16-1872

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RICHARD J. KWASNY, an individual,
Defendant-Appellant,
v.
THOMAS E. PEREZ, Secretary, United States
Department of Labor,
Plaintiff-Appellee.

On Appeal from the United States District Court for the
Eastern District of Pennsylvania
Case No. 3-12-cv-01430
The Honorable Judge Eduardo C. Robreno

BRIEF FOR THE SECRETARY OF LABOR

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STATEMENT OF THE ISSUES

As restated by the Secretary, the issues raised by defendant-appellant Richard Kwasny are:

1. Whether the undisputed material facts establish that Kwasny breached his fiduciary duties to his employees' retirement plan in violation of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, et seq.

2. Whether the Secretary of Labor had actual knowledge of Kwasny's fiduciary violations more than three years before filing suit, which could establish a statute of limitations defense under ERISA.

3. Whether a plan participant's prior suit against Kwasny and a judgment rendered against Kwasny in that suit precludes the Secretary's claims as res judicata.

STATEMENT OF JURISDICTION

The district court had jurisdiction over the underlying action under 29 U.S.C. § 1132(e). Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction to review the district court's final judgment entered on February 9, 2016.

STATEMENT OF RELATED CASES

There are no other related cases.

STATEMENT OF THE FACTS

Defendant Richard Kwasny was a managing partner of his law firm, Kwasny & Reilly, PC ("Kwasny & Reilly"). J.A. 6a.[1] The law firm sponsored an ERISA-covered pension plan for its employees, the Kwasny and Reilly 401(k) Profit-Sharing Plan ("Plan"), which was established in 2003. J.A. 37a-38a, ¶¶ 6, 10; J.A. 43a-44a, ¶¶ 6, 10. Kwasny & Reilly was also the plan administrator. Id. The employees of Kwasny & Reilly were the Plan's participants, and Kwasny was one of the Plan's trustees. J.A. 37a-38a, ¶¶ 7, 11; J.A. 44a, ¶¶ 7, 11; J.A. 117a, 112a.

The employees of Kwasny & Reilly contributed a portion of their pay to their retirement accounts in the Plan through payroll deductions. J.A. 118a, 112a; see also J.A. 111a.[2] Between September 7, 2007, and November 13, 2009, employee contributions in the amount of $40,416.30 were deducted from the pay of Kwasny & Reilly employees, but those contributions were never forwarded to the Plan. J.A. 118a, 122a; see also J.A. 113a. Instead, at the direction of Kwasny, these deductions were comingled with the general assets of Kwasny & Reilly for the firm's use. J.A. 118a, ¶ 9; J.A. 122a.

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[1] "J.A." refers to the Joint Appendix.

[2] As the district court described, "[a] defined contribution ERISA employee benefit plan such as the one at issue allows plan members to contribute a portion of their salary, pre-tax, into individual retirement accounts." J.A. 6a n.2 (citing 29 U.S.C. § 1002(34)).

On October 12, 2011, Larry Haft, an attorney formerly employed by Kwasny & Reilly, filed a complaint in the Court of Common Pleas of Bucks County, Pennsylvania, against Kwasny and Kwasny & Reilly seeking, among other things, unpaid wages and payroll deductions never forwarded to the Plan under both state law and ERISA. J.A. 78a-82a. On August 29, 2012, the state court issued an order awarding punitive damages against Kwasny for his failure to comply with an order. J.A. 86a. "[T]he punitive damage award order specifically stated that Kwasny could move for reconsideration if he provided complete discovery responses" and paid Haft $1,000. J.A. 22a n.13. The district court noted that this order was the only signed order from the state action in the record. J.A. 22a.

STATEMENT OF THE CASE

On July 16, 2014, the Secretary filed a complaint against Kwasny and Kwasny & Reilly in the United States District Court for the Eastern District of Pennsylvania. J.A. 36a-42a.[3] The Secretary sought, among other things, a judgment that the defendants had violated their fiduciary duties to the Plan under ERISA, restoration of the losses to the Plan resulting from the defendants' fiduciary breaches and replacement of the defendants as fiduciaries to the Plan with an

[3] The Secretary also added the Plan as a nominal defendant solely to be assured that complete relief could be granted. J.A. 38a.

independent fiduciary to administer the Plan. Id. On October 24, 2014, Kwasny filed an answer. J.A. 43a-46a.

The Secretary issued discovery requests, requests for admissions and also noticed a deposition of Kwasny. Despite the Secretary's efforts to obtain discovery, the Secretary required the district court's intervention and filed a series of motions. The Secretary filed a motion to compel Kwasny to serve complete responses to the Secretary's First Set of Interrogatories and First Set of Request for Production of Documents, which the court granted on July 2, 2015. J.A. 31a, Dkt. #27. On July 9, 2015, the Secretary filed a motion for sanctions against Kwasny due to his failure to appear at a properly noticed deposition, J.A. 31a, Dkt. #28, which the district court granted in part. J.A. 33a, Dkt. #53. And, as most relevant here, the Secretary filed a motion, which the district court also granted on July 20, 2015, to deem admitted the Secretary's request for admissions because Kwasny failed to respond to this request after 30 days as required by Federal Rule of Civil Procedure 36(a)(3). J.A. 122a. Kwasny has not appealed these rulings.

On August 12, 2015, the Secretary filed a motion for summary judgment. J.A. 32a, Dkt. #41. Kwasny filed a response in opposition and his own cross-motion for summary judgment (the "Kwasny Response and Cross-Motion"). J.A. 47a-95a, Dkt. #48. After further briefing by both the Secretary and Kwasny, the

district court entered an opinion and order granting summary judgment to the Secretary and denying it to Kwasny.[4] J.A. 2a-27a.

