No. 12-3330

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BONNIE FISH, et al.,
Plaintiffs-Appellants,
v.

GREATBANC TRUST COMPANY,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Illinois

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

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SECRETARY OF LABOR'S INTEREST

The Secretary of Labor ("Secretary") has primary enforcement and regulatory authority for Title I of the Employee Retirement Income Security Act ("ERISA). See 29 U.S.C. §§ 1134, 1135; Sec. of Labor v. Fitzsimmons, 805 F.2d 682, 688-91 (7th Cir. 1986) (en banc). Because ERISA-covered employee benefit plans are so numerous, civil actions brought by plan fiduciaries, participants, and beneficiaries under 29 U.S.C. § 1132(a) to remedy ERISA violations are essential means of enforcement. The Secretary therefore has a strong interest in the interpretation of ERISA's statute of limitations provisions as they apply in such private actions as well as in the Secretary's own civil actions. Here, the Secretary as amicus curiae argues that, in dismissing plaintiffs' suit as time-barred, the district court misconstrued the ERISA limitations provisions.

STATEMENT OF THE ISSUES

1. Whether, under the three-year statute of limitations in ERISA section 413(2), the district court erred by concluding that, more than three years before filing suit, plaintiffs had "actual knowledge" of their pleaded ERISA claims and thus were barred from bringing suit.

2. Whether the three-year limitations period in ERISA section 413(2) can apply to a plaintiff (here, the Plan's current trustee) that, as late as 15 months

before becoming a plaintiff in the action, lacked actual knowledge of the violations at issue.

STATEMENT OF FACTS[1]

1. The Antioch Company ("Antioch" or the "Company") marketed scrapbooks and photo albums. Before the December 16, 2003 transaction at issue here, the ERISA-covered Antioch Employee Stock Ownership Plan ("ESOP" or "Plan") owned about 43% of Antioch's stock, Morgan family members 46.5%, and 38 other shareholders the remaining 11%. The Plan's participants are current or former Antioch employees. During the relevant period, defendants Lee Morgan ("Morgan"), Asha Morgan Moran ("Moran"), and Chandra Attiken ("Attiken") were officers and directors of Antioch, as well as the members of the Plan's fiduciary Advisory Committee ("Advisory Committee"). Doc. # 146 ¶¶ 4-6. In August 2003, Antioch appointed defendant GreatBanc Trust Co. ("GreatBanc") to serve as the Plan's sole and independent trustee. Doc. # 223-16 at 118-19, Doc. # 146 ¶ 3.

The disputed transaction involved a tender offer by Antioch, through which all Antioch shareholders other than the Plan redeemed their Antioch stock for $850 per share. 2012 WL 3990638 at *1. As a condition of the tender offer, the Plan

[1] Unless cited otherwise, the sources for this statement of facts are two of the district court's opinions and orders: 2012 WL 3990638 at *1-3 and *5-7 and 830 F.Supp.2d at 427-29.

did not tender any of its Antioch stock. Id. Accordingly, the parties effectively transferred all of the equity held by other investors to the ESOP.

As a condition of agreeing to the transaction, GreatBanc insisted on the execution of the "Put Price Protection Agreement" ("PPPA"), which became a term of the tender offer. Id. at *1-2. Under the PPPA, Antioch (under the ownership of the ESOP) guaranteed that it would redeem participants' stock holdings on the date of their employment terminations, if any, as set forth in the following table:

Termination Date	Value Per Share
Jan. 1, 2003 – Sept. 30, 2004	Greater of fair market value or $840.26
Oct. 1, 2004 – Sept. 30, 2005	Fair market value plus $21.00
Oct. 1, 2005 – Sept. 30, 2006	Fair market value plus $12.80

Id.

Thirty days before the December 16, 2003 transaction date, Antioch sent to all shareholders and Plan participants lengthy disclosures concerning the proposed transaction. Docs. # 223-6, # 223-7, and # 223-8. In addition to disclosing the above information, these disclosures also noted transaction-related risks such as:

- the difficulty and uncertainty of valuing Antioch's stock (Doc. # 223-7 at 23);

- Antioch's resulting substantial new debt load (id. at 21-22);

- the fact that "[b]ecause it is impossible to estimate [such] future repurchase obligations accurately, there is a possibility that [Antioch's] repurchase obligations will be significantly greater than anticipated" (id. at 24); and

- the danger that Antioch's future share repurchases from the Plan will reduce Antioch's cash flow available for other business purposes (id. at 21) and, if Antioch could not pay this repurchase obligation, leave the Company insolvent (id. at 24).

See Doc. # 223-7 at 21-24. Antioch's disclosures additionally stated that Antioch had projected its potential share repurchase liability "under a set of assumptions that [it] believes to be reasonable" (id. at 24).

