for the Katten plan, Mark Broutman (Director of Partnership Accounting) and Jim Berge (Human Resources Manager) of Katten; and for the Fried Frank plan, Karl Groskaufmanis, Esq. (General Counsel) of Fried Frank.

Following the hearing, both Mr. Greebel and the Government submitted further briefing regarding Mr. Greebel's objections. (ECF No. 765, Defendant's Post-Hearing Brief ("Def. Mem."); ECF No. 766, Government's Post-Hearing Brief; ECF No. 767, Defendant's Reply; ECF No. 768, Government's Reply.)

Legal Standard

The Government "shall be responsible for collection of an unpaid fine or restitution," 18 U.S.C. § 3612(c), and "may enforce a judgment . . . against all property or rights to property of the person fined," 18 U.S.C. § 3613(a), or against the property or rights to property of a person ordered to pay restitution, 18 U.S.C. § 3664(m). "The [G]overnment may enforce restitution orders arising from criminal convictions using the practices and procedures for the enforcement of a civil judgment under federal or state law as set forth in the Federal Debt Collection Procedures Act ('FDCPA')." *United States v. Cohan*, 798 F.3d 84, 89 (2d Cir. 2015).

When the Government seeks to enforce a judgment through a garnishment, "[a] court may issue a writ of garnishment against property (including nonexempt disposable earnings) in which the debtor has a substantial nonexempt interest and which is in the possession, custody, or control of a person other than the debtor, in order to satisfy the judgment against the debtor." 28 U.S.C. § 3205(a). After the court issues a writ of garnishment, the Government serves the

garnishee and the judgment debtor with a copy of the writ, and the garnishee files a written answer indicating what property belonging to the debtor it holds. *See* 28 U.S.C. § 3205(c)(1)-(4).

"[T]he judgment debtor . . . may file a written objection to the [garnishee's] answer and request a hearing." 28 U.S.C. § 3205(c)(5). "The issues at such hearing shall be limited (1) to the probable validity of any claim of exemption by the judgment debtor; (2) to compliance with any statutory requirement for the issuance of the postjudgment remedy granted; and (3) if the judgment is by default and only to the extent that the Constitution or another law of the United States provides a right to a hearing on the issue, to (A) the probable validity of the claim for the debt which is merged in the judgment; and (B) the existence of good cause for setting aside such judgment." 28 U.S.C. § 3202(d)(1)-(3).

"The party objecting shall . . . bear the burden of proving such grounds." 28 U.S.C. § 3205(c)(5).

Discussion

Construed liberally, Mr. Greebel's objections are predicated on the first of the limited possible grounds: "the probable validity of any claim of exemption by the judgment debtor." 28 U.S.C. § 3202(d)(1). First, he argues that he does not have a current, unilateral right to withdraw the funds from either retirement account, and thus the accounts are not currently susceptible to garnishment by the Government. (*See* Def. Obj. at 2-7; Def. Mem. at 1-4.) Second, Mr. Greebel argues that if the Government can garnish the funds held in the accounts, the Consumer Credit Protection Act precludes the Government from garnishing any more than 25 percent of the funds. (*See* Def. Obj. at

8-15; Def. Mem. at 4-5.) As explained below, Mr. Greebel has failed to meet his burden to sustain either ground for his objections.