In its Opinion, the district court found that Kwasny was liable for a breach of his fiduciary duties of loyalty and prudence, ERISA sections 404(a)(1)(A), (B), 29 U.S.C. §§ 1104(a)(1)(A), (B), when he failed to forward $40,416.30 in withheld employee contributions to the Plan and directed those contributions to be commingled with the general assets of his firm. J.A. 10a-12a. The district court found that Kwasny's conduct also resulted in his violation of prohibited transaction provisions set forth in ERISA sections 406(a)(1)(D), (b)(1), 29 U.S.C. §§ 1106(a)(1)(D) and 1106(b)(1) by dealing with these Plan funds in his own and his firm's interests. Id. The court ordered Kwasny to pay $40,416.30 in restitution to the Plan and $9,798.85 in pre-judgment interest. J.A. 24a-27a. The district court also ordered the removal of Kwasny as a fiduciary to the Plan, barred Kwasny from ever serving as a fiduciary to any ERISA plan, and appointed an independent fiduciary to terminate the Plan. J.A. 3a ¶¶ 4-6; J.A. 26a-27a. The district court further held that Kwasny would be liable for the costs of the independent fiduciary. J.A. 3a ¶6; J.A. 26a-27a.

[4] On the same date (February 9, 2016), the district court also entered an opinion, J.A. 33a, Dkt. #54, and order, J.A. 33a, Dkt. #55, granting the Secretary's motion for a default judgment against Kwasny & Reilly, which had failed to answer the complaint.

The court granted summary judgment in the Secretary's favor on his fiduciary breach and prohibited transaction claims based upon the facts the court deemed Kwasny to have admitted, which the court held conclusively established that: (1) "Kwasny was a trustee of the Plan"; (2) "between September 7, 2007 and November 13, 2009, $41,936.73 was withheld from employee paychecks but not deposited into the Plan";[5] (3) "Kwasny directed that the withheld employee contributions be commingled with the general assets of the Firm"; (4) "he directed that employee contributions be used for the benefit of the Firm"; and (5) "he was responsible for determining if the employees' payroll checks and contribution checks were issued by Paychex, the company that prepared the Firm's payroll." J.A. 10a-12a. The Secretary also provided a declaration from the Firm's bookkeeper, Kathleen Meske, which confirmed the court's conclusion that Kwasny instructed Meske to withhold employee contribution checks from the Plan. Id. The district court concluded that these undisputed facts established that Kwasny violated his fiduciary duties as trustee to the Plan and therefore entitled the Secretary to an entry of judgment in his favor and against Kwasny. J.A. 12a.

The court then considered and rejected the four affirmative defenses asserted by Kwasny: laches, statute of limitations, res judicata, and failure to join an indispensable party. J.A. 13a-24a. First, the court rejected Kwasny's argument

[5] The district court later noted that the correct amount is $40,416.30. J.A. 10a n.6.

that laches applied because "'it is well-established that the United States is not subject to the defense of laches in enforcing its rights.'" J.A. 13a n.8 (quoting United States v. St. John's Gen. Hosp., 875 F.2d 1064, 1071 (3d Cir. 1989) (citation omitted)).

Second, the court rejected Kwasny's claim that ERISA's statute of limitations barred the action because it was brought more than three years after the Secretary had "actual knowledge of the breach or violation." 29 U.S.C. § 1113(2). The court ruled that Kwasny's bare assertion that, in 2010, some unknown Department of Labor investigator reviewed and copied the Plan's books and records in order to determine whether a violation of ERISA had been committed was "self-serving, conclusory, and unsubstantiated." J.A. 16a. Not only did Kwasny not provide any basis to support his claim, but two Department of Labor employees submitted declarations denying the existence of any investigation until the fall of 2011. J.A. 10a, 14a-15a.

Third, the district court rejected Kwasny's argument that the 2012 punitive damages judgment in the state court action brought by a Plan participant, Larry Haft, for unpaid wages and for Kwasny's failure to deposit employee and employer contributions into his Plan account barred the Secretary's claims on the basis of res judicata and issue preclusion. J.A. 22a. While recognizing that the earlier action may have arisen from the same set of facts, the district court ruled in accordance

with the Fifth and Seventh Circuits that the Secretary has "strong independent interests" in protecting the integrity of the nation's pension system and the general welfare of the nation and is not in privity with private litigants. J.A. 19a-21a. Consequently, the court concluded that the Secretary's suit was not precluded by private litigation under res judicata or issue preclusion principles, because there is no privity between the Secretary and Haft. Id. Furthermore, the court found Kwasny presented only one signed state court order from Haft's action, and it reflected a judgment granting punitive damages against Kwasny for failure to comply with the state court's orders, not as compensation to Haft with respect to his retirement account. Id. The district court refused to allow the amount of Haft's earlier judgment to offset the monetary relief provided as part of the judgment in the Secretary's action here, because Haft's award was for punitive damages arising from Kwasny's failure to comply with a prior order of the state court and not for "his underlying claims regarding his withheld Plan contributions." J.A. 21a-22a.

Finally, the district court rejected Kwasny's argument that the Secretary's action should be dismissed because the Secretary had failed to join an alleged indispensable party, Mark Reilly, Kwasny's law firm partner and the Plan's co-trustee. J.A. 22a-24a. The district court recognized that "[t]he liability of ERISA fiduciaries is typically joint and several" and that "a plaintiff is not required to 'name all the trustees as defendants.'" J.A. 23a-24a (quoting Struble v. New Jersey

Brewery Emps' Welfare Tr. Fund, 732 F.2d 325, 332 (3d Cir. 1984)). Accordingly, Reilly was not an indispensable party. J.A. 24a.