These disclosures also summarized the Houlihan Lokey firm's appraisal of the proposed transaction (with its $850 share price and the PPPA) as financially fair to shareholders other than the Plan. Doc. # 233-6 at 32-33, 45-51. In its role as the Company's adviser, however, Houlihan Lokey, did not purport to render an opinion on the transaction's fairness to the Plan. Id. at 46 and 51. The disclosures did not contain any analysis of the PPPA's potential effects on: how many and which Plan participants might leave Antioch in response to the PPPA; Antioch's resulting repurchase liability to the Plan; or Antioch's future ability to pay for those repurchases. Id.; Doc. # 223-8 at 24-27.

Both Antioch's disclosures and a separate pre-closing memorandum (Doc. # 136-34) from GreatBanc to Plan participants additionally advised: (1) that GreatBanc had received a preliminary opinion (Doc. # 136-89) from its consultant

Duff & Phelps, that the proposed transaction was financially fair to the Plan and (2) that GreatBanc had made a "preliminary determination" that the proposed transaction was prudent for the Plan. Doc. # 223-6 at 31, 51-52; Doc. # 136-34 at 2 and 8. Neither Duff & Phelps' preliminary fairness opinion nor GreatBanc's memorandum otherwise commented on the proposed $850 share price or on the PPPA's potential effects on the Company's stock repurchase liability, cash flow, solvency, or share price. Doc. # 136-34 at 2 and 8; Doc. # 136-89 at 38. See Doc. #136-3 at 16 (transcript pp. 196-97); Doc. # 136-97 (Duff & Phelps' final opinion, issued on closing date).

2. The participant-plaintiffs filed suit March 17, 2009. 2012 WL 3990638 at *2. In May 2009, they filed the amended complaint, which Evolve Bank, the Plan's sole trustee since January 2008, joined as plaintiff. Doc. # 136-121, Doc. # 43. In their amended complaint, plaintiffs specifically alleged, *inter alia*, that defendants:

- relied upon an unrealistic projected redemption rate (Doc. # 43 ¶ 78.f);

- failed to obtain an independent study of Antioch's future repurchase liability to the Plan (id. ¶ 78.h, see id. ¶¶ 78.d and 78.i);

- "failed to take any action to reduce the likelihood of a 'stampede' of [employee] terminations and redemptions" (id. ¶ 78.j); and

- "fail[ed] to determine whether [Antioch] would have the ability to redeem Plan shares . . . if redemptions exceeded the projected redemption rate calculated by [the] sellers (id. ¶ 78.i, see id. ¶¶ 78.c and 78.d).

In response to defendants' summary judgment motions, plaintiffs filed expert testimony from Robert F. Reilly, who is a professional stock appraiser experienced in evaluating the fairness of corporate stock transactions. Doc. # 144-3 ("Reilly Declaration"). Reilly found "no indication that Duff or [GreatBanc] considered or analyzed the impact of the PPPA and the distribution policy on the Antioch repurchase obligation or the Company liquidity." Id. ¶ 31. See id. ¶¶ 18-19 (explaining the necessary actuarial and financial analyses) and ¶ 20 (risks to Antioch's cash flow and solvency). See Doc. # 144-3 ¶¶ 4, 6, 12 (GreatBanc "did not quantify the expected common stock value impact"), 29-31. Reilly also noted that the PPPA "contractually allowed the Plan participants to terminate their employment outside of the normal restrictions placed on retirement plans." Id. ¶ 27. As a result, he explained, "contractual (i.e., PPPA-related) liquidity events also created an additional contingent liability . . . in addition to the Company's regular repurchase obligation liability." Id. ¶ 28.

3. The district court granted summary judgment dismissing all claims as time-barred by the three-year statute of limitations period in ERISA section 413(2). With exceptions not relevant here, that limitations period ends "three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation." 29 U.S.C. § 1113(2).

The district court characterized "Alleged Breach No. 1" as a claim that the stock sale by the defendant-shareholders violated ERISA section 406(a), 29 U.S.C. § 1106(a), which prohibits certain non-exempt transactions – whether direct or indirect – between a plan and plan insiders that ERISA defines as "parties in interest."[2] See Doc. # 43 ¶¶ 79 and 81. The district court characterized "Alleged Breach No. 2" as defendant GreatBanc's alleged imprudence in violation of ERISA section 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). See id. The district court viewed the complaint as having alleged that, by not tendering the Plan's Antioch shares, GreatBanc: approved a transaction that "set[ ] the redemption price too high in the face of Antioch's substantial debt ([amended complaint] ¶¶ 75-76)," increased Antioch's debt, decreased Antioch's cash flow, caused employees to leave Antioch's employment at a rate higher than expected, and left Antioch with a share redemption obligation to Plan participants that it could not meet. 2012 WL 3990638 at **2, 3, and 6.

