No. 08-1532-cv (L)
No. 08-1534-cv(CON)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

April H. YOUNG, Alonzo Young, Michael Matthews, Rick A. Jennings, and Mary M. Brewer, individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,

v.

GENERAL MOTORS INVESTMENT MANAGEMENT CORPORATION, State Street Bank and Trust Company,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLANTS

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STATEMENT OF THE ISSUE

Whether the district court erred in holding that the Plaintiffs' claims for breach of fiduciary duty under ERISA section 502(a)(2), 29 U.S.C. § 1132(a)(2), were time-barred on the grounds that the Plaintiffs gained "actual knowledge" of the facts necessary to establish their claims more than three years before they filed suit when they received plan documents describing the relevant transactions.

INTEREST OF THE SECRETARY OF LABOR

The Secretary of Labor has primary authority to interpret and enforce Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq. The Secretary's interests include promoting the uniform application of the Act, protecting plan participants and beneficiaries, and ensuring the financial stability of plan assets. See Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 689-94 (7th Cir. 1986) (en banc). The Secretary therefore has a strong interest in ensuring the proper interpretation of ERISA, especially since a decision in this case could affect the Secretary's ability to bring her own cases. She files this brief as amicus

curiae in support of the Plaintiffs to urge the Court to correct the district court's misinterpretation of ERISA's statute of limitations.[1]

STATEMENT OF FACTS

The Plaintiffs are participants in eight retirement plans sponsored by General Motors Corporation ("GM") and Delphi Corporation ("Delphi") (collectively the "Plans"). Young v. General Motors Inv. Mgmt. Corp., 2008 WL 1971544 at *1 (S.D.N.Y. Mar. 24, 2008); Young Dkt. A-19, ¶ 2; Brewer Dkt. A-49, ¶ 2. The Defendants, General Motors Investment Management Company ("GMIMCO"), and the Plans' investment manager, State Street Bank and Trust Company, (collectively, "the Defendants") are alleged to be the Plans' fiduciaries. Young, 2008 WL 1971544 at *1; Young Dkt. A-19, ¶ 51; Brewer Dkt. A-49, ¶ 48. The Plaintiffs seek relief on behalf of the Plans and bring their suits as class actions on behalf of all participants and beneficiaries of the Plans. Young Dkt. A-19, ¶ 8; Brewer Dkt. A-49, ¶ 8.

The Plans are defined contribution plans in which participants could generally allocate the assets in their individual Plan accounts among a variety of investment options offered by the Plans. Young, 2008 WL 1971544 at *1; Young Dkt. A-19, ¶¶ 37-38; Brewer Dkt. A-49, ¶¶ 33-34.

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[1] The brief expresses no view on the merits of the Plaintiffs' claims or whether the complaints properly state ERISA claims, since the court did not dismiss on those bases.

These investment options included several single-equity stock funds. Young, 2008 WL 1971544 at *1; Young Dkt. A-19, ¶ 4; Brewer Dkt. A-49, ¶ 4. These funds were originally invested in GM stock, but came to overwhelmingly hold non-GM stock after GM sold or spun off corporate holdings. Young Dkt. A-19, ¶¶ 43-46; Brewer Dkt. A-49, ¶¶ 39-43. Although the Plans provided for the eventual divestiture of these single-equity funds, those phase-out dates were removed from the Delphi Plans in 2001 and subsequently not observed with respect to the GM Plans, so that the Plans remained invested in the single-equity funds until early 2007. Young Dkt. A-19, ¶ 47; Brewer Dkt. A-49, ¶ 44.

The Plaintiffs allege that maintaining the Plans' investments in single-equity funds was imprudent and impermissibly undiversified, and that the Defendants thus failed to prudently manage the assets of the Plans in violation of section 404(a)(1)(A)-(D) of ERISA, 29 U.S.C. § 1104(a)(1)(A)-(D), and were liable pursuant to ERISA sections 502(a)(2) and 409(a), 29 U.S.C. §§ 1132(a)(2), 1109(a), for the resulting losses to the Plans. Young, 2008 WL 1971544 at *1; Young Dkt. A-19, ¶¶ 90-94; Bewer Dkt. A-49, ¶¶ 87-91.

The Plans also offered certain mutual funds as investment options. Young, 2008 WL 1971544 at *2; Young Dkt. A-19, ¶ 6; Bewer Dkt. A-49, ¶

6. Claiming that these mutual funds charged the Plans excessive fees, the Plaintiffs allege that defendant GMIMCO failed in its obligations under section 404 of ERISA, 29 U.S.C. § 1104, by causing and continuing to allow the Plans to maintain investments in these mutual funds when comparable investment products were available at much lower costs. Young, 2008 WL 1971544 at *2; Young Dkt. A-19, ¶ 97; Bewer Dkt. A-49, ¶ 94. The Plaintiffs assert that GMIMCO was liable for the resulting losses to the Plans pursuant to ERISA sections 409(a) and 502(a)(2), 29 U.S.C. §§ 1109(a), 1132(a)(2). Young, 2008 WL 1971544 at *2; Young Dkt. A-19, ¶¶ 95-99; Bewer Dkt. A-49, ¶¶ 91-96.

