No. 12-16217

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BARBARA J. FULLER and all other similarly situated,
Plaintiff-Appellant

v.

SUNTRUST BANKS, INC., et al.,
Defendants-Appellees

BRIEF OF THE ACTING SECRETARY OF LABOR IN SUPPORT OF PLAINTIFF-APPELLANT

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

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SunTrust Banks, Inc. Benefits Plan Committee

SunTrust Banks, Inc. 401(k) Plan participants (and their beneficiaries) from April 25, 2002 through December 31, 2010

Tetrick, David, Jr.

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STATEMENT OF THE ISSUES

The Plaintiff alleges breaches of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. ("ERISA"), arising out of the inclusion of proprietary mutual funds in a defined-contribution 401(k) plan made available to employees of defendant SunTrust Banks, Inc. ("SunTrust"). The district court dismissed the Plaintiff's ERISA claims based on her failure to file her action within three years of obtaining "actual knowledge" of all the facts material to her claims. In this brief the Acting Secretary of Labor addresses the following questions:

1. Whether the district court erred by dismissing Plaintiff's claims as outside ERISA's three-year statute of limitations, 29 U.S.C. § 1113(2), when the "actual knowledge" standard is not met by a finding of mere "constructive knowledge," and there is no basis to conclude that the documents containing the facts relied upon by the court were ever in Plaintiff's possession or read by Plaintiff.

2. Whether the district court erred by holding that Plaintiff's knowledge of general facts about the nature and goals of the mutual funds, the fees paid to advisors of the mutual funds and the historic and current performance of the mutual funds was sufficient to establish Plaintiff's actual knowledge under 29 U.S.C. § 1113(2) of all the relevant facts of her claims of disloyalty, imprudence and prohibited conduct.

INTEREST OF THE SECRETARY OF LABOR

The Secretary of Labor has primary authority to interpret and enforce the provisions of Title I of ERISA. See Donovan v. Cunningham, 716 F.2d 1455, 1462-63 (5th Cir. 1983). The Secretary's interests include promoting the uniform application of the Act, protecting plan participants and beneficiaries and ensuring the financial stability of plan assets. See Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 689-94 (7th Cir. 1986) (en banc). The Secretary, therefore, has an interest in the proper application of ERISA's statute of limitations for fiduciary breaches, especially since a decision in this case could affect the Secretary's ability to bring cases in the Eleventh Circuit. The Secretary submits this brief as amicus curiae in support of the Plaintiff to urge the Court to correct the district court's misinterpretation of ERISA's statute of limitations.

STATEMENT

The facts are based on the allegations set forth in the Amended Complaint, which are presumed to be true for purposes of a motion to dismiss. Plaintiff Barbara J. Fuller was an employee of SunTrust or one of its subsidiaries for 38 years and ended her employment in 2005. Am. Compl. ¶ 11. SunTrust sponsored a defined contribution employee benefit 401(k) plan within the meaning of section

3(2)(A) of ERISA, 29 U.S.C. § 1002(A) (the "Plan").[1] Id. ¶¶ 21, 22 and 25. Plaintiff, though no longer a SunTrust employee, is still a participant in the Plan. Id. ¶ 11. The Defendants are SunTrust, which is the Plan sponsor, the members of the Benefits Plan Committee and current and former chairs of the Compensation Committee. Id. ¶¶ 12-17. The Benefits and Compensation Committees are named fiduciaries under the terms of the Plan. Plaintiff's Amended Complaint alleges that Defendants mismanaged the Plan in violation of their duties under section 404 of ERISA and engaged in transactions prohibited by section 406 of the Act, 29 U.S.C. §§ 1104, 1106, all in connection with the inclusion in the Plan of eight SunTrust proprietary mutual funds (the "SunTrust Funds").[2] Id. ¶¶ 2, 87-134.

The SunTrust Funds were added as investment options in the Plan between 1997 and 2005. Id. ¶ 51. Trusco Capital Management, Inc. ("Trusco"), a

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[1] The governing plan document describes the plan as an ESOP whose purpose is to invest in employer stock. See Fuller v. SunTrust Banks, Inc., 2012 WL 1432306 at * 2 (N.D. Ga. March 20, 2012) (citing Doc. 29–3 at 3–4). As described below, however, the case concerns the Plan's investment in proprietary funds created and managed by SunTrust, but not SunTrust stock itself.