The district court held that the claims were time-barred by ERISA's statute of limitations. The court reasoned that the plaintiffs had "actual knowledge" for

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[2] Defendants Morgan, Moran, and Attiken were parties in interest because they were Plan fiduciaries (as members of its Advisory Committee) and also were officers, directors, or owners of 10% or more of Antioch's stock. See 29 U.S.C. §§ 1002(14)(A), (H); Doc. # 43 ¶¶ 7-9. Through the defendants' tendering of employer stock and the Plan's agreement not to tender employer stock, the Plan's ownership share of Antioch increased from 43% to 100%. See 2012 WL 3990638 at *3.

purposes of section 413(2) of all their claims in November 2003 – more than three years before suit (and a month before the defendants' tender of stock). The court based its conclusion entirely on the plaintiffs' receipt and "at least skimm[ing]" of Antioch's pre-transaction disclosures. Id. at *5. The court determined that plaintiffs had actual knowledge of the essential facts of the prohibited transaction claim because they knew from the disclosures "(1) that Antioch would redeem shares not held by the Plan and (2) that the Plan would end up as the sole shareholder in Antioch." Id. at *6. Although ERISA provides an exemption from the prohibited transaction rules for an ESOP's direct or indirect purchase of stock for not more than "adequate consideration," 29 U.S.C. § 1108(e), the court made no findings regarding plaintiffs' knowledge (or lack thereof) of whether the factual elements of the exemption had been satisfied.

The district court also determined that plaintiffs had actual knowledge of the essential facts of the imprudence claim because the disclosures had advised them about the PPPA, "the debt that Antioch took on with the transaction," and the risk that Antioch could be pushed into insolvency if it proved unable to meet its share redemption obligations to the Plan, and because plaintiffs acknowledged in their complaint that the post-transaction "veritable 'stampede of employees'' to redeem their stock at the "locked-in" PPPA prices was "predictable." Id. at *6-7 ("Plainly a great many Plan participants knew from the selfsame documents that they had a limited opportunity to redeem their shares in the Plan for more than they were worth."). The district court did not analyze plaintiffs' knowledge (or lack thereof) of defendant GreatBanc's decision-making concerning the proposed transaction's potential risks and rewards to the Plan. See id. at *7 (stating that plaintiffs' "true complaint is about the *substance* of the decision, not about the *process* undertaken in reaching the decision").

The district court dismissed the entire action with prejudice, without separately addressing plaintiff-trustee Evolve Bank's standing. Id. at *8. In an earlier decision, however, the court suggested that, although Evolve was "a stranger to the restructuring transaction and hence lack[ed] 'actual knowledge'" under ERISA 413(2), 830 F.Supp.2d 426, 429 n.7 (N.D. Ill. 2009), it apparently joined the suit "as a 'manipulative tactic'" to evade the statute of limitations. Id.

SUMMARY OF ARGUMENT

I. ERISA generally gives plan participants six years from the date of an illegal transaction to bring a lawsuit alleging fiduciary misconduct. ERISA § 413(1), 29 U.S.C. § 1113(1). There is an exception, however, for cases in which the participant has "actual knowledge of the breach or violation." ERISA section 413(2), 29 U.S.C. § 1113(2). In such cases, the participant must bring the lawsuit within three years of acquiring such knowledge. Id. Under this three-year exception, it is not enough to establish that the participant had "constructive knowledge" of a breach or that the participant could have discovered the breach if sufficiently diligent. Instead, the participant must have had "actual knowledge" of the specific facts that made the defendant's conduct illegal. In holding that the plaintiffs were barred by the three-year provision, the court mistook constructive knowledge for actual knowledge and improperly deprived the Plan participants of a remedy for misconduct that depleted their retirement accounts.

Central to the plaintiffs' claims is the allegation that the defendants failed to arrive at their determination of the price and terms of the stock transactions at issue by way of a prudent investigation. The prudence of the defendants' investigation was critical both to the plaintiffs' allegation that the defendants had violated ERISA's standard of "care, skill, prudence, and diligence" and to their allegation that the transaction fell outside the "adequate consideration" exemption from ERISA's prohibited transaction rules (an exemption that importantly focuses on the stock's fair market value and the prudence of the fiduciary's determination of that value). Contrary to the court's premise, it was not enough that the plaintiffs knew the bare terms of the transaction (even assuming they had such knowledge). Under ERISA, they could not have had "actual knowledge" of the defendants' imprudence unless they also had actual knowledge of infirmities in the fiduciaries' process, analysis, or reasoning for approving the transactions.

Nothing in the disclosure documents that participants received, however, informed them of any such infirmities. Instead, the disclosures indicated that a professional fiduciary, relying on qualified advisers, had applied expert judgment to arrive at an appropriate share value and deal structure. The documents disclosed no particular flaws in the financial data, methodologies, or reasoning that led GreatBanc to approve the transaction. Instead, they reported in conclusory fashion only that, following receipt of its advisor's opinion, GreatBanc had preliminarily found the proposed transaction to be prudent and in Plan participants' best interest, without describing any of GreatBanc's or its advisor's underlying assumptions or analyses. By failing to find whether or not any plaintiff had any personal knowledge as to any of the facts relating to GreatBanc's decisionmaking process and reasoning, the district court misconstrued and misapplied the actual knowledge standard in section 413(2).