SUMMARY OF THE ARGUMENT

Kwasny admitted that he was a fiduciary who had an obligation to protect his employees' retirement funds yet diverted his employees' contributions to their 401(k) pension plan to his firm's bank account and used these funds in the interests of his firm. As the district court correctly concluded, given these undisputed facts, summary judgment that Kwasny violated his fiduciary obligations under ERISA is justified. On appeal, Kwasny ignores his admissions that compel the conclusion that he breached his fiduciary duties and instead repeats the legally irrelevant, factually unsupported, and self-serving arguments that the district court properly rejected below.

The district court properly rejected Kwasny's statute of limitations defense. Kwasny asserts, again without any support, that the Secretary had actual knowledge of Kwasny's violations more than three years before filing suit. Kwasny ignores this Circuit's stringent standard for showing actual knowledge and instead he makes conclusory assertions about the Secretary's knowledge insufficient to meet that standard.

Finally, the district court properly rejected Kwasny's argument that a Plan participant's state court judgment against Kwasny precludes the Secretary's suit as

a matter of res judicata, or that it requires an offset against the judgment in this case. Kwasny's arguments fail, among other reasons, because the Secretary and the individual participant are not in privity; therefore, a fundamental requirement of res judicata is not met. Moreover, Kwasny fails to provide any reason to believe the participant recovered any money for the Plan or his account within the Plan to which an offset might apply. Kwasny thus provides no basis to reverse the district court's decision.

ARGUMENT

I. THE UNDISPUTED MATERIAL FACTS ESTABLISH THAT KWASNY BREACHED HIS FIDUCIARY DUTIES

A. Standard of Review

A district court's ruling granting summary judgment is subject to de novo review. Meditz v. City of Newark, 658 F.3d 364, 369 (3d Cir. 2011). An order granting summary judgment may be affirmed on any grounds supported by the record. Azur v. Chase Bank, USA, 601 F.3d 212, 216 (3d Cir. 2010).

B. The District Court's Judgment Was Based on Admitted Facts, Which Defendant Does Not Challenge in this Court.

The district court properly granted summary judgment in the Secretary's favor "[b]ased primarily upon the deemed admissions" of Kwasny. J.A. 10a. Federal Rule of Civil Procedure 36(a)(3) provides that unless an answer or objection is served upon a party requesting admissions within 30 days, the "matter

is admitted." E.g., Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976); McNeil v. AT&T Universal Card, 192 F.R.D. 492, 494 (E.D. Pa. 2000) ("Plaintiffs never responded to the requests for admissions, and therefore the matters addressed in the requests for admission are deemed admitted."). Thus, a matter deemed admitted for a failure to respond to a request for admissions will be treated as dispositive in a motion for summary judgment. E.g., Anchorage Assocs. v. Virgin Islands Bd. of Tax Review, 922 F.2d 168, 176 n.7 (3d Cir. 1990) ("This Court and others have held that 'deemed admissions' under Fed. R. Civ. P. 36(a) are sufficient to support orders of summary judgment"); Rissinger v. State Farm Ins., Case No. 1:14-CV-2439, 2016 WL 3027822, *3 (M.D. Pa. May 27, 2016); Harrison v. Ammons, Case No. 1:05–CV–2323, 2009 WL 2588834, *4 (M.D. Pa. Aug. 19, 2009).

Here, after Kwasny failed to respond to the Secretary's requests for admissions, the district court granted the Secretary's motion to deem these matters admitted on July 20, 2015. Kwasny did not appeal that ruling or even discuss it in his opening brief, so the deemed admissions continue to bind him in these appellate proceedings. E.g., State Nat'l Ins. Co. v. Cty. of Camden, -- F.3d --, No. 14-4766, 2016 WL 2990975, at *3 (3d Cir. May 24, 2016) ("If an appeal is taken only from a specified judgment, this Court does not exercise jurisdiction to review other judgments that were not specified or 'fairly inferred' by the Notice."); Fed. R.

Civ. Proc. 36(b); see also Fisher v. Miller, 571 F. App'x 119, 121 n.2 (3d Cir. July 8, 2014) (unpublished) ("Fisher did not designate the District Court's June 24, 2013 order . . . see Fed. R. App. P. 3(c), nor did he mention the order in his opening brief. He thus waived any challenge to that order.").[6] Kwasny cannot challenge these admissions now, because they are properly deemed admissions under Rule 36 pursuant to the court's unchallenged order.

In its summary judgment decision, the district court relied on this ruling pursuant to Federal Rule of Civil Procedure 36(b), because "[a] matter admitted under this rule is conclusively established[.]" J.A. 7a n.5. Pursuant to the district court's prior ruling, Kwasny admitted, among other things, that (1) he "was a trustee of the Plan [Kwasny & Reilly 401(k) Profit Sharing Plan]"; (2) he "directed that employee withholdings intended for deposit into the Plan be commingled with the general assets of the Firm [Kwasny & Reilly P.C.]"; (3) he "directed that the employee withholdings intended for deposit into the Plan be used for the benefit of the Firm"; and (4) he "has not restored any part of the missing employee withholdings to the Plan." J.A. 117a-119a. In fact, Kwasny totally ignores the

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[6] Kwasny had an opportunity to move the court to withdraw or amend the admissions but declined to do so. "Although the [District] Court explained to Kwasny during the July 20, 2015 conference that if he 'wanted to be relieved from those admissions, [he could] file a motion' by August 7, 2015, Kwasny did not move to have the admissions withdrawn or amended." J.A. 7a n.5. Kwasny does not dispute this in his opening brief.

existence of his Rule 36 admissions in his appellate brief, notwithstanding their dispositive and binding effect. He therefore waives any challenge to the district court's reliance on them as sufficient to support summary judgment. E.g., In re Fosamax (Alendronate Sodium) Products Liab. Litig. (No. II), 751 F.3d 150, 157–58 (3d Cir. 2014) ("We have consistently held that '[a]n issue is waived unless a party raises it in its opening brief, and for those purposes a passing reference to an issue . . . will not suffice to bring that issue before this court.'") (citation omitted).