I. Mr. Greebel's Rights to the Funds in the Retirement Accounts

The Mandatory Victims Restitution Act "provides that a restitution award may be enforced against 'all property or rights to property of the person,' except for property that falls within the exemptions set forth in Section 6334(a)(1)-(8), (10) and (12) of the Internal Revenue Code." *United States v. Jaffe*, 417 F.3d 259, 265 (2d Cir. 2005) (quoting 18 U.S.C. § 3613(a)). These exceptions, as defined in the Internal Revenue Code, include "[a]nnuity or pension payments under the Railroad Retirement Act, benefits under the Railroad Unemployment Insurance Act, special pension payments received by a person whose name has been entered on the Army, Navy, Air Force, and Coast Guard Medal of Honor roll, and annuities based on retired or retainer pay under" the Retired Serviceman's Family Protection plan. 28 U.S.C. § 6334(a)(6). The foregoing exceptions do not include private retirement accounts, like the ones at issue here. Moreover, "courts have repeatedly held that [the] provisions of ERISA and the Internal Revenue Code, respectively, that generally preclude the assignment or alienation of pension benefits do not apply to the United States in its efforts to collect on a judgment of restitution." *United States v. Hotte*, No. 97-cr-669 (SJ), 2007 WL 2891313, at *3 (E.D.N.Y. Sept. 28, 2007) (collecting cases).

Thus, there is no doubt that the Government can garnish Mr. Greebel's retirement accounts, so long as the funds are the property of Mr. Greebel, or he has "rights to" the funds in the accounts. A recent

decision of the Second Circuit confirms this: In *United States v. O'Brien*, the Government sought to garnish two retirement accounts to which the defendant contributed while working at a law firm, in order to enforce a judgment of restitution following his criminal conviction. No. 19-3895-CR, 2021 WL 1051540, at *1 (2d Cir. Mar. 19, 2021) (summary order). The Second Circuit affirmed the district court's overruling of the defendant's procedural and substantive objections, finding that nothing limited the Government's ability to garnish lump sums from both law firm retirement accounts. *See id.* at *3. Here, Mr. Greebel argues, relying on creative, if not tortured, constructions of both retirement plan documents, that he does not have a current right to the funds in the accounts. His arguments are without merit.

A. The Fried Frank Plan

The document governing the Fried Frank plan states: "Upon a Participant's Separation from Service, other than by reason of his death, he *shall be entitled to a distribution of his interest in his Account balance in a single lump sum* or shall be entitled to effect a no-load transfer of the Investment Fund shares held in his Account to an Individual Retirement Account established by Merrill Lynch[.]" (Def. Obj., Ex. A at 31 (Section 6.01) (emphasis added).) This language clearly and unambiguously entitled Mr. Greebel a right to withdraw his entire account balance in a single lump sum from the Fried Frank plan after his employment with the firm ended. The General Counsel for Fried Frank, Karl Groskaufmanis, Esq., testified at the evidentiary hearing, and confirmed as much:

> Q. So, based upon your understanding of the plan, are there any limitations for someone, a

> participant who has separated from Fried Frank, are there any limitations on their ability to withdraw funds from the Merrill Lynch account?
>
> . . .
>
> A. My answer is that the plan that sets the— sort of the terms on which a participant who has left the firm can effect a transfer of the assets from his fund. So it essentially sets the parameters for how that worked. To the extent there are limits, there are limits embedded in the plan, but, I mean, as a general principle, both in its interpretation and its operation, former participants are able and have been able to withdraw the assets from their accounts at the firm.

(H'ring Tr. at 79:12-80:20.)

Based on the unambiguous plan language, there is no doubt that Mr. Greebel has unfettered rights to withdraw from the Fried Frank retirement account all funds in which he has an interest. Despite the clear plan language, Mr. Greebel argues that a subsequent provision in the document governing the Fried Frank plan prevents him from requesting an immediate lump sum from the account. In support of his argument, Mr. Greebel relies on the subsequent provision in the plan, which states that the "balance shall not be distributed until he reaches his sixty-second (62nd) birthday unless he elects within the period between thirty (30) days and one hundred and eighty (180) after he receives the notice required by Treasury Regulation Section 1.411(a)-11(c) to receive his benefits prior to that date." (Def. Obj., Ex. A at 31 (Section 6.02(b)).) However, the clearest and most logical

interpretation of Section 6.02(b) is that it establishes the minimum age at which distributions will begin for participants in the plan who have not separated from the firm, or who have separated but have not requested a lump sum. In those instances, Section 6.02(b) directs that distributions will begin when the participant turns 62. The provision does not purport to alter or supersede the preceding provision, Section 6.01, which states that the participant is entitled to a distribution of the entire balance in a single lump sum after separation from the firm.[1] Thus, Mr. Greebel's objection that he does not have a current, unilateral right to withdraw the funds in the Fried Frank plan is respectfully overruled.