Nor could Plan participants have acquired actual knowledge of a breach merely by discovering that an unspecified number of their coworkers had chosen to redeem their stock. Knowledge of post-transaction redemptions did not establish imprudence in GreatBanc's prior approval or demonstrate that it had failed to prudently consider the potential risk of such redemptions (a risk specifically noted in the disclosure documents). The redemptions could have reflected financial developments subsequent to GreatBanc's approval of the deal, competing views of different plan participants about the stock's current value, or a variety of other considerations. There is no basis in the record for concluding that the plaintiffs thereby acquired knowledge of flaws in GreatBanc's prior decision-making or even knowledge that it was now imprudent for the plaintiffs to continue to hold Antioch stock. The court's conclusion to the contrary is highly speculative and inconsistent with the actual knowledge standard it purported to apply.

II. The district court provided no rationale for dismissing plaintiff Evolve Bank, the plan's current trustee. The Bank could not possibly have had actual knowledge of a breach within the relevant time period because it had only just become a trustee 15 months before filing its claims. Moreover, although the court suggested in an earlier decision that Evolve may have joined this action through a "manipulative tactic," the defendants did not proffer evidence or argument of any impropriety in the Bank's appointment as trustee or its joinder in the litigation. Consequently, the section 413(1) limit of six years from the time of the alleged breach applies to the Bank (as it should to all plaintiffs) and no one can dispute that that period clearly has not run.

ARGUMENT

I. Plaintiffs lacked actual knowledge of the alleged ERISA violations.

A. The "Actual Knowledge" Standard

As stated in ERISA section 413, in the absence of fraud or concealment, an action for breach of an ERISA fiduciary duty must be filed 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.

29 U.S.C. § 1113. The six-year limitations period (starting from the time of the breach) is the basic rule, and the three-year period (initiated by a plaintiff's actual knowledge of a claim) "is an exception to ERISA's six-year statute of limitations." Brock v. Nellis, 809 F.2d 753, 754-55 (11th Cir. 1987). Accord, Wright v. Heyne, 349 F.3d 321, 327 (6th Cir. 2003) (citing "[t]he basic ERISA limitation period of six years"). In light of the relative length of the basic six-year period, "Congress evidently did not desire that those who violate [a fiduciary] trust could easily find refuge in a time bar." Nellis, 809 F.2d at 754.

The Seventh Circuit defines "actual knowledge" in section 413(2) as knowledge of the "'essential facts of the transaction or conduct constituting the violation.'" Rush v. Martin Peterson Co., 83 F.3d 894, 896 (7th Cir. 1996) (quoting Martin v. Consultants and Administrators, Inc., 966 F.2d 1078, 1086 (7th

Cir. 1992). "Actual knowledge" in this context does not require the "'potential plaintiff to have knowledge of every last detail of the transaction, or knowledge of its illegality.'" Id. It is not, however, a "constructive knowledge or inquiry notice" standard. Wolin v. Smith Barney, Inc., 83 F.3d 847, 853 (7th Cir. 1996); Radiology Center S.C. v. Stifel Nicolaus & Co., 919 F.2d 1216, 1222 (7th Cir. 1990) ("Notice of facts which in the exercise of reasonable diligence would lead to actual knowledge does not satisfy the actual knowledge standard."); see generally, Caputo v. Pfizer, Inc., 267 F.3d 181, 193-94 (2d Cir. 2001) (collecting cases). Instead, it requires at least "'specific knowledge of the actual breach of duty upon which [the plaintiff] sues.'" Martin, 966 F.2d at .086 (citations omitted). Thus, plaintiffs lack the requisite actual knowledge to trigger the shorter three-year limitations period if they lack "specific knowledge" of material facts supporting an element of a claim, even if they had actual knowledge of the other elements, or they could have obtained the missing knowledge through diligent inquiry, or persons other than the plaintiffs had that knowledge but did not communicate it to them.

B. The subject and extent of the defendants' investigation and analysis of the proposed transaction were facts essential to plaintiffs' ERISA claims about which plaintiffs lacked actual knowledge.

1. In what the district court labeled as "Alleged Breach No. 1," 2012 WL 3990638 at *3, plaintiffs alleged that the parties engaged in a non-exempt

prohibited transaction under ERISA § 406(a), 29 U.S.C. § 1106(a), when they entered into the agreement transferring all of the equity held by parties in interest to the ESOP for an excessive purchase price. Doc. # 43 ¶¶ 79 and 81. Section 406(a)(1) provides that a plan fiduciary shall not cause a plan to engage in a transaction "if he knows or should know" that the transaction constitutes a "direct or indirect"

> (A) sale or exchange, or leasing, of any property between the plan and a party in interest; [or]
>
> * * *
>
> (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; . . . .