"Rule 36 admissions are conclusive . . . and are sufficient to support summary judgment." Langer v. Monarch Life Ins. Co., 966 F.2d 786, 803 (3d Cir. 1992); accord Anchorage Assoc., 922 F.2d at 176 n.7; see also Kida v. EcoWater Sys. LLC, Case No. 10–4319, 2011 WL 4547006, *4 (E.D. Pa. Sept. 30, 2011) ("An admission established by default (i.e., a party's failure to respond to a request for admission) is likewise conclusive pursuant to Rule 36."). Federal Rule of Civil Procedure 56(e) likewise provides that "[i]f a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact . . . the court may . . . (2) consider the fact undisputed . . . (3) grant summary judgment if the motion and supporting materials -- including the facts considered undisputed -- show that the movant is entitled to it[.]" Based on Kwasny's admissions, the district court's ruling on the merits of the summary judgment motion is undisputedly correct.

Based on these admissions, the district court correctly granted summary judgment that Kwasny clearly violated ERISA sections 404 and 406. Withheld employee contributions are assets of the Plan not the firm. See United States v. Grizzle, 933 F.2d 943, 946 (11th Cir. 1991); LoPresti v. Terwilliger, 126 F.3d 34, 39–40 (2d Cir. 1997); Bannistor v. Ullman, 287 F.3d 394, 402 (5th Cir. 2002); Finkel v. Romanowicz, 577 F.3d 79, 86 n.8 (2d Cir. 2009) ("Here, we consider an employee's contributions to an ERISA plan, which became plan assets when money was withheld from the employee's wages"); see generally 29 C.F.R. § 2510.3-102(a) (plan assets "include amounts . . . that a participant or beneficiary pays to an employer . . . for contribution to the plan."). This Court has described Kwasny's fiduciary obligations under ERISA:

> Section 404 requires fiduciaries to discharge their duties 'solely in the interest of the participants and beneficiaries . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity' would use.' 29 U.S.C. § 1104(a)(1). Supplementing that foundational obligation is § 406, which prohibits plan fiduciaries from entering into certain transactions. Id. § 1106. Subsection (a) erects a categorical bar to transactions between the plan and a 'party in interest' deemed likely to injure the plan. Id. § 1106(a); Reich v. Compton, 57 F.3d 270, 275 (3d Cir.1995). Subsection (b) prohibits fiduciaries from entering into transactions with the plan tainted by conflict-of-interest and self-dealing concerns. 29 U.S.C. § 1106(b)[.]

Nat'l Sec. Sys., Inc. v. Iola, 700 F.3d 65, 81–82 (3d Cir. 2012). Kwasny's conduct in directing the firm's employees' own contributions, which are the assets of the pension plan, into his law firm's corporate accounts is a clear violation of these

obligations. In his appellate brief, Kwasny does not contest the district court's legal conclusion that he violated ERISA based on the admitted facts.

C. Kwasny's Arguments Are Irrelevant and Unsupported

Notwithstanding his complete failure in his appellate brief to address his admissions that served as the "primary basis" for the district court's decision that he breached his fiduciary duties, J.A. 10a-12a, Kwasny now attempts to raise "factual" arguments on appeal that are legally irrelevant to the summary judgment decision because they either contradict his own admissions or are simply too conclusory and unsupported to undermine the district court's decision. Opposition to summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). "[A]n inference based upon speculation or conjecture does not create a material factual dispute sufficient to defeat entry of summary judgment." Robertson v. Allied Signal, Inc., 914 F.2d 360, 382 n.12 (3d Cir. 1990).

First, Kwasny complains that he was denied the opportunity to cross-examine Kwasny & Reilly's bookkeeper, Meske, on her Declaration, "particularly as [Kwasny] denied that he was 'responsible for determining if payroll checks and contribution checks were issued[.]'" Kwasny Br. 9. The inability to cross-examine a declarant, however, cannot by itself create a basis for denying summary

judgment. See Nat'l Union Fire Ins. Co. v. Argonaut Ins. Co., 701 F.2d 95, 97 (9th Cir. 1983) ("neither a desire to cross-examine an affiant nor an unspecified hope of undermining his or her credibility suffices to avert summary judgment").

Regardless, "[h]aving been deemed to admit that he directed that employee withholdings for the Plan 'be commingled with general assets of the Firm … [and] used for the benefit of the Firm,'" J.A. 118a ¶¶ 9-10, any attempt by Kwasny to now undermine Meske's assertions, which merely confirm his admissions, must fail. As this Court explained in Airco Indus. Gases, Inc. v. Teamsters Health and Welfare Pension Fund of Phila. and Vicinity, 850 F.2d 1028, 1036-37 (3d Cir. 1988), a court lacks the discretion to alter the effect of a Rule 36 admission. Thus, in Airco, this Court reversed the district court's ruling after a four-day trial that a welfare plan's no-refund policy was in effect in 1981, because the fund had previously admitted, pursuant to a Rule 36, that the no-refund policy had been adopted at a meeting of the trustees on November 3, 1983. Id. at 1035-36. The Court in Airco wrote: "[t]his admission is not merely another layer of evidence, upon which the district court can superimpose its own assessment of weight and vitality. It is, to the contrary an unassailable statement of fact[.]" Id. at 1037 (emphasis added).