The Plaintiffs filed a lawsuit on March 8, 2007, relating to the GM Savings Plans and a separate lawsuit on April 12, 2007, relating to the Delphi Savings Plans. Young Dkt. A-19; Bewer Dkt. A-49. In support of their virtually identical claims, both complaints averred "an investigation by Plaintiffs' counsel, which included a review of plan and trust documents," but neither complaint indicated when or whether the Plaintiffs had received or read such documents. Id.

On June 25, 2007, the Defendants filed motions to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, arguing that Plaintiffs' claims were barred in their entirety by ERISA's three-year statute of

limitations. Young, 2008 WL 1971544 at *2. Under ERISA section 413, 29 U.S.C. § 1113, absent fraud or concealment, claims for breach of fiduciary duty must be brought within the earlier of (1) six years after the date of the last act or omission constituting part of the breach or (2) three years after the date on which the plaintiff gains actual knowledge of the alleged breach.

On March 24, 2008, the district court granted, in a single ruling, the Defendants' motions to dismiss both cases. It held that the Plaintiffs' claims were time-barred because the Plaintiffs had actual knowledge of the facts supporting their claims more than three years before filing their lawsuits. Young, 2008 WL 1971544 at *3. In so holding, the district court cited this Court's instruction that a plaintiff has "actual knowledge" "when he has knowledge of all material facts necessary to understand that an ERISA fiduciary has breached his or her duty or otherwise violated the Act." Id. at *2, citing Caputo v. Pfizer, Inc., 267 F.3d 181, 193 (2d Cir. 2001). The court also purported to rely on Caputo for the further proposition that "where the alleged breach stems from a transaction that a plaintiff claims is 'inherently a statutory breach'. . . knowledge of the transaction 'standing alone'" can constitute actual knowledge. Id. at *2 (citation omitted). The court then held that because a 2004 Prospectus "plainly disclose[d] that the Single Equity Funds were undiversified investments primarily holding the

stock of a single company" and because "quarterly performance summaries" from 1999 onward "provided to Plan participants clearly disclosed the fees and expenses associated with the [Mutual] Funds," the Plaintiffs had actual knowledge of both sets of alleged breaches upon the issuance of those documents, more than three years before filing suit. Id. at *2-3. Although the court recognized that "actual knowledge" is distinct from "constructive knowledge," and "knowledge of facts cannot be attributed to plaintiffs who have no actual knowledge of them," the court maintained that "actual knowledge" did not require a showing that the Plaintiffs had actually seen or read the relevant documents. Id. at *2 n.3.

The Plaintiffs appealed, and on April 25, 2008, the Second Circuit consolidated the cases.

SUMMARY OF THE ARGUMENT

ERISA allows plan participants and the Secretary to sue to remedy fiduciary breaches and ordinarily provides for a six-year statute of limitations; when a plaintiff has "actual knowledge of the breach or violation," however, a three-year limitations period applies. ERISA section 413(2), 29 U.S.C. § 1113(2). The court below erred by applying the three-year limitations period to the Plaintiffs because its dismissal at the pleadings stage was not supported by any evidence of what the Plaintiffs knew or

when they knew it. The pleadings do not reveal whether the Plaintiffs had actual knowledge of the breaches they alleged, and having dismissed on the pleadings, the court stymied any development of such evidence through discovery. The plan documents cited in the complaints do not substitute for such evidence, but at most provided constructive knowledge of possible breaches. Under this Court's precedents, however, it is not enough to suspect a violation or to have constructive knowledge of a breach to trigger the three-year statute of limitations; the plaintiff must have actual "knowledge of all material facts necessary to understand that an ERISA fiduciary has breached his or her duty or otherwise violated the Act." Caputo, 267 F.3d 193.

Accordingly, the case should not have been dismissed on statute-of-limitations grounds for three separate reasons. First, the pleadings provide no evidence that the Plaintiffs ever read or even received the relevant plan documents. Second, the complex nature of the Plaintiffs' allegations – concerning the Plans' investments in single-equity funds and in certain mutual funds that allegedly charged excessive fees – as compared to the limited amount of information disclosed by such documents, refutes any finding that they knew all the facts necessary to establish their claims. Finally, even if the Plaintiffs gained actual knowledge of the alleged initial

fiduciary breach at a point in time outside the three-year limitations period, that knowledge should not bar claims for subsequent fiduciary breaches that occurred within the three-year limitations period.