29 U.S.C. §§ 1106(a)(1)(A) and (D).[3]

However, ERISA section 408, 29 U.S.C. § 1108, exempts from the prohibited transaction rules certain transactions otherwise prohibited by section 406. In particular, ERISA section 408(e) provides an exemption for the "acquisition or sale by a plan of qualifying employer securities" (stock issued by

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[3] As the district court recognized (2012 WL 3990638 at *1), the Company, rather than the ESOP, formally purchased the tendered stock. The purpose and effect of the transaction, however, was to effectively transfer all of the equity formerly held by investors outside the ESOP to the ESOP. Before the transaction, the ESOP was the approximate 43%-owner of the Company. Afterwards, it owned 100% of the company's equity, which was encumbered by the repurchase and debt obligations associated with the stock sale. Although the district court ultimately did not rule on the issue, this is a "direct or indirect" transaction, within the meaning of section 406 of ERISA, between the ESOP and parties in interest who, by design, transferred their equity to the ESOP.

the employer that maintains the plan) if, among other conditions, such acquisition or sale "is for adequate consideration." 29 U.S.C. § 1108(e)(1). For stock, like the Antioch stock, that does not trade on a generally recognized market, ERISA section 3(18)(B) defines adequate consideration as "the fair market value of the asset as determined in good faith by the [plan's] trustee or named fiduciary." 29 U.S.C. § 1002(18)(B).

Thus, a plan's acquisition or sale of employer stock is illegal under section 406 only if it falls outside the scope of the express exemption provided by 408(e). E.g., Keach v. U.S. Trust Co., 419 F.3d 626, 635-36 (7th Cir. 2005); Donovan v. Cunningham, 716 F.2d 1455, 1465 (5th Cir. 1983) ("These per se rules are not automatically applicable to ESOP fiduciaries, however. . . . An ESOP may acquire employer securities in circumstances that would otherwise violate Section 406 if the purchase is made for 'adequate consideration.'").

Under the section 408(e) exemption, the transaction's legality turned on two distinct elements: (1) the stock's fair market value and (2) the fiduciaries' "good faith" (i.e., prudent) process for determining fair market value. See Keach, 419 F.3d at 636-37 and n.5 (referring to "two distinct elements"); Chao v. Hall Holding Co., 285 F.3d 415, 436 (6th Cir. 2002) (same); Cunningham, 716 F.2d at 1467-68 ("[T]he ESOP fiduciaries will carry their burden to prove that adequate consideration was paid by showing that they arrived at their determination of fair market value by way of a prudent investigation in the circumstances then prevailing.").

There is no basis in the record for finding that the plaintiffs had actual knowledge of specific facts demonstrating that the defendants had failed to satisfy either element of the exemption. Nothing in the statute makes a payment of $850 per share illegal in and of itself, and nothing in the disclosures advised the participants that the price was higher than the stock's fair market value or that the defendants had employed an imprudent process in arriving at that price. To the contrary, the disclosures described the price as reflecting the fair market value of the stock as determined by a professional fiduciary, GreatBanc, after careful consideration of the views of expert advisers. Knowing only "(1) that Antioch would redeem shares [at $850] not held by the Plan and (2) that the Plan would end up as the sole shareholder in Antioch," 2012 WL 3990638 at *6, was plainly not enough to establish actual knowledge of a breach. Without disclosure that the price exceeded fair market value or disclosure of any flaws in GreatBanc's evaluation of the transaction, the plaintiffs here would not have had "actual knowledge" of a breach, even if they had carefully studied the disclosures relied upon by the district court.

2. In what the district court labeled as "Alleged Breach No. 2," 2012 WL 399068 at *3, plaintiffs charged all defendants with breaches of their fiduciary duty

of prudence under ERISA section 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). Section 404(a)(1)(B) states an "objective prudent person standard" that comprises two elements: the financial merits of the transaction plus the fiduciary's justification for approving that transaction. Eyler v. Comm'r of Internal Revenue, 88 F.3d 445, 454 (7th Cir. 1996). To determine fiduciary prudence under section 404(a)(1)(B), therefore, "courts examine both the process used by the fiduciaries to reach their decision as well as an evaluation of the merits." Id. (citation omitted, emphasis added); see Jenkins v. Yager, 444 F.3d 916, 927-28 (7th Cir. 2006) (same). Here too, however, in assessing the state of plaintiffs' knowledge, the district court evaluated only plaintiffs' knowledge of the transaction's basic terms and price, while wrongly assuming that "the process used by the fiduciaries to reach their decision" was inessential to the plaintiffs' claim and to the threshold knowledge inquiry.

But, in addition to requiring actual knowledge of a transaction's terms, which commonly are not imprudent on their face, "actual knowledge" within the meaning of 413(2) "usually require[s] some knowledge of how the fiduciary selected the investment." Brown v. Amer. Life Holdings, Inc., 190 F.3d 856, 859 (8th Cir. 1999); see Armstrong v. LaSalle Bank Nat'l Ass'n, 446 F.3d 728, 723-33 (7th Cir. 2006) (reversing summary judgment for defendant trustee where record was silent on plan trustee's reasons for agreeing to an allegedly imprudent stock transaction). Plaintiffs lacked that knowledge here because defendants did not disclose it to them.