B. The Katten Plan

Mr. Greebel's objections to the garnishment of funds in which he has an interest, held pursuant to the Katten plan, also lack merit. The governing Katten plan document states, in the relevant part: "By applying to the Applicable Administrative Named Fiduciary in the form and manner prescribed by the Applicable Administrative Named Fiduciary, an Inactive Participant *may make a withdrawal from all Accounts of any amount, up to the entire value, of his Accounts*." (Def. Obj., Ex. B at 35 (Section 7.4) (emphasis added).)

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[1] Mr. Greebel also argues that Fried Frank's Pension Committee may have the discretion to overrule the language of the document governing the Fried Frank plan. (*See* Def. Mem. at 3.) To the contrary, Fried Frank's General Counsel credibly testified that the Pension Committee only becomes involved in interpreting the governing plan document when there is a dispute about how a provision ought to be interpreted; the Pension Committee does not have the authority to deny a valid claim for the funds (nor would the Pension Committee become involved in such a request in the normal course). (*See* H'ring Tr. at 69:8-21.)

Mr. Greebel concedes that he is an "Inactive Participant." (*See* Def. Obj. at 3 n.1.) Despite the clear language that he "may make a withdrawal . . . of any amount, up to the entire value" from the account, Mr. Greebel argues that he does not have an immediate right to do so, because he is required to "apply," and to follow a certain process. (*Id.* at 4-6.)

Notwithstanding that an inactive participant must follow some administrative procedures in order to effect a withdrawal of any amount of the participant's funds, there is nothing in the governing plan document that alters the participant's right to make a withdrawal of the full balance from the account.[2] At the evidentiary hearing before the court, the Director of Partnership Accounting for Katten, Mark Broutman, credibly confirmed that the plain reading of this language is applied in practice:

> Q. . . . And your experience, from what you've actually observed at Katten, are there any limitations on the amount of money that an inactive participant can withdraw from their Schwab accounts?
>
> A. An inactive participant, someone who is terminated from the firm can fully access any

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[2] Mr. Greebel argues that Charles Schwab has the authority to deny any request to withdraw funds. (*See* Def. Mem. at 1-2.) But nothing in the documents gives Charles Schwab a substantive, rather than an administrative, role over the Katten plan. Both witnesses from Katten testified at the hearing that they were not aware of Charles Schwab having any discretion to deny a properly-submitted request for funds. (*See* H'ring Tr. at 33:6-10; 53:25-54:4.)

amount in their Schwab defined contribution plan account.

Q. And when you say can fully access, do you mean they can withdraw those full amounts?

. . .

A. The answer would be yes.

(H'ring Tr. at 50:18-24.)

Mr. Greebel cannot plausibly argue that he lacks "rights to" funds which he is able to "fully access."[3] Mr. Greebel relies on a separate document that provides a summary of the Katten plan, which states: "Once [a participant] reach[es] age 59 1/2, [he] may withdraw all or a part of [his] Plan Account for any reason." (Def. Obj., Ex. C at 14.) Mr. Greebel argues that because he is required to wait until he is 59 and a half years old, he will not be able to withdraw his