ARGUMENT

THE DISTRICT COURT ERRED BY DISMISSING THE PLAINTIFFS' CLAIMS AS TIME-BARRED UNDER ERISA'S THREE-YEAR LIMITATIONS PERIOD

A. At Most, the Pleadings Established That the Plaintiffs Had Constructive Knowledge of the Facts Necessary to Establish Their Claims

1. "Actual Knowledge" Triggering ERISA's Three-Year Statute of Limitations is Knowledge of Each Factual Element of a Plaintiff's Claim, and Not Mere Constructive Knowledge

Pursuant to ERISA section 413, 29 U.S.C. § 1113, in the absence of fraud or concealment, an action for breach of an ERISA fiduciary duty must be brought within:

> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or...
>
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation.

While the six-year period is the "basic" rule, the three-year period is an "exception." Brock v. Nellis, 809 F.2d 753, 754-55 (11th Cir. 1987), cert. dismissed, 483 U.S. 1057 (1987); Diduck v. Kaszycki & Sons Contractors, Inc., 874 F.2d 912, 919 (2d Cir. 1989). In enacting ERISA, Congress sought

"to protect . . . the interests of participants in employee benefit plans . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of [such] plans," and by "providing for appropriate remedies, sanctions, and ready access to the Federal courts." Section 2(b), 29 U.S.C. § 1001(b). Consistent with this goal, the basic six-year limitations period ensures that those who violate their fiduciary duties do not take "refuge in a time bar" (Nellis, 809 F.2d at 754), and the exceptional three-year period applies only where a plaintiff has "actual knowledge of the breach or violation." Section 413(2), 29 U.S.C. § 1113(2).

Although there are some differences among the Circuits as to the precise requirements of the actual knowledge standard, all agree and the Second Circuit is clear that "actual knowledge" is not satisfied by mere "constructive knowledge."[2] Constructive knowledge is a "should have known" standard (Caputo, 267 F.3d at 194); it has been defined as "knowledge of facts sufficient to prompt an inquiry which if properly carried out, would have revealed [the alleged] misdeed." Nellis, 809 F.2d at 754; see, e.g., Krause v. Bennett, 887 F.2d 362, 370 (2d Cir. 1989) (possession of stolen property is not "actual knowledge" that it was stolen); VTech

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[2] Caputo's formulation of actual knowledge, discussed below, falls in the middle of the spectrum of circuit interpretations of "actual knowledge." See Edes v. Verizon Commc'ns, Inc., 417 F.3d 133, 141 (1st Cir. 2005) (citing different circuit formulations).

Holdings Ltd. v. PriceWaterhouse Coopers, 348 F. Supp. 2d 255, (S.D.N.Y. 2004) (access to books only establishes constructive, not actual, knowledge of their contents).

Caputo v. Pfizer, Inc., which the district court properly recognized to be the controlling precedent in the Second Circuit, makes clear that "constructive knowledge" of an alleged breach is insufficient to trigger ERISA's three-year statute of limitations. Caputo involved a claim of fraudulent misrepresentation. The plaintiffs alleged that in 1990 and 1991, they asked their employer whether an enhanced "golden handshake" retirement package would be offered as part of an impending retirement program and, after being told it would not, retired. Caputo, 267 F.3d at 185-86. However, the subsequently-announced retirement program included such a "golden handshake" and in November 1991, the plaintiffs learned that they would have been eligible for it had they not retired earlier. Id. at 186. Although the plaintiffs suspected in 1991 that they had been misinformed, they did not know the information they were given was knowingly false — a required element of the alleged misrepresentation claim — until 1995, and they did not file suit until 1996. Id. at 187-88.

The court held that the plaintiffs' suspicion in 1991 that "something was awry" was insufficient to trigger the exceptional three-year statute of

limitations. Caputo, 267 F.3d at 193. At most, in 1991 the plaintiffs "should have known" of the alleged breach, and the court reasoned that charging them with knowledge at that point meant applying a "constructive knowledge" trigger "repugnant to the plain language of the statute as well as its legislative history." Id. at 194.[3] Thus, in this Circuit (as elsewhere), constructive knowledge will not trigger ERISA's three-year limitations statute. See also LaScala v. Scrufari, 479 F.3d 213, 220 n.1 (2d Cir. 2007) ("ERISA § 413(2) requires 'actual knowledge,'" so that a "district court's finding that certain plaintiffs, but not others, had constructive knowledge, even if credited, would not satisfy this provision").

Caputo held instead that "actual knowledge" is "knowledge of all material facts necessary to understand that an ERISA fiduciary has breached his or her duty or otherwise violated the Act." Caputo, 267 F.3d at 193. Under this standard, the plaintiff "need not have knowledge of the relevant law," but "must have knowledge of all facts necessary to constitute a claim." Id. at 193. Such facts "'could include necessary opinion of experts,

[3] The court noted that a constructive-knowledge trigger for the three-year limitations period was removed by a 1987 amendment to ERISA. Id.

knowledge of a transaction's harmful consequences, or even actual harm.'" Id. (quoting Gluck v Unisys Corp., 960 F.2d 1168, 1177 (3d Cir. 1992)).[4]