3. There is a significant gap between what facts were essential to the plaintiffs' claims and what the district court found they knew more than three years before bringing suit. As described above, pp. 5-6, plaintiffs alleged that $850 share price exceeded fair market value and that GreatBanc failed to properly analyze the transaction's potential effect on participants' post-transaction decisions to retire and cash out their benefits, Antioch's resulting share repurchase liability, the corresponding risks to Antioch's cash flow and solvency, and the potential effect on the value of the Plan's Antioch stock.[4] The district court made no findings, however, on any plaintiff's personal knowledge as to any of these facts or on the process and reasoning that led GreatBanc to agree to the transaction, all facts essential to both the prudence and prohibited transaction violations pleaded here.

Despite the district court's reliance on Antioch's disclosures at the time of the tender offer, those disclosures could not have imparted any such knowledge, even if they were carefully read and understood by the plaintiffs. The consistent

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4 In opposing summary judgment, plaintiffs bolstered their amended complaint with declaration testimony from a corporate finance expert, Robert F. Reilly. See p. 6 above and Reilly Declaration, Doc. # 144-3. Federal Rule of Civil Procedure 56 required the district court to draw all reasonable factual inferences in favor of plaintiffs as the parties opposing summary judgment here. E.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

message in Antioch's disclosures was that qualified professionals (Houlihan Lokey for the non-Plan shareholders and GreatBanc and Duff & Phelps for the Plan) had applied expert judgment to arrive at the right price and a proper deal structure. At most, the disclosures advised Plan participants only that Antioch had "projected its potential share repurchase liability . . . under a set of assumptions that it believed to be reasonable." However, "because it is impossible to estimate future repurchase obligations accurately," the disclosures acknowledged "a possibility that [Antioch's] repurchase obligations will be significantly greater than anticipated," and that, "if Antioch could not pay this repurchase obligation, [that fact could] leave the Company insolvent." Doc. # 223-7 at 24. The disclosures nowhere described the repurchase liability assumptions or analyses, and, indeed, the latter two statements could apply to any Company that maintains an ESOP that acquires stock in a large debt-financed transaction. See pp. 3-5 above.

The disclosures recited no "essential facts" indicating that Plan trustee GreatBanc had not adequately considered the risks (to Plan participants) from the Plan assenting to the proposed transaction on the terms disclosed. Antioch's disclosures reported only that, following GreatBanc's receipt of Duff & Phelps' preliminary opinion that the proposed transaction was fair to the Plan, GreatBanc had preliminarily determined that the transaction was prudent and in Plan participants' best interest. Antioch's disclosures nowhere described any of

GreatBanc's or Duff & Phelps' underlying assumptions or analyses. In its notice to Plan participants on the same day as Antioch's disclosures, GreatBanc similarly reported its own and Duff & Phelps' preliminary determinations that the transaction was fair to the ESOP and that the price reflected fair market value, without discussion of any data or rationales. Doc. # 136-34 at 2 and 8.

Given Plan participants' receipt of only these few, general facts about GreatBanc's justification for the transaction in Antioch's disclosures and GreatBanc's memorandum, they had no actual knowledge of any particular flaws in the financial data, methodologies, or reasoning that led GreatBanc to approve the transaction. Indeed, from all that appears in Antioch's disclosures, the proposed transaction (with its $850/share tender price and guaranteed repurchase prices) was reasonable; and if imprudent, the facts supporting the existence of a breach were hidden from the Plan participants.

Even assuming, without evidence, that the plaintiffs had actually read and fully understood all the disclosures, the disclosure documents did not give them actual knowledge of a breach. Based on these documents, a reasonable participant could easily have concluded that competent professionals made a prudent judgment about the stock price and deal structure as part of a decision-making process that necessarily involved some uncertainties. While the defendants considered (and disclosed) the possibility of excessive redemptions, they had plainly decided that the risk was worth taking, and nothing in the documents would have alerted an ordinary reader to the fact that the transaction was imprudent. The documents told participants that Antioch had projected its repurchase liability "under a set of assumptions that [it] believes to be reasonable." Doc. # 223-7 at 24. They did not, however, tell the participants that GreatBanc had failed to do the sorts of prudent repurchase analyses that the plaintiffs' expert testified were necessary to determine the impact of the repurchase commitments on the value of the stock and potential insolvency of the Company. <u>See</u> pp. 5-6 above and Reilly Declaration, Doc. # 144-3.

Significant financial expertise was necessary for the prudent analysis of the transactions at issue. The plaintiffs' case is premised on the fiduciaries' failure to act with "the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims" as ERISA's duty of prudence requires. 29 U.S.C. § 1104(a)(1)(B); <u>Cunningham</u>, 716 F.2d at 1467-68 (fiduciaries complied with adequate consideration exemption if they "arrived at their determination of fair market value by way of a prudent investigation in the circumstances then prevailing"). In the disclosure documents, GreatBanc purported to rely, in part, on the analyses of such experts as Duff & Phelps to conclude that the deal was fair to the ESOP and the price was right.