Moreover, Kwasny raises no challenge to the district court's reliance on Meske's Declaration for the sole assertion that "Kwasny [had] instructed her to

send the employee contribution checks [to the Plan's asset custodian] only after he paid employee wages, himself, and the firm's outstanding bills." J.A. 11a. Instead, Kwasny repeats his irrelevant arguments below that Meske was not privy to certain firm conversations and that the contribution checks refer solely to his law firm and not himself. Kwasny Br. 9. None of his assertions on appeal concerns the district court's use of the Declaration to establish that Kwasny had instructed Meske on what to do with the employee contributions, a conclusion also fully consistent with his deemed admissions. Kwasny, for example, even frivolously complains that a genuine factual dispute exists because the term "Kwasny" is not defined in Meske's Declaration. Kwasny Br. 9.

Second, having admitted he was a trustee and that he directed employee Plan withholdings be commingled and used for the benefit of his law firm, Kwasny's argument that a material factual dispute exists as to whether he was the sole Plan trustee responsible for the wrongful diversion of the employee withholdings is unfounded. Kwasny Br. 10. Even if it is undisputed that he was not the sole trustee, the fact is immaterial to his liability. As recognized by the district court, see J.A. 23a-24a, it is undisputed that ERISA fiduciary liability is "joint and several." See Struble, 732 F.2d at 332 (providing that a plaintiff is not required to "name all of the trustees as defendants. It is a well-established principle of trust law that multiple trustees who are at fault may be held jointly and severally liable. See

Restatement (Second) of Trusts § 258 (1959)."), abrogated on other grounds, Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989)). Moreover, Kwasny's own admissions identify his clear responsibility for the violation even if another trustee was jointly and severally liable. J.A. 118a ¶¶ 9-10 ("he directed that employee withholdings for the Plan 'be commingled with general assets of the Firm … [and] used for the benefit of the Firm[.]'").

Based on his deemed admissions, Kwasny violated his duties under ERISA and he is responsible for "any losses" caused by the violation. See 29 U.S.C. § 1109 ("Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries . . . shall be personally liable to make good to such plan any losses to the plan resulting from each such breach[.]").

II. ERISA'S STATUTE OF LIMITATIONS IS NOT A BAR TO THE SECRETARY'S ACTION

A. Standard of Review

"Our standard of review of the District Court's order granting summary judgment is plenary . . . as is our review of the District Court's finding that [the plaintiff] failed to file her action within the period the statute of limitations allowed." Santos ex rel. Beato v. United States, 559 F.3d 189, 193 (3d Cir. 2009).

B. Discussion

The district court correctly rejected Kwasny's argument that the Secretary's action was barred by ERISA section 413(2), 29 U.S.C. § 1113(2), the three-year statute of limitations. Section 413(2) provides that, absent fraud or concealment, a claim for fiduciary breach must be commenced "three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation." (emphasis added). Kwasny has provided no basis for altering the district court's determination that Kwasny failed to establish a "genuine dispute regarding whether the Secretary had actual knowledge of the breaches" more than three years before filing suit. J.A. 13.

This Court has repeatedly stressed that Congress set a "high standard" for finding an ERISA action barred under section 413's "actual knowledge" requirement. Gluck v. Unisys Corp., 960 F.2d 1168, 1176 (3d Cir. 1992); Montrose Med. Grp. Participating Sav. Plan v. Bulger, 243 F.3d 773, 778 (3d Cir. 2001); Richard B. Roush, Inc. Profit Sharing Plan v. New England Mut. Life Ins.. Co., 311 F.3d 581, 587 (3d Cir. 2002); Cetel v. Kirwan Fin. Grp., Inc., 460 F.3d 494, 511 (3d Cir. 2006). Actual knowledge requires that the plaintiff knows much more than the possibility that a violation of ERISA has occurred. Actual knowledge requires that the plaintiff have "knowledge of all material facts necessary to appreciate that a claim … existed." Nat'l Sec. Sys., 700 F.3d at 100.

In Gluck, 960 F.3d at 1177, this Court noted that the Eleventh Circuit has adopted a "similar approach" with respect to the Secretary's claims in Brock v. Nellis, 809 F.2d 753, 755 (11th Cir. 1987), and quoted Brock: "To charge the Secretary with actual knowledge of an ERISA violation, it is not enough that he had notice that something was awry; he must have specific knowledge of the actual breach of duty upon which he sues." Thus, consistent with the statutory language, the pertinent question is whether the Secretary as "the plaintiff" had actual knowledge more than three years before the suit was filed.

Actual knowledge "requires a showing that plaintiffs actually know not only of the events that occurred which constitute the breach or violation but also that those events supported a claim of breach of fiduciary duty or violation under ERISA." Montrose, 243 F.3d at 787. For example, in Roush, a district court ruled a suit was barred by section 413 because the plaintiff had received a letter more than three years earlier from the defendant's attorney "admitting [the defendant's] failure to invest properly [the plaintiff's] funds." Roush, 311 F.3d at 583. This Court reversed the dismissal. This Court found that the plaintiff only possessed the requisite actual knowledge after he had later received "a completed, accurate accounting" of how his money had been handled and the "harm or harmful consequences." Id. at 587.