[2] In general, proprietary mutual funds are ones that a brokerage firm or other financial institution sells and also manages. Non-proprietary funds are ones that a third party manages. The funds at issue are the STI Classic Capital Appreciation Fund, STI Classic Small Cap Growth Fund, STI Classic Growth and Income Fund, STI Classic Mid-Cap Equity Fund, the STI Classic Investment Grade Bond Fund, the STI Classic Short-Term Bond Fund, the STI Classic Prime Quality Money Market Fund and the STI Classic International Equity Index Fund.

SunTrust subsidiary, serves as the investment advisor for all of the SunTrust Funds, and Trusco receives a fee for its services based on assets under management. Id. ¶ 28. The Amended Complaint alleges that the fees charged by Trusco in connection with the SunTrust Funds were unreasonably high and that the Funds were unreasonably poor performers when compared to other investment options that could have been selected for the Plan. Id. ¶¶ 2, 57-62. The Amended Complaint further alleges that Defendants selected the SunTrust Funds for the Plan and subsequently refused to remove them as Plan investment options because Defendants wanted to encourage additional investments in the SunTrust Funds, which, in turn, secured additional fees for SunTrust's subsidiary, Trusco. Id. ¶¶ 94-100.

According to the Amended Complaint, internal SunTrust documents confirm that Defendants were aware that better performing lower cost options were available for participants' retirement investments, but they nevertheless chose and retained the SunTrust Funds for the Plan because of the large fees paid to Trusco. Id. ¶ 59. The Amended Complaint alleges that if the Plan had offered comparable funds from, for example, The Vanguard Group, instead of the SunTrust Funds, Plan participants would have earned approximately $110 million more for their retirement during the Class Period. Id. ¶ 61.

SunTrust also sponsored a defined benefit Retirement Plan (the "Retirement Plan"). Id. ¶ 22. Under the terms of the Retirement Plan, SunTrust was responsible for Plan fees, rather than the participants and beneficiaries who effectively incurred the Fund charges under the 401(k) Plan. The fiduciaries of the Retirement Plan primarily invested in Separately Managed Accounts that had fees that were at least 50% lower than the SunTrust Funds. Id. ¶ 59. The Amended Complaint cites a document circulated at a Committee meeting that weighed the advantages and disadvantages of using non-proprietary funds in the Retirement Plan and listed as one of the advantages the "[f]avorable perception of fiduciary monitoring and oversight process working as it should," and as one of the disadvantages the financial loss to the company from foregone fee income. Id.

This action was commenced in the Northern District Court of Georgia on March 11, 2011, after an administrative review process had been completed.[3] The action was brought on behalf of a putative class of Plan participants.[4] Fuller v. SunTrust Banks, Inc., 2012 WL 1432306 at *1 (N.D. Ga. March 20, 2012). In

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[3] The administrative process was initiated on April 24, 2008, by Mary E. Lee, a former participant in the Plan. That claim was denied on August 29, 2008. Ms. Lee filed an administrative appeal on November 26, 2008, which was denied on March 26, 2009. On March 11, 2011, Ms. Lee instituted this action by filing a complaint. On March 12, 2011, Plaintiff Barbara Fuller was assigned all rights and interests in the class claim, including all rights to further litigate this case, after Ms. Lee was unable to continue to represent the class for personal reasons.

support of her claims, Plaintiff alleges, among other things, that: (i) during the Class Period the Committee Defendants removed certain non-SunTrust Funds for performance reasons, but did not remove any SunTrust Funds even though they knew or should have known that the Funds had serious performance issues; (ii) the Committee Defendants permitted Trusco to participate in Committee meetings in which they made important decisions about Plan investment options, despite Trusco's financial interest in obtaining additional fees; (iii) the Committee Defendants did not follow any systematic process for monitoring performance prior to 2006, and the process adopted after 2006 was tainted by the central role given to conflicted fiduciaries and advisors. Am. Compl. ¶ 59.

The Amended Complaint, which was filed on June 6, 2011, contains seven counts against Defendants. As principally relevant here, Count I alleges that the Committee Defendants engaged in prohibited transactions in violation of ERISA sections 406(a)(1)(A), (C) and (b), 29 U.S.C. §§ 1106(a)(1)(A), (C) and (b), by causing the Plan to invest its assets in the SunTrust Funds by selecting and failing to remove the funds from the Plan. Id. ¶¶ 87-93. Count II alleges that the

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[4] The Amended Complaint purports to be on behalf of a class consisting of Plan participants and beneficiaries, excluding the Defendants, who had a balance through their Plan accounts in any of the SunTrust mutual funds at any time from April 25, 2002 through December 31, 2010 (the "Class Period"). The court determined that the beginning date of the class period was no earlier than April 9, 2004. The case was dismissed without certifying a class.