This Court therefore requires an affirmative finding of actual knowledge as to each fact necessary to establish a claim.[5] For that reason, when an alleged breach turns on complex facts, including procedural imprudence not evident from the transaction itself, a plaintiff will not ordinarily have knowledge of each fact necessary to establish his or her claim merely because the plaintiff knows of the contested transaction. Caputo, 267 F.3d at 193 (knowledge of "a transaction that is not inherently a

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[4] Thus, in Caputo the plaintiffs did not have actual knowledge of a fiduciary breach in 1991 when the fiduciaries assured them that there would be no enhanced retirement benefit if they waited to retire. Caputo, 267 F.3d at 193-94. Instead, they only gained actual knowledge when they learned of "all of the material facts elemental to the alleged breach," specifically in 1995 when they learned from a ruling in another case that the misinformation they had received was knowingly false, an element of their legal claim. Id. See also Frommert v. Conkright, 433 F.3d 254, 272 (2d Cir. 2006) (actual knowledge of unlawful misrepresentation existed, not when plaintiffs knew of improper benefits calculation, but only once they knew that the calculation was contrary to plan terms, a required factual element of their claim); Stavola v. Ne. Utilities, 453 F. Supp. 2d 584, 591 (D. Conn. 2006) (even when plaintiff knew about defendant's misrepresentation, plaintiff lacked actual knowledge of an alleged fiduciary breach because she did not know that the misinformation was deliberate, a fact necessary to establish her misrepresentation claim).

[5] In our view, the "knowledge of all facts necessary to constitute a claim" standard set forth in Caputo, 267 F.3d at 193, requires knowledge of enough facts to make out each element of a prima facie case. It does not mean the plaintiff must know all facts that might influence the outcome of the case.

statutory breach of fiduciary duty. . . cannot communicate the existence of an underlying breach") (citations omitted). As the D.C. Circuit has noted, because a "fiduciary's independent investigation of the merits of a particular investment is at the heart of [404(a)'s] prudent person standard," "a failure to perform the most basic of fiduciary duties. . . is not disclosed by the filing of [plan documents.]" Fink v. Nat'l Sav. & Trust Co., 772 F.2d 951, 957 (D.C. Cir. 1985).[6]

Thus, plan documents that reveal a contested transaction will ordinarily be insufficient standing alone to disclose an ERISA breach under the actual knowledge standard. Accordingly, before applying ERISA's exceptional three-year statute of limitations to a complex claim of fiduciary imprudence, a court should neither presume actual knowledge based on constructive knowledge nor deduce knowledge of all the facts necessary to

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[6] See also Brown v. American Life Holdings, Inc., 190 F.3d 856, 859-60 (9th Cir. 1999) (although for an "illegal investment. . . knowledge of the transaction would be actual knowledge of the breach. . . if the fiduciary made an imprudent investment, actual knowledge of the breach would usually require some knowledge of how the fiduciary selected the investment"); Maher v. Strachan Shipping Co., 68 F.3d 951, 953-56 (5th Cir. 1995) (knowledge of annuity purchase standing alone does not constitute actual knowledge of imprudence because factors outside the transaction are necessary to establish the alleged imprudence); Waller v. Blue Cross, 32 F.3d 1337, 1339-41 (9th Cir. 1994) (accord); Dole v. Guido, 1991 WL 35843, at *3 (S.D.N.Y. 1991) (filing of plan documents did not create actual knowledge of delinquent plan contributions noted therein because liability turned on material facts not revealed by the contributions or the delinquency alone).

establish the alleged breach solely upon the plaintiff's knowledge of the transaction.

2. The District Court Erred by Charging the Plaintiffs with Actual Knowledge of the Contents of Plan Documents Based Only on Their Presumed Constructive Knowledge

As a preliminary matter, even assuming a breach can be discerned from examining the documents, it cannot be assumed that a plaintiff read them immediately upon receipt (or indeed that the documents were received). Thus, in Bona v. Barasch, 30 Empl. Benefits Cas. (BNA) 1875 (S.D.N.Y. 2003), the court concluded that on a 12(b)(6) motion, it could not charge the plaintiffs with actual knowledge of a transaction merely because it had been described in plan documents. The court reasoned that "without any factual development on the issue," the defendants had "demonstrated only that plaintiffs could have examined [the] tax forms" and "[a]bsent a showing that plaintiffs actually did examine those forms and learned of the transactions, the court cannot impute actual knowledge to them." Id. at 1887.