[3] Mr. Greebel also argues that Section 8.1(a) of the document governing the Katten plan "suggests that Mr. Greebel cannot presently make a withdrawal." (Def. Obj. at 6.) To the contrary, Section 8.1(a) states: "Subject to the other requirements of this Article, an Inactive Participant may elect to have all or a portion of his Account Balance paid to him beginning upon any Settlement Date following his Termination of Employment in a form of payment allowed hereunder." (Def. Obj., Ex. B at 43 (Section 8.1(a)).) The "Settlement Date" merely refers to the date on which the transactions are completed in order for any securities to be converted, as would be necessary for a participant to receive funds from the plan. Consequently, this provision confirms that Mr. Greebel has a right to the funds. Mr. Greebel also cites the assignment and alienation provision of the document governing the Katten plan (*see* Def. Obj. at 7), but courts have consistently held that anti-alienation provisions do not apply to restitution garnishments, and the Second Circuit has held that courts may "consider ERISA protected assets in determining appropriate fines and restitution," *United States v. Irving*, 452 F.3d 110, 126 (2d Cir. 2006).

funds pursuant to the process described in the Katten plan (which lists dates that do not align with the purported 59 and a half requirement), and thus, he will not have access to the funds until distributions begin, when he turns 70 and a half. (*See* Def. Obj. at 7.) As an initial matter, the document relied upon by Mr. Greebel is merely a summary, and does not govern, much less override, the Katten plan, or bear on the court's decision. In any event, the court does not read the summary as altering any of the rights in the Katten plan's governing document, including that an inactive participant "may make a withdrawal from all Accounts of any amount, up to the entire value, of his Accounts."

In conclusion, the plain language of the documents governing the two retirement plans both state that a former employee has unlimited access to the funds in the retirement accounts. The witnesses from both law firms confirmed as much. Mr. Greebel thus has "rights to" these funds, and they are subject to garnishment under the Mandatory Victims Restitution Act.

II. The Consumer Credit Protection Act

Mr. Greebel next argues that even if the Government can garnish his funds in the retirement accounts, it is limited to garnishing 25 percent of the funds, pursuant to a statutory cap contained in the Consumer Credit Protection Act ("CCPA").

Section 303 of the CCPA[4] provides that "the maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to

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[4] Section 303 of the CCPA, 15 U.S.C. § 1673, applies to collections under the FDCPA. 18 U.S.C. § 3613(a)(3).

garnishment may not exceed 25 per centum of his disposable earnings for that week." 15 U.S.C. § 1673(a)(1). "Earnings" are defined as "compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program." 15 U.S.C. § 1672(a).

Though the plain language of the statute directs that the 25 percent cap applies to garnishments of "periodic payments pursuant to a pension or retirement program," the statute does not explicitly limit the Government's ability to garnish a retirement account when it does so by garnishing the entire account at once, before periodic distributions to the recipient have begun. In holding that the CCPA's 25 percent cap does not apply to tax refunds, the Supreme Court instructed that the cap was intended to apply only to "periodic payments of compensation needed to support the wage earner and his family on a week-to-week, month-to-month basis." *Kokoszka v. Belford*, 417 U.S. 642, 651 (1974). Courts have subsequently interpreted the cap consistently with that guidance. *See United States v. Belfort*, 340 F. Supp. 3d 265, 268 (E.D.N.Y. 2018) (holding that the cap did not apply to the defendant's ownership interest in a company). The intent of the cap was to limit the amount of money the Government could garnish where the individual was receiving periodic payments that he or she might be using to cover living expenses. It was not meant to apply to the garnishment of a debtor's interest in the entire balance of an asset that may be withdrawn in a lump sum.

Mr. Greebel argues that the funds in his retirement accounts must be considered "earnings," because

he made contributions to the accounts that were deducted from his salary. (*See* Def. Mem. at 4-5.) It is true that the funds in the accounts can be traced back to Mr. Greebel's law firm salaries, but he has not cited any authority holding that retirement account contributions are still classified as earnings, rather than as assets or investments, once in the fund. The purpose of these funds was to transform an employee's fund contributions into investment assets that accumulate and grow. Thus, at the point that the money went into the accounts, that money ceased to be "earnings," and instead became an investment vehicle. Consider a hypothetical: If Mr. Greebel had put a portion of his paychecks toward the purchase of a beach house, no lawyer could reasonably argue that the beach house constituted "earnings" which could not be seized by the Government merely because Mr. Greebel contributed money that he earned toward the purchase of the house. *See Kokoszka*, 417 U.S. at 651 (agreeing with lower court holding that "earnings" means "periodic payments of compensation" but not "every asset that is traceable in some way to such compensation").