Committee Defendants breached their duties of prudence and loyalty, in violation of ERISA sections 404(a) (1) (A) and (B), 29 U.S.C. §1104(a) (1) (A) and (B), by failing to remove or replace the SunTrust Funds. Id. ¶¶ 94-100.

The Defendants moved to dismiss the Amended Complaint on the grounds that the district court lacked subject matter jurisdiction over Plaintiff's claims, Plaintiff failed to state a claim for relief, and Plaintiff's claims were time-barred. On March 20, 2012, the district court issued an order granting in part and denying in part Defendant's motion. Fuller v. SunTrust Banks, Inc., 2012 WL 1432306. The district court dismissed the Count I prohibited transaction claim on the ground that, with the exception of the International Equity Fund, each of the SunTrust Funds had been selected for the Plan more than six years prior to the filing of the Compl.[5] Id. at *7.

With respect to Plaintiff's Count II prudence and loyalty claims arising out of the selection of the SunTrust Funds, the district court recognized that the Committee Defendants' "duties of loyalty and prudence . . . did not end upon selecting the funds," and that an ERISA fiduciary has an "ongoing duty to monitor

5 The district court dismissed all claims with respect to the International Equity Fund for lack of standing because the Amended Complaint did not allege that the Plaintiff had invested in the International Equity Fund. Id. at *8. Plaintiff is not appealing any aspect of the dismissal of the Count I prohibited transaction claim, including the statute of limitations holding. Because those issues are not raised on appeal, this brief does not further address them.

investments and remove investments that are no longer viable." Id. at *10. The district court stated that the Amended Complaint raised sufficient questions of fact with respect to the failure to remove to survive a challenge based on the six-year statute. Id.

The district court, however, held that insofar as Plaintiff's claim arose prior to April 2007, this claim was barred by the three-year statute of limitations, which bars claims brought more than three years after "the earliest date on which the plaintiff had actual knowledge of the breach or violation." 29 U.S.C. § 1113(2). [6] Relying almost entirely on documents submitted as exhibits attached to Defendants' Motion to Dismiss, which the court characterized as "plan documents," the district court determined that the Plaintiff had actual knowledge "of the essential facts of her claim more than three years prior to filing this suit." Fuller, 2012 WL 1432306, at *12 ("Plaintiff was aware of the performance of the funds, even if she was unaware of the existence of a potential cause of action."). In so ruling, it did not consider knowledge of the monitoring process to be an "essential fact" required to trigger the shorter limitations period. Id.

In response to the district court's ruling, Plaintiff filed a Motion to Reconsider on the actual knowledge issue. Plaintiff urged the court to apply the

[6] The court extended the limitations period by an additional 336 days because, for purposes of the motion to dismiss, Defendants conceded that ERISA's statute of limitations was tolled during the administrative process. See n.4 supra.

six year statute or to at least recognize that the issue could not be properly determined on a motion to dismiss. Defendants moved to dismiss the Amended Complaint in its entirety on the ground that the only viable remaining claims would have to arise within three years of the filing of the Complaint (i.e., after April 10, 2007) but the Plaintiff had fully divested from the SunTrust Funds by then.[7] By Order dated October 30, 2012, the district court denied Plaintiff's Motion for Reconsideration and granted Defendants' Motion to Dismiss in its entirety. Docket No. 70.

SUMMARY OF ARGUMENT

ERISA allows plan participants and the Secretary to sue to remedy fiduciary breaches and ordinarily provides for a six-year statute of limitations. When a plaintiff has "actual knowledge of the breach or violation," however, a three-year limitations period applies. 29 U.S.C. § 1113(2). The court below erred by finding "actual knowledge" and applying the three-year limitations period to the Plaintiff for two reasons.