Similarly, in McConnell v. Costigan, 2002 U.S. Dist. LEXIS 3279, *30 (S.D.N.Y. 2002), the court rejected the defendants' argument that the plaintiffs had actual knowledge of unpaid plan contributions because regular pay reports provided information from which they could have deduced that

the contributions were inadequate. Although each plaintiff could have theoretically combined the reports with other information and gained actual knowledge, such "possible" actual knowledge did not, at summary judgment, satisfy the Caputo test of actual knowledge of each fact necessary to establish a claim. Id. at *28-30; see also Reich v. Lancaster, 55 F.3d 1034, 1058 (5th Cir. 1995); Harris v. Finch, No. 05-951, slip op. at 7 (N.D.N.Y. May 13, 2008); cf. MidAmerica Fed. Sav. & Loan Ass'n v. Shearson/American Express, Inc., 886 F.2d 1249, 1254-55 (10th Cir. 1989) (rejecting argument, in a securities case, that receipt of prospectus gives knowledge of its contents where no one reviewed the prospectus).[7]

By presuming that the Plaintiffs had knowledge of the contents of the plan documents cited in their complaint around the time of the alleged breaches and therefore had actual knowledge of their contents, the district court applied a constructive knowledge standard inapposite to ERISA's three-year statute of limitations. At the pleadings stage, the court's obligation on a motion to dismiss was to accept as true all well-pleaded factual allegations in the complaint and view them in the light most favorable to the plaintiff. Leeds v. Meltz, 85 F.3d 51, 53 (2d Cir. 1996).

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[7] The Defendants therefore err in contending that distribution of a document is sufficient to establish actual knowledge of its contents. See GMIMCO Br. 31-35; State Street Br. 29-31.

This obligation is incompatible with presuming actual knowledge when such presumption supported, at most, a finding of constructive knowledge inadequate to satisfy the actual knowledge standard.

The court mistakenly cited Frommert and Caputo for the proposition that "this Circuit has focused on whether the documents provided to plan participants sufficiently disclosed the alleged breach of fiduciary duty, not whether individual Plaintiffs actually saw or read the document." Young, 2008 WL 1971544 at *2 n.3. However, neither Frommert nor Caputo remove the necessity for an inquiry into the plaintiff's actual knowledge of facts necessary to establish a claim, as the court suggests. Although Frommert did analyze plan documents and the disclosures contained therein, it did so for the purposes of deducing the outer boundaries of what the plaintiffs could have known. Frommert, 433 F.3d at 272. Because the court concluded that the documents could not reveal the misrepresentations at issue in the case, it had no need to analyze the separate question whether the plaintiffs actually read the contents of the documents at the time alleged. Caputo similarly lacks any indication that a court's inquiry into a plaintiff's actual knowledge is limited to the question of whether plan documents disclosed the underlying transactions, and it is unclear why the district court suggests otherwise, particularly given Caputo's concern with establishing the

plaintiffs' "knowledge of all facts necessary to constitute a claim." Caputo, 267 F.3d at 193.

Here, instead, the court simply presumed, based on a cursory review of the pleadings and without identifying the material facts elemental to the Plaintiffs' claims, that the Plaintiffs had actual knowledge of the alleged breaches. The court's approach contravenes Caputo's exacting standard and falls well short of establishing – rather than presuming – that the Plaintiffs had actual knowledge of all facts necessary to establish a claim.[8]

3. Even Assuming the Plaintiffs had Actual Knowledge of the Contents of the Plan Documents, They Lacked Actual Knowledge of All the Facts Necessary to Establish Their Claims

The breaches alleged in this case do not support the district court's conclusion that the Plaintiffs knew all the facts necessary to establish their claims merely from reading the plan documents. Rather, the complex nature

[8] The court's error is not saved by Bishop v. Lucent Technologies, Inc., 520 F.3d 516 (6th Cir. 2008). See GMIMCO Br. 18, 34-35; State Street Br. 26, 27-28). First, Bishop applies a lower standard for actual knowledge than the one this Court applies. 520 F.3d at 521 (expressly rejecting Caputo). Second, the case is factually distinct because it involved an affirmative finding on actual knowledge: although the complaint lacked a specific identification of the date on which the plaintiffs acquired actual knowledge, the court concluded that the complaint contained a number of facts from which it could deduce actual knowledge. Id. at 520. Here, in contrast, the court did not make such affirmative findings. It did not identify any facts from the complaint supporting the Plaintiffs' actual knowledge apart from the plan documents and it failed to affirmatively connect the Plaintiffs to those documents.

of the Plaintiffs' legal claims regarding the single-equity-fund investments and the mutual-funds fees as compared to the limited amount of information disclosed by the plan documents completely refutes this conclusion.[9]

First, Caputo does not hold that knowledge of an "inherent" "statutory breach of fiduciary duty" standing alone constitutes actual knowledge of the underlying breach, so that the Plaintiffs possess the requisite actual knowledge as soon as they learn about the contested transactions. Caputo only addresses alleged fiduciary breaches that are "not inherent," holding that for such breaches, knowledge of the transaction alone "cannot communicate the underlying breach." Caputo, 267 F.3d at 193. The district court's suggested inverse proposition, that knowledge of a transaction standing alone constitutes knowledge of an "inherent" breach, is contradicted by Caputo's holding that actual knowledge of a fiduciary breach may encompass "[s]uch material facts [as] 'necessary opinions of experts, knowledge of a transaction's harmful consequences, or even actual harm.'" Caputo, 267 F.3d at 193 (citation omitted).