Kwasny's vague and unsupported allegations that the Secretary had received information about this case more than three years prior to the litigation, Kwasny Br. 16-17, are far from sufficient to meet section 413's "stringent[ ]" actual knowledge requirement, Montrose, 243 F.3d at 787. Kwasny alleges that a complainant made telephone calls to the Department of Labor starting in 2006, and that, as a consequence, an unnamed Department of Labor investigator also made a visit to his office in 2010. Id. With respect to the calls, the representatives of the Secretary filed a declaration below stating that the complaints the Department of Labor received in 2006 and 2010 did not reveal Kwasny's identity, the identity of the 401(k) plan, or include any documents substantiating the claims of unremitted employee contributions. J.A. 109a. It was not until September 2011, less than three years before the complaint in this case was filed, that the Secretary received a complaint identifying Kwasny and the 401(k) plan and supporting documentation of a breach of ERISA. Id. This is analogous to the situation in Brock, where a district court found the Secretary knew that an ERISA plan had overpaid for property but the Secretary did not know about the defendants' involvement in the overpayment. 809 F.2d at 755. The Eleventh Circuit concluded that this knowledge did not suffice as "actual knowledge" so as to trigger ERISA's three-year time limit. Id. Here, apart from this conclusory allegation that telephone calls were made to the Department in 2006, Kwasny never describes how these

telephone calls or the content of these calls can establish "actual knowledge" under section 413's "stringent" standard without any information identifying the plan or fiduciaries. "The object of [summary judgment under Rule 56] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit." Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888 (1990).

With respect to the alleged visit, the Secretary has flatly denied that any of the Department's investigators came to Kwasny's office in 2010. J.A. 106a-07a. Kwasny cannot identify any evidence to support his bare assertion. "Kwasny does not assert that he saw the investigator or that he provided any materials to him." J.A. 10a. "There is no indication whether he claims to have witnessed these events or upon what facts this statement is based." J.A. 16a-17a. Thus, the district court correctly concluded: "Kwasny's declaration that in 2010 a Department of Labor investigator came to the Firm office and reviewed the ERISA books and records, making copies of them, is self-serving, conclusory, and unsubstantiated. . . . Thus, the Court concludes that Kwasny's declaration does not . . . establish[ ] . . . a genuine dispute regarding whether the Secretary had actual knowledge of the breaches before the fall of 2011." J.A. 16a-17a. Kwasny presents no basis or reason to find error in the district court's ruling.

The district court's ruling is supported by this Court's repeated recognition that "conclusory, self-serving affidavits are insufficient to withstand a motion for

summary judgment." Blair v. Scott Specialty Gases, 283 F.3d 595, 608 (3d Cir. 2002). "Instead, the affiant must set forth specific facts that reveal a genuine issue of material fact." Kirleis v. Dickie, McCanney & Chilicote, 560 F.3d 156, 161 (3d Cir. 2009). This principle has repeatedly guided this Court in its rejection of insubstantial appeals of summary judgment. E.g., Anderson v. Warden of Berks Cty. Prison, 602 F. App'x 892, 894 (3d Cir. Feb. 25, 2015) (unpublished). Furthermore, even assuming an investigator had visited Kwasny's office in 2010, Kwasny's conclusory declaration, J.A. 62a, does not identify what books and records the investigator examined and how those records showed a diversion of contributions, the identity of the fiduciary, or any other details necessary to establish that the Department of Labor had "knowledge of all material facts necessary to appreciate that a claim … existed." Nat'l Sec. Sys., 700 F.3d at 100.

This Court has also clearly rejected as legally irrelevant attempts, like Kwasny's, to argue that it is sufficient to show that the Secretary had constructive knowledge of the ERISA claims more than three years before the complaint. Kwasny Br. 15. In Gluck, this Court explicitly rejected constructive knowledge as a basis for triggering ERISA section 413, 29 U.S.C. § 1113. This Court explained: "Of course, a plaintiff may have constructive knowledge of a breach before he actually knows of the breach, but section 1113 calls for actual knowledge." Gluck, 960 F.2d at 1176.

Kwasny also cannot just impute the knowledge of the Plan's participants to the Secretary, see Kwasny Br. 16; he must establish the Secretary had actual knowledge. See Fish v. GreatBanc Tr. Co., 749 F.3d 671, 679 (7th Cir. 2014) ("a court applying § 1113(2) must take care to resist the temptation to slide toward reliance upon constructive knowledge or imputed knowledge, neither of which is actual knowledge") (emphasis added). Moreover, as explained in the following section of this brief, the Secretary was never in privity with the Plan's participants, making any attempt to impute their knowledge to the Secretary wholly improper.

Kwasny also asserts that summary judgment is in error because "there is a factual dispute as to when the plan participants and the [Secretary] knew of the alleged breach." Kwasny Br. 10. In support, Kwasny solely refers to the plan participants' alleged knowledge of the breach, but fails to demonstrate how any disputes over the participants' knowledge of the breach is a "material fact" relevant for the summary judgment decision. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment . . . Only disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Any factual dispute about when the participants had actual knowledge is irrelevant and

immaterial because only the Secretary's actual knowledge triggers the three-year limitations period for the Secretary's claims. Consequently, when and whether the Plan participants knew about Kwasny's breach of his fiduciary duty is legally irrelevant both on the question of whether the suit was timely and on the question of whether Kwasny breached his duties as a fiduciary.