However, to prudently rely on an expert's analysis, the fiduciary making the decision must (1) "investigate the expert's qualifications," (2) "provide the expert with complete and accurate information" and (3) "make certain that reliance on the expert's advice is reasonably justified under the circumstances." Keach, 419 F.3d at 637 (ESOP trustee's reliance on a stock appraisal) (internal quotation marks and citation omitted). Accord, e.g., Hall Holding, 285 F.3d at 430; Howard v. Shay, 100 F.3d 1484, 1488 (9th Cir. 1996). Neither Antioch's nor GreatBanc's disclosures to Plan participants touched on any of these elements, set forth the bases for concluding that GreatBanc had failed to adhere to its duty of prudence, or set forth the details of the assumptions, logic, and analyses relied upon by GreatBanc and the consultants. As a result, the disclosed facts did not add up to "actual knowledge" that GreatBanc had failed to prudently determine the stock's fair market value and to agree to a transaction structure fair to Plan participants.

By assuming that plaintiffs' "true complaint is about the *substance* of the decision, not about the *process* undertaken in reaching the decision" (2012 WL 3990638 at *6 (original italics)), the district court misconstrued the nature of the plaintiffs' claims and impermissibly discounted some of those claims' essential elements that the plaintiffs did not know and, that, in fact, were completely missing from the disclosures they received. See Maher v. Strachan Shipping Co., 68 F.3d 951, 956 (5th Cir. 1995) (explicitly rejecting a defendant's argument that knowledge of a transaction's terms (the purchase of a group annuity) was enough to trigger section 413(2) because "[i]nasmuch as [plaintiffs] are challenging the actual selection of [the annuity issuer], they must have been aware of the process utilized by [the defendant fiduciary] in order to have had actual knowledge of the resulting breach of fiduciary duty"); see also George v. Kraft Foods Global, Inc., 814 F.Supp.2d 832, 851 (N.D. Ill. 2011) (knowledge of mutual funds' "structure, investment strategy, fees, and performance" was not actual knowledge of alleged ERISA violations concerning fiduciary defendants' selection and ongoing management of the plan's investments in those mutual funds); Fernandez v. K-M Indus. Holding Co., Inc., 585 F.Supp.2d 1177, 1182-83 (N.D. Cal. 2008) (without knowledge that ESOP trustee had failed to discount employer stock for employer's potential asbestos tort liability, ERISA plaintiffs did not have actual knowledge that the stock was overpriced); Montgomery v. Aetna Plywood, Inc., 956 F.Supp. 781, 786 (N.D. Ill. 1997) (where ERISA plaintiffs did not know the "corporate assets and a certain level of analysis" – all necessary to determine ESOP-held stock's fair market value, plaintiffs did not have actual knowledge that an ESOP trustee sold that stock too cheaply).

4. In finding "actual knowledge," the district court also relied on the plaintiffs' supposed subsequent knowledge of a "stampede" in 2004 or later of some unspecified number of Plan participants to redeem their Antioch stock. The court's reasoning, however, is faulty and its conclusion in error.

An average plan participant who read the 2003 disclosures, took them to heart, and actually credited them as true, could well have concluded that, notwithstanding the best efforts of GreatBanc, one of the risks identified (and characterized as inherently uncertain) had come to pass. The fact that a risk identified by a professional fiduciary and purportedly competent consultants had in fact materialized does not mean that it was imprudent, disloyal, or prohibited for the fiduciaries to have taken on the risk in the first place.

Moreover, once the PPPA redemptions started in 2004, there could have been a variety of non-breach explanations for the "stampede," assuming that the "stampede" was evident to the participants who remained with the Company. For instance, the uptick in Plan participants' redemption demands could have resulted from an unexpected downturn in the Company's performance after 2003, or the run of redemptions could have been the result of a panic fueled by word of mouth and the sight of coworkers departing rather than of a reasoned and informed judgment about the Company's economic future. Indeed, some of the plaintiffs may have stuck with their holdings precisely because they thought their investments would ultimately turn out well. At most, the "stampede" gave participants reason to believe there was a possible breach – and, if so, that the breach had, in fact, caused a loss – but actually proving or knowing that there was a breach depended on the particulars of GreatBanc's analyses and on whether or not it had adhered to professional standards, as discussed above.

Neither knowledge of the disclosure information nor knowledge of the subsequent rush to redeem by an unspecified number of participants gave plan participants here knowledge of any deficiency in the selection of the experts, the accuracy of the information they were provided, or the reliability on their conclusions based on the data available at the time and professional investment standards. None of the disclosures that Plan participants received advised them that the parties had arrived at the price improperly or disclosed specific errors in the determination of the initial price of the stock or in the financial analyses that had led them to structure the transaction on its original terms. Thus, the isolated fact of some Plan participants' post-transaction redemptions could not have given plaintiffs here actual knowledge of GreatBanc's decision-making process or of its reasons for deeming the transaction prudent.