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[9] As Caputo recognizes, plaintiffs may bring suit once they suspect a violation and so are not required to plead sufficient facts to satisfy the actual knowledge standard in order to bring suit. Caputo, 267 F.3d at 194-95. The court below did not consider the separate question of whether the Plaintiffs pled sufficient facts to state a legal claim pursuant to Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955 (2007), and the Secretary takes no position on that separate issue not before this Court.

Second, even if the district court's assertion that knowledge of a transaction constitutes actual knowledge of an inherent statutory breach followed from Caputo or its progeny, this is not such a case. Contrary to the district court's finding, the Plaintiffs' claims are not limited to a theory that either the single-equity funds or the fee payments were "inherently a statutory breach of fiduciary duty." Young, 2008 WL 1971544 at *2. The Plaintiffs do not claim that the Defendants committed a statutory prohibited transaction. Compare 29 U.S.C. § 1106 (prohibited transactions) to 29 U.S.C. § 1104(a)(1)(A)-(D). Nor have they insisted that the single-equity funds or fees were facially imprudent. While the Plaintiffs' complaints focus factually on the single-equity funds and the mutual fund fees, they allege legal claims — fiduciary imprudence in violation of ERISA section 404(a)(1)(A)-(D) — that necessarily turn on complex substantive and procedural facts relating, in the words of ERISA section 404, to "circumstances then prevailing." These legal claims necessitate consideration of additional facts not disclosed by the plan documents, and the transactions standing alone are insufficient by themselves to establish each required element of the Plaintiffs' claims.

In particular, the Plaintiffs allege that the Defendants failed to act for the "exclusive purpose of providing benefits to participants and their

beneficiaries"; failed to defray "reasonable expenses of administering the plan"; failed to act "with the care, skill, prudence, and diligence" of "a prudent man" under the "circumstances then prevailing"; failed to diversify the investments of the Plans "so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so"; and failed to comply with "the documents and instruments governing the plan[s]." ERISA section 404(a)(1)(A)-(D), 29 U.S.C. § 1104(a)(1)(A)-(D).

A determination as to whether the Defendants have breached these legal duties requires consideration of both the fiduciaries' decision-making process and the merits of the decisions themselves, as measured against a "reasonable" and "prudent" person standard and "circumstances then prevailing." Compare 29 U.S.C. § 1106 (prohibited transactions) with id. § 1104(a)(1)(B) (requiring fiduciary to act with "the care, skill, prudence, and diligence under the circumstances then prevailing" expected of a prudent person acting in like capacity). See also Katsaros v. Cody, 744 F.2d 270, 279 (2d Cir. 1984) ("Prudence is measured according to the objective 'prudent person' standard....The court's task is to inquire 'whether the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment.'") (citations omitted); Donovan

v. Cunningham, 716 F.2d 1455, 1467 (5th Cir. 1983), cert. denied, 467 U.S. 1251 (1984) (imprudence violations under section 404 should be evaluated both for the merits of a particular investment and the fiduciary's independent investigation of the merits).

That the Plaintiffs' claims relate in part to diversification does not mean that they had actual knowledge of each fact necessary to establish a claim once they knew some funds were undiversified. Under ERISA, there is no percentage test for diversification. Instead, the statute requires sufficient diversification of the plan's overall investments "so as to minimize the risk of large losses unless under the circumstances it is clearly prudent not to do so," 29 U.S.C. § 1104(a)(1)(C), a standard that requires considerations of process, overall plan holdings and other circumstances. Without knowledge of facts apart from bare percentages indicating that the fiduciaries' reasoning and analysis was inadequate, a plaintiff cannot actually know that assets lacking diversification are in fact imprudently invested.

Moreover, the Plaintiffs allege not only that the Plans as a whole were undiversified, but that it was imprudent for the fiduciaries to offer those funds given the risks associated with them. Accordingly, the breaches alleged by the Plaintiffs are not "inherent," because they require consideration of process and relative merit, as well as reasonableness and

circumstance, i.e., material facts that are not ordinarily disclosed on the face of a transaction. It cannot be known from the plan documents that such facts exist or that the Plans as a whole were undiversified. Therefore, knowledge that the Plans here contained single-equity funds could not standing alone "communicate the existence of an underlying breach." Caputo, 267 F.3d at 193.