III. RES JUDICATA FAILS TO PROVIDE KWASNY WITH ANY VIABLE DEFENSE

A. Standard of Review

This Court's "review of an application of res judicata is plenary." Elkadrawy v. Vanguard Grp., Inc., 584 F.3d 169, 172 (3d Cir. 2009).

B. Discussion

Kwasny maintains that res judicata precluded the entry of summary judgment against him, but never clearly explains why. Kwasny Br. 17-21. Instead, most of this section of his brief is devoted to explaining the doctrines of claim preclusion and issue preclusion, and describing the tests employed to determine the applicability of those doctrines. Id. at 17-20.

Kwasny claims that the state court in Haft's action granted an alleged default judgment against Kwasny in addition to punitive damages, and the existence of this default judgment creates a factual dispute that barred summary judgment on his defense of res judicata. Kwasny Br. 11. The district court determined that the only signed order in the record did not award damages in order to compensate Haft or

the Plan, but, instead, awarded punitive damages for Kwasny's failure to abide by the state court's orders. Id. ("Kwasny does not provide any other signed court order indicating any other award against him."). As recognized by the district court, Kwasny's failure to provide even a copy of a signed order granting default judgment meant there was no basis for finding res judicata or for offsetting the award of damages in the instant case. J.A. 21a-22a. Kwasny offers no basis on appeal to dispute this conclusion. Thus, Kwasny refers to Haft's action in the Pennsylvania court as the basis for his arguments on res judicata and issue preclusion without much analysis as to what issue or claims this action supposedly precludes or why. Kwasny Br. 20.

In any event, because Kwasny was found to be liable to a Plan participant, Larry Haft, in the Pennsylvania state court judgment, it is unclear how the doctrine of issue preclusion would be helpful to him. As observed by the district court with respect to Kwasny's arguments, see J.A. 17a n.10, and as evident in his brief to this Court, see Kwasny Br. 20-21, it is unclear how Kwasny seeks to apply the doctrine of issue preclusion in this case because he makes no attempt to apply issue preclusion, only claim preclusion, to the facts of his case. See Kwasny Br. 20. Nonetheless, because privity is required by both claim preclusion and issue

preclusion, both defenses will fail if the privity requirement is not established.[7] See, e.g., Bd. of Trustees of Trucking Emps of N. Jersey Welfare Fund, Inc. - Pension Fund v. Centra, 983 F.2d 495, 504-05 (3d Cir. 1992).

This Court has defined "privity" as a "'mutual or successive relationship to the same rights of property. In its broadest sense, 'privity' is defined as mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right.'" Greenway Ctr., Inc. v. Essex Ins. Co., 475 F.3d 139, 149 (3d Cir. 2007) (quoting Ammon v. McCloskey, 655 A.2d 549 (Pa. Super. Ct. 1995) (quoting Black's Law Dictionary (5th ed. 1979)). Kwasny asserts that the Secretary is in privity with Haft by relying on two cases: Gambocz v. Yelencsics, 468 F.2d 837, 841 (3d Cir. 1972), and Lubrizol Corp. v. Exxon Corp., 929 F.2d 960, 966 (3d Cir. 1991). Kwasny Br. 19-20. Both cases present factual circumstances completely different from the case here. In Lubrizol, the parties found to be in privity were Exxon and its wholly-owned affiliate. 929 F.2d at 966. In Gambocz, this Court found privity for individuals who were participating in the same conspiracy that was the subject

[7] Moreover, even aside from privity, the state court did not have jurisdictional competence to adjudicate an ERISA claim, see Stuhlreyer v. Armco, Inc., 12 F.3d 75, 78 (6th Cir. 1993), because nothing in ERISA would allow the Secretary to sue for fiduciary breach in a state court. See 29 U.S.C. 1132(e)(1). However, as in Stuhlreyer, it is unnecessary to rely on this shortcoming, because the Secretary and the Haft plaintiff are not in privity.

of the suit. 468 F.2d at 842. Kwasny fails to explain how any connection between the Secretary and Haft could constitute a comparable relationship of privity, and it would not.

In fact, the district court's conclusion that there was no privity between the Secretary and Haft is in keeping with every circuit court that has considered the issue. See Herman v. S.C. Nat'l Bank, 1413, 1424 (11th Cir. 1998) (Secretary of Labor in suit for fiduciary breach under ERISA not bound by res judicata arising from private litigation due to a lack of privity); Beck v. Levering, 947 F.2d 639, 642 (2d Cir. 1991) (same); Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 687-91 (7th Cir. 1986) (en banc) (same); Donovan v. Cunningham, 716 F.2d 1455, 1462-63 (5th Cir. 1983) (same); see also Shipping Co. v. New England Life Ins. Co., 496 F.3d 326, 340 (4th Cir. 2007) ("a number of our sister circuits have held that, in light of the overarching national interest in ensuring the financial stability of pension plans and the inability of private plaintiffs to adequately represent this interest, the Secretary of Labor is not bound by the results reached by private litigants in ERISA suits").

The lack of privity between the Secretary and a private plaintiff in suits for fiduciary breach, such as the suit in this case, is reflective of a broader limitation on the applicability of res judicata where a governmental entity is exercising its police powers. See Fitzsimmons, 805 F.2d at 692 ("The Government is not barred

by the doctrine of res judicata from maintaining independent actions asking courts to enforce federal statutes implicating both public and private interests merely because independent private litigation has also been commenced or concluded."); see also U.S. Commodity Futures Trading Comm'n v. Kratville, 796 F.3d 873, 889 (8th Cir. 2015) ("'It is a well-established general principle that the government is not bound by private litigation when the government's action seeks to enforce a federal statute that implicates both public and private interests.'" (quoting EEOC v. Pemco Aeroplex, Inc., 383 F.3d 1280, 1291 (11th Cir. 2004)).