Mr. Greebel relies on a nonbinding 2018 opinion letter from the United States Department of Labor that states, in part: "The fact that lump-sum payments may occur only occasionally or one time does not alone render them outside the scope of earnings under the CCPA. Indeed, bonuses are often infrequent or given only one time, but the statute plainly includes them as earnings." (Def. Obj., Ex. D at 4.) The context of the Department of Labor opinion letter was a question to the Department about "lump-sum payments and garnishment limits relating to withholdings for child support under the CCPA." (*Id.* at 2.) The opinion has no persuasive weight in the context of restitution owed by a convicted criminal defendant to

his victims, an area in which the Department of Labor has no responsibility. Even if the Department of Labor were considered to have the expertise to interpret the CCPA in this context, the court need not afford its opinion any deference, because "[t]he intent of Congress is clear," and the court "must reject administrative constructions which are contrary to clear congressional intent." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 & n.9 (1984).

The CCPA is clear that the cap applies to "compensation paid or payable for personal services," 15 U.S.C. § 1672(a), and the Supreme Court has held that this language was intended to apply to "periodic payments of compensation needed to support the wage earner and his family on a week-to-week, month-to-month basis," *Kokoszka*, 417 U.S. at 651. Accordingly, the cap does not apply to the Government's garnishment of Mr. Greebel's two retirement accounts under the circumstances presented here.

The court has considered the cases cited by the parties and is persuaded that the majority of decisions weigh in favor of the Government's authority to garnish the entire corpus of Mr. Greebel's retirement accounts.

Conclusion

For the foregoing reasons, the court finds that Mr. Greebel's objections to the garnishments are without merit. The objections are overruled, and the writs of garnishment are affirmed. The Government shall submit orders of garnishment directing the garnishees as to the disposition of the funds in the garnished accounts, by April 21, 2021.

SO ORDERED.

Dated: April 16, 2021
Brooklyn, New York

/s/
Hon. Kiyo A. Matsumoto
United States District Judge
Eastern District of New York

APPENDIX C

STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 1672. Definitions

For the purposes of this subchapter:

(a) The term "earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.

(b) The term "disposable earnings" means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld.

(c) The term "garnishment" means any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt.

15 U.S.C. § 1673. Restriction on garnishment

(a) Maximum allowable garnishment

Except as provided in subsection (b) and in section 1675 of this title, the maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment may not exceed

(1) 25 per centum of his disposable earnings for that week, or

(2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage prescribed by section 206(a)(1) of Title 29 in effect at the time the earnings are payable,

whichever is less. In the case of earnings for any pay period other than a week, the Secretary of Labor shall by regulation prescribe a multiple of the Federal minimum hourly wage equivalent in effect to that set forth in paragraph (2).

(b) Exceptions

(1) The restrictions of subsection (a) do not apply in the case of

(A) any order for the support of any person issued by a court of competent jurisdiction or in accordance with an administrative procedure, which is established by State law, which affords substantial due process, and which is subject to judicial review.

(B) any order of any court of the United States having jurisdiction over cases under chapter 13 of Title 11.

(C) any debt due for any State or Federal tax.

(2) The maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment to enforce any order for the support of any person shall not exceed—

(A) where such individual is supporting his spouse or dependent child (other than a spouse or child with respect to whose support such order is used), 50 per centum of such individual's disposable earnings for that week; and

(B) where such individual is not supporting such a spouse or dependent child described in clause (A), 60 per centum of such individual's disposable earnings for that week;

except that, with respect to the disposable earnings of any individual for any workweek, the 50 per centum specified in clause (A) shall be deemed to be 55 per centum and the 60 per centum specified in clause (B) shall be deemed to be 65 per centum, if and to the extent that such earnings are subject to garnishment to enforce a support order with respect to a period which is prior to the twelve-week period which ends with the beginning of such workweek.