Specifically, knowledge of the single-equity funds alone would not have afforded the Plaintiffs knowledge of the "care, skill, prudence, and diligence under the circumstances then prevailing" used by the Defendants in offering these funds. 29 U.S.C. § 1104(a)(1)(B). Mere knowledge of their existence would not have informed the Plaintiffs whether the Defendants took such steps to "minimize the risk of large losses" as investigating alternative investments, analyzing the risks created by the single-equity funds, or continuously monitoring the investments, some or all of which plaintiffs would have needed to know to establish a claim of procedural imprudence. 29 U.S.C. § 1104(a)(1)(C). Nothing in the plan documents that formed the basis for the court's dismissal speaks to these procedural aspects of either an (a)(1)(B) imprudence claim or an (a)(1)(C) diversification claim, and nothing in the pleadings indicates that the

Plaintiffs knew additional facts necessary to establish the elements of these claims more than three years before they brought suit.[10]

Similarly, knowledge of the fee charges could not have provided the Plaintiffs with the knowledge necessary to deduce whether such rates were the product of a prudent process. There is no indication from reading the complaints that the plan documents reveal in any way whether the fiduciaries analyzed the fees, investigated other fee structures, negotiated the fees they paid, attempted to negotiate lower fees, undertook to monitor the fee rates as compared to changes in competitive fee rates, or considered the comparative advantages of mutual funds over lower-cost investment structures. Absent an awareness of some or all of these facts, the Plaintiffs lacked knowledge of all the facts necessary to establish the procedural aspect of their claim of excessive fees.

For similar reasons, knowledge of the single-equity funds did not, standing alone, equate to actual knowledge that the Plans on the whole were undiversified or substantively imprudent. There is no indication that the Plaintiffs knew the holdings of the Plans as a whole, including what percentage of the Plans' overall holdings consisted of the single-equity

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[10] Plaintiffs also allege violations of ERISA sections 404(a)(1)(A) and (D), 29 U.S.C. § 1104(a)(1)(A) and (D),which may also raise process considerations.

funds, and the overall allocation of assets between all of the various investments in the Plans' portfolios. Even if the Plaintiffs had cause to question the Plans' retention of some single-equity funds as part of their broad range of investment funds and options, the Plaintiffs' knowledge of the bare existence of such funds falls far short of knowing sufficient facts to establish the elements of a diversification claim -- e.g., that the funds constitute a substantial (or even significant) portion of the Plans' assets, that the funds' inclusion as part of an otherwise diversified array of investment options is imprudent, or even that it would have been prudent to eliminate the funds from the menu of Plan investments in light of the costs and financial trade-offs that such an action would have entailed.

Likewise, the substantive prudence of the fee payments turned on a number of material facts that could not be evident from the fees themselves or the plan documents. For example, nothing in the fees themselves revealed whether the fiduciaries could have paid lower fees for the same level of risk or rate of return or what similarly situated fiduciaries paid in fees for comparable investments. Nor did the fees themselves reveal the purpose for which the fiduciaries elected the mutual funds as opposed to other investment options or lower-cost mutual funds, or how such funds fit within their larger investment strategy. Without such information, the

Plaintiffs had no context within which to judge the merits of the fee rates and from which to "actually know" that the fees were imprudent in violation of section 404(a)(1).

It follows that the court below could not have reasonably found the Plaintiffs to have had "actual knowledge" of all the facts necessary to state their claims merely by having read the plan documents and having understood the disclosed transactions. In finding "actual knowledge," the court erred in assuming such knowledge and then concluding that the Plaintiffs therefore knew all the facts necessary to establish their claims.

Permitting the claims to go forward in these circumstances does not, as the district court suggests, provide "an end run around ERISA's limitations requirement." Young, 2008 WL 1971544 at *2 n.3. At most, it affords the plaintiff the "basic" six-year limitations period. Nellis, 809 F.2d at 754-55. In some circumstances the "exceptional" three-year limitations period based on the existence of actual knowledge will provide a necessary safeguard preventing litigants from sleeping on their rights. But where, as here, no such affirmative finding of actual knowledge can be made, there is no justification for cutting the limitations period in half. In fact, a six-year limitations period is particularly appropriate in cases like this where the alleged breaches are sufficiently complicated to evade detection. The "six-

year time period reflects Congress' determination to impress upon those vested with the control of pension funds the importance of the trust they hold" and shows that Congress "did not desire that those who violate that trust could easily find refuge in a time bar." Nellis, 809 F.2d at 754. Particularly when the material facts at issue are complicated, "reasonable people cannot be expected to discern fully from [plan documents] that the [fiduciary] has utterly failed to perform its fiduciary duties." Fink, 772 F.2d at 958. For that reason, Caputo recognizes that a plaintiff may not be able, and need not, plead sufficient facts to satisfy the actual knowledge standard in order to bring suit, but can gain such knowledge through discovery. Caputo, 267 F.3d at 194-95.

B. Any Finding that the Plan Documents Provided the Plaintiffs Actual Knowledge of the Initial Fiduciary Breach Cannot Encompass Subsequent Fiduciary Breaches and Should Not Bar Claims Based on Conduct or Omissions that Occurred Within Three Years Prior to Filing

The Plaintiffs' claims are based not only on the Defendants' original decisions to offer the single-equity funds and to enter into the disputed fee arrangements but also on their repeated failures to alter the investments and fees so as to render them prudent in light of ever-changing market conditions. The Defendants had an ongoing duty to monitor the Plans' investments that extended into the three-year period that preceded this suit.