The broad public purpose furthered by ERISA was recognized by the district court, J.A. 19a-21a, and described in detail in Fitzsimmons. The Seventh Circuit wrote:

> [T]he government's interest in bringing an ERISA action is to enforce fiduciary standards and ensure the financial stability of billions of dollars of assets . . . Thus, aside from its duty of protecting the individual beneficiaries of these pension programs, the government in this case clearly has an even stronger and paramount obligation to protect the very integrity, heart and lifeline of the program itself . . . [T]he Secretary sues to enforce the fiduciary obligations undertaken by trustees of these pension funds and to assure the very uniformity of enforcement of the law under the ERISA statutes.

Fitzsimmons, 805 F.2d at 692-93. The Seventh Circuit concluded that the Secretary is "not in privity with the private litigants for purposes of the application of the doctrine of res judicata." Id. at 699. This view was echoed by the Eleventh Circuit in Herman, which also noted "the Secretary's national public interest in

[the] deterrence" of violations of ERISA, as compared to the narrower interests of private litigants. 140 F.3d at 1423. The Fifth Circuit in Cunningham similarly observed:

> [T]he Secretary in the present case seeks to vindicate a public interest that is broader than the interest of the plaintiffs in the Alabama lawsuit. Those plaintiffs were interested in recouping only their *own* economic losses; the Secretary seeks to determine the legality of specific conduct and to prevent those who have engaged in illegal activity from causing loss to *any* future ERISA plan participant. Thus, although the monetary settlement sought in the prior litigation may have achieved the goals of the private plaintiffs, it is clearly inadequate to vindicate the broader interest of the government.

716 F.2d at 1462 (emphasis in original).

Rather than challenge the correctness of the rulings by these circuit courts on the inapplicability of res judicata in an ERISA action brought by the Secretary, Kwasny argues that these decisions "are clearly distinguishable." Kwasny Br. 21. Kwasny's argument is far from clear, but Kwasny attempts to distinguish these cases by suggesting that while the Secretary can seek injunctive relief when the private plaintiffs seek monetary relief, the Secretary is barred from concurrently seeking monetary relief. Id. Kwasny is mistaken. First, the lack of privity permits concurrent judgments, and, in fact, circuit decisions acknowledge concurrent monetary judgments can occur in these circumstances. For example, in Beck, the Second Circuit permitted concurrent monetary judgments by private plaintiffs and the Secretary. 947 F.3d at 642. The Eleventh Circuit in Herman also rejected the

same argument, recognizing that the lack of privity means the Secretary can assert all claims for monetary and injunctive relief when there is a concurrent private monetary judgment or settlement; the Secretary is not just limited to injunctive relief. 140 F.3d at 1425 n.19, 1428 (permitting claims to seek restitution of plan losses).

Finally, Kwasny argues that the state court action's judgment would offset the judgment here. As explained earlier, the judgment concerned only punitive damages not compensatory damages to the participant or the Plan, so no offset applies. But even if such a compensatory judgment had been entered, in order to be entitled to an offset, Kwasny, at the very least, would have to provide evidence of a payment of the judgment, which he failed to do. See Beck, 947 F.2d at 642. In Beck, the Second Circuit permitted the Secretary and private plaintiffs to secure "concurrent" judgments and only permitted offset of "the amounts recouped by the Plans by the sums recovered by the private plaintiffs." Id. (emphasis added). This ensures the Secretary has full ability to make whole the Plan's loss if the private plaintiffs decide to compromise or abandon the collection of the judgment amount, a result consistent with the remedial purposes of ERISA. Id.; see also Baldwin v. Univ. of Pittsburgh Med. Ctr., 636 F.3d 69, 77 (3d Cir. 2011) ("We are guided by the principle that ERISA is a remedial statute that should be liberally construed to achieve its ends, which include protecting plan participants and beneficiaries.").

Any offset would be limited to any amount of such a judgment that Haft actually recouped for the Plan. Kwasny produced no evidence that any monies were actually paid to the Plan or the participant. See Kwansy Br. 21 (noting only "collection attempts"). Kwasny's arguments on res judicata and offset are without merit.[8]

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that this Court affirm the district court's grant of summary judgment in favor of the Secretary.

DATED: August 10, 2016

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[8] While Kwasny refers to a fourth issue based on a failure to name an "indispensable party" in his statement of issues presented, Kwasny Br. 2, Kwasny makes no arguments on this issue in the rest of his opening brief. He identifies no error in the district court's cogent and correct analysis. See J.A. 22a-24a. Accordingly, this issue is waived. E.g., In re Fosamax, 751 F.3d at 157–58.

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CERTIFICATION OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(c) and Third Circuit Rule, I hereby certify that the attached brief is proportionately spaced, has a typeface of 14 points, and contains 7,717 words.

DATED: August 10, 2016

__/s/ Thomas Tso_____
THOMAS TSO

CERTIFICATE OF IDENTICAL COMPLIANCE OF BRIEFS & VIRUS CHECK

I certify that the digital version and hard copies of the Secretary's Brief are identical. I further certify that a virus scan was performed on the Brief using McAfee, and that no viruses were detected.

Dated: August 10, 2016

/s/ Thomas Tso

THOMAS TSO

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF System.

DATED: August 10, 2016

___/s/ Thomas Tso_____
THOMAS TSO