First, dismissal at the pleading stage was improperly based on a constructive knowledge, or "should have known," standard. The pleadings, which must be

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[7] In its original decision, the district court had declined to dismiss Count II in its entirety because there remained an issue whether "Plaintiff may be able to show that at some point within the three-year limitation period" (i.e., between April 10, 2007 and March 11, 2011), a claim accrued based on Defendants' failure to remove the SunTrust Funds." Fuller, 2012 WL 1432306, at *12.

assumed to be factually accurate on a motion to dismiss, do not reveal whether the Plaintiff had actual knowledge of the breaches alleged, and the court prevented any development of such evidence through discovery by dismissing the case on the pleadings. The purported plan documents attached to Defendants' motion to dismiss do not substitute for such evidence, but at most provided a basis to suspect that evidence sufficient to provide knowledge of possible breaches was available to Plaintiff if she knew where to look and had done so. Under this Court's precedent, however, it is not enough that the plaintiff had "notice that something was awry; he must have had specific knowledge of the actual breach of duty upon which he sues." Brock v. Nellis, 809 F.2d 753, 755 (11th Cir. 1987).

Second, even if Plaintiff had read the documents, the general facts about the goals of the mutual funds, their current and historic performance and the fees paid to advisors did not provide Plaintiff with actual knowledge of a breach of duty. The record is devoid of any evidence that Plaintiff knew that the fees were excessive, that the funds were underperforming or that the process used by Defendants to select and retain the SunTrust Funds was flawed. Thus, Plaintiff did not have knowledge of facts essential to each element of her claims and, consequently, lacked "actual knowledge" sufficient to trigger ERISA's three-year statute of limitations.

ARGUMENT

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

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

> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation.

This Court in Nellis recognized that the three-year actual knowledge statute of limitations is an exception to the six-year limitations period and stressed that the "six-year time period reflects Congress' determination to impress upon those vested with the control of pension funds the importance of the trust they hold." 809 F.2d at 754. Accord, Wright v. Heyne, 349 F.3d 321, 327 (6th Cir. 2003); Diduck v. Kaszycki & Sons Contractors, Inc., 874 F.2d 912, 919 (2d Cir. 1989); see Landwehr v. Dupree, 72 F.3d 726, 733 (9th Cir. 1995) (six-year limitations period "should adequately protect defendants from untimely claims"). The Court stated that "Congress evidently did not desire that those who violate that trust could easily find refuge in a time bar." Nellis, 809 F.2d at 754.

Accordingly, the actual knowledge standard under section 413(2) is literal and strict. For a plaintiff to have actual knowledge sufficient to trigger this three-year statute of limitations, "it is not enough that he had notice that something was awry; he must have had specific knowledge of the actual breach of duty upon which he sues." Id. at 755. 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. As discussed below, constructive knowledge under a "should have known" standard is not enough, so that the actual knowledge standard is not met merely because plaintiffs could have obtained actual knowledge if they had conducted an inquiry that they never undertook to perform.

A. The District Court Wrongly Applied A Constructive Knowledge Standard To Decide That Plaintiff Had Actual Knowledge For Section 413 Purposes

1. "Actual knowledge" is not satisfied by mere "constructive knowledge." Constructive knowledge is a "should have known standard." Caputo v. Pfizer, 267 F.3d 181, 194 (2d Cir. 2001), and presupposes "knowledge of facts sufficient to prompt an inquiry which if properly carried out, would have revealed [the alleged] misdeed." Nellis, 809 F.2d at 754; see, e.g., VTech Holdings Ltd. v.

PriceWaterhouse Coopers, 348 F. Supp. 2d 255 (S.D.N.Y. 2004) (access to books only establishes constructive, not actual, knowledge of their contents).[8]

In Caputo, 267 F.3d at193, the Second Circuit held that "a plaintiff has 'actual knowledge of breach or violation' . . . when he has knowledge of all material facts necessary to understand" that a breach has occurred. "[K]nowledge of all material facts" is not satisfied by mere "constructive knowledge." Id. at 193-94. Instead, it generally requires at least "'specific knowledge of the actual breach of duty upon which [the plaintiff] sues.'" Martin v. Consultants and Administrators, Inc., 966 F.2d 1078, 1086 (7th Cir. 1992) (citations omitted). As the same district court that heard this case recognized in another matter, "[c]ourts have construed the 'actual knowledge' requirement strictly; constructive knowledge is inadequate, rather, the plaintiff must have knowledge of the facts or transaction that constituted the breach in order to trigger the statute of limitations." New Orleans Employers Int'l Longshoremen's Ass'n, AFL-CIO Pension