Even if the Plaintiffs gained actual knowledge of the alleged initial fiduciary breach at some point outside the limitations period, that knowledge could not bar claims for subsequent fiduciary breaches stemming from this alleged failure to monitor that occurred within the three-year limitations period.

On account of the "continuing nature of [the fiduciaries'] dut[ies] under ERISA to review plan investments and eliminate imprudent ones," each repeated failure to act prudently created a "new transaction and a distinct violation." Martin v. Consultants & Adm'rs, Inc., 966 F.2d 1078, 1087 (7th Cir. 1992). See also Boeckman v. A.G. Edwards, Inc., 461 F. Supp. 2d 801, 814-15 (S.D. Ill. 2006); Bona, 30 Empl. Benefits Cas. (BNA) at 1888; Buccino v. Cont'l Assurance Co., 578 F. Supp. 1518, 1521 (S.D.N.Y. 1983) (holding that fiduciaries "were under a continuing obligation to advise the Fund to divest itself of unlawful or imprudent investments" and their "failure to do so gave rise to a new cause of action each time the Fund was injured by its continued possession of individual policies").

Here, the Defendants' alleged failure to monitor similarly gave rise to a new cause of action each time the Plan was injured by the continued maintenance of the single-equity funds and payment of the fees. In such circumstances, any claim relating to violations that allegedly occurred within

the three-year statute of limitations cannot be time-barred regardless of the level of knowledge acquired within this period so long as the alleged harm is not merely the present effect of past violations that occurred outside the limitations period. Cf. Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2165, 2167, 2169 (2007) (the time for filing a Title VII charge begins when any discrete act of discrimination occurs; "[b]ut of course, if an employer engages in a series of acts each of which is intentionally discriminatory, then a fresh violation takes place when each act is committed"); Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 110-11, 113 (2002). Otherwise, a fiduciary could permanently violate the statute with impunity once three years had passed, as long as he continued to breach the law in similar ways. Such a rule would undermine the stringency of the "the continuing nature" of a fiduciary's duties and leave them "free to engage in repeated violations, so long as they have once been discovered but not sued." Consultants & Adm'rs, Inc., 966 F.2d at 1087-88, citing 29 U.S.C. § 1104(a)(1)(B).

Therefore, even if the Plaintiffs gained actual knowledge of the alleged original fiduciary breach — selecting the funds and fees — at a point in time that was outside the three-year limitations period, that does not mean that the Plaintiffs also gained actual knowledge at that time of other distinct

fiduciary breaches that did not actually occur until later. Consultants & Adm'rs, Inc., 966 F.2d at 1087-88 ("actual knowledge" of bidding and monitoring processes in 1984 did not create actual knowledge of similar bidding and monitoring in 1985-1987); NYSA-ILA Med. & Clinical Servs. Fund v. Catucci, 60 F. Supp. 2d 194, 199-200 (S.D.N.Y. 1999) ("[t]he fact that certain claims are time-barred does not render other similar claims time-barred" as "each time a fiduciary made an improper payment with Fund assets, 'the Fund [was] harmed and a new cause of action arose"), quoting Dole v. Formica, 14 Empl. Benefits Cas. (BNA) 1397, 1406 (N.D. Ohio 1991) (finding new claim arose each time fiduciaries paid excessive fees).[11]

Thus, the violations that occurred within three years of filing suit, from which distinct losses allegedly occurred, should be subject to a distinct limitations period and treated as timely. The district court therefore erred in dismissing the entire case as untimely.

[11] Phillips v. Alaska Hotel & Rest. Employees Pension Fund, 944 F.2d 509, 520-21 (9th Cir. 1991) is distinguishable. Apart from the Phillips discussion of ERISA's statute of limitations expressly being dicta, the discussion concerns the ongoing, present effects of past violations, not repeat but distinct violations occurring in the limitations period immediately preceding the time of suit. See also id. at 521-22 (O'Scannlain, J., concurring). The Defendants' reliance on Phillips and like cases is therefore misplaced. See GMIMCO Br. 25-31; State Street Br. 31-35.

CONCLUSION

For the reasons stated above, the Secretary respectfully requests that this Court reverse the decision of the district court.

Respectfully submitted,

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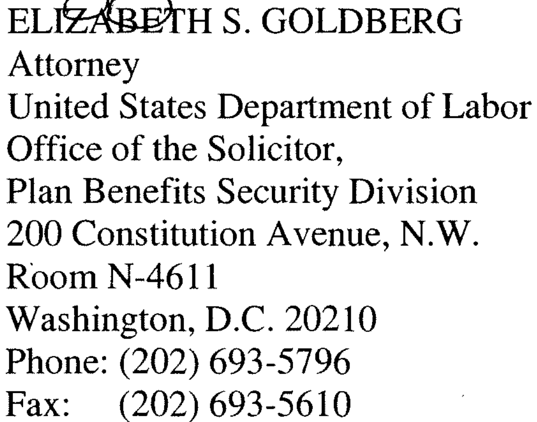

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Attorney for U.S. Department of Labor
July 3, 2008

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