5. Nor is the district court's suggestion of "willful blindness" well-founded. In effect, it suggests that these participants are to be held to a higher standard than the fiduciary, advisers, and investment professionals who originally structured the

deal, concluded it was proper, and advised the plan participants accordingly. The Plan participants and employees of Antioch were employed in the business of producing and selling scrapbooks, photo albums, and accessories, not in the business of analyzing financial statements or managing investments. Neither the disclosures cited by the court, nor the subsequent "stampede," gave the participants "actual knowledge" that the fiduciaries charged to protect them had failed to do their job. Instead, for purposes of ERISA's statute of limitations, they were entitled to take GreatBanc at its word and assume that it had adhered to its ERISA obligations when it committed the ESOP to the transaction. Section 413(2) imposes an actual knowledge standard for imposition of the three-year bar, not "constructive knowledge." Accordingly, the six-year limitation of section 413(1) applies. See Wolin, 83 F.3d at 853 (applying six-year statute where plaintiffs have only "constructive knowledge or inquiry notice").

II. The district court erred in dismissing the claims of plaintiff Evolve Bank & Trust as barred by any limitations period in ERISA section 413.

The judgment appealed from (Doc. # 269) dismissed the claims of plaintiff Evolve Bank as well as those of the four individual plaintiffs, but the district court erred insofar as it dismissed, without explanation, plaintiff Evolve Bank's claims as untimely under ERISA section 413. Evolve Bank became a trustee on January 17, 2008 (Doc # 136-121), and it joined this action by signing the amended complaint filed May 27, 2009. Doc. # 43. Absent any evidence showing that Evolve Bank knew the essential facts of its claims more than three years earlier (i.e., before May 27, 2006), Evolve Bank's January 17, 2008 appointment date precluded any summary judgment finding that it had any relevant actual knowledge more than three years before joining this suit. As the parties opposing summary judgment, plaintiffs were entitled to all reasonable inferences of fact in their favor. E.g., Matsushita, 475 U.S. at 587.

The only suggestion as to the basis for the district court's dismissal of Evolve Bank's claims comes from its earlier decision, where the court suggested in a footnote that Evolve Bank may have joined this suit as a party plaintiff through "a manipulative tactic," which the district court feared could "allow[] the clock to be continually restarted." 830 F.Supp.2d at 431 n.7. This fear is factually groundless, inasmuch as there is no evidence that the plaintiffs or other parties engaged in any such "manipulative tactic" to evade the participant-plaintiffs' presumed statute of limitations problem. In any event, even if such a "constructive knowledge" standard were permissible under section 413, it is inappropriate to impute the knowledge of a former fiduciary to a current trustee that properly seeks to protect the Plan's interest by pursuing litigation. In the only federal appellate decision on this point, the Ninth Circuit held that, under section 413(2), "the [three-year] statute of limitations started to run on the first date that either [plaintiff] . . . had actual knowledge of the alleged violation, regardless of whether any Plan fiduciary or service provider knew of the violation before that date." Landwehr v. Dupree, 72 F.3d 726, 732 (9th Cir. 1992).

The district court's concern is also groundless legally. The section 413(2) actual knowledge standard cannot extend the basic six-year time limit and, therefore, cannot "continually restart[]" the limitations period clock. See Librizzi v. Children's Mem'l Med. Ctr., 134 F.3d 1302, 1307 (7th Cir. 1998) (sections 413(1) and (2) "give[] [plaintiff] participants the shorter of two periods, one measured from the violation and the other from knowledge"); Wolin, 83 F.3d at 850 (absent fraud or concealment, suit is timely under section 413 only until the end of "whichever [period] comes first"). By making the plaintiff's deadline for filing suit the earlier of three years from actual knowledge or six years from the date of the breach or violation, sections 413(1) and (2) operate together to preserve the six-year period's protection for potential defendants where a plaintiff acquires section 413(2) actual knowledge more than three years after the breach or violation. As the Ninth Circuit noted in Landwehr, 72 F.3d at 733, "[t]his six-year outer limit on most ERISA actions should adequately protect defendants from untimely claims."

Defendants have not argued that Evolve Bank had actual knowledge more than three years before it joined this suit. Defendants also did not dispute that all plaintiffs, including Evolve Bank, met the basic six-year limitations period that commenced when the transaction closed on December 16, 2003. Nor was there any evidence alleged to show any impropriety in Evolve Bank's appointment or joinder. Therefore, there was no statutory justification for dismissing Evolve Bank on any limitations ground in ERISA section 413.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's decision.

January 29, 2013

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE WITH
FED. R. APP. R. 32(a)(7)(B) and CIRCUIT RULE 32(B)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6983 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 with a 14-point font size in Times New Roman typeface.

/s/ *Peter B. Dolan*

CERTIFICATE OF SERVICE

I certify that on January 29, 2013, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ *Peter B. Dolan*