(c) Execution or enforcement of garnishment order or process prohibited

No court of the United States or any State, and no State (or officer or agency thereof), may make, execute, or enforce any order or process in violation of this section.

18 U.S.C. § 3613. Civil remedies for satisfaction of an unpaid fine

(a) ENFORCEMENT.—The United States may enforce a judgment imposing a fine in accordance with the practices and procedures for the enforcement of a civil judgment under Federal law or State law. Notwithstanding any other Federal law (including section 207 of the Social Security Act), a judgment imposing a fine may be enforced against all property or rights to property of the person fined, except that—

(1) property exempt from levy for taxes pursuant to section 6334(a)(1), (2), (3), (4), (5), (6), (7), (8), (10), and (12) of the Internal Revenue Code of 1986 shall be exempt from enforcement of the judgment under Federal law;

(2) section 3014 of chapter 176 of title 28 shall not apply to enforcement under Federal law; and

(3) the provisions of section 303 of the Consumer Credit Protection Act (15 U.S.C. 1673) shall apply to enforcement of the judgment under Federal law or State law.

(b) TERMINATION OF LIABILITY.—The liability to pay a fine shall terminate the later of 20 years from the entry of judgment or 20 years after the release from imprisonment of the person fined, or upon the death of the individual fined. The liability to pay restitution shall terminate on the date that is the later of 20 years from the entry of judgment or 20 years after the release from imprisonment of the person ordered to pay restitution. In the event of the death of the person ordered to pay restitution, the individual's estate will be held responsible for any unpaid balance of the restitution amount, and the lien provided in

subsection (c) of this section shall continue until the estate receives a written release of that liability.

(c) LIEN.—A fine imposed pursuant to the provisions of subchapter C of chapter 227 of this title, an assessment imposed pursuant to section 2259A of this title, or an order of restitution made pursuant to sections[1] 2248, 2259, 2264, 2327, 3663, 3663A, or 3664 of this title, is a lien in favor of the United States on all property and rights to property of the person fined as if the liability of the person fined were a liability for a tax assessed under the Internal Revenue Code of 1986. The lien arises on the entry of judgment and continues for 20 years or until the liability is satisfied, remitted, set aside, or is terminated under subsection (b).

(d) EFFECT OF FILING NOTICE OF LIEN.—Upon filing of a notice of lien in the manner in which a notice of tax lien would be filed under section 6323(f)(1) and (2) of the Internal Revenue Code of 1986, the lien shall be valid against any purchaser, holder of a security interest, mechanic's lienor or judgment lien creditor, except with respect to properties or transactions specified in subsection (b), (c), or (d) of section 6323 of the Internal Revenue Code of 1986 for which a notice of tax lien properly filed on the same date would not be valid. The notice of lien shall be considered a notice of lien for taxes payable to the United States for the purpose of any State or local law providing for the filing of a notice of a tax lien. A notice of lien that is registered, recorded, docketed, or indexed in accordance with the rules and requirements relating to judgments of the courts of the State where the notice of lien is registered, recorded, docketed, or indexed shall

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[1] So in original. Probably should be "section".

be considered for all purposes as the filing prescribed by this section. The provisions of section 3201(e) of chapter 176 of title 28 shall apply to liens filed as prescribed by this section.

(e) DISCHARGE OF DEBT INAPPLICABLE.—No discharge of debts in a proceeding pursuant to any chapter of title 11, United States Code, shall discharge liability to pay a fine pursuant to this section, and a lien filed as prescribed by this section shall not be voided in a bankruptcy proceeding.

(f) APPLICABILITY TO ORDER OF RESTITUTION.—In accordance with section 3664(m)(1)(A) of this title, all provisions of this section are available to the United States for the enforcement of an order of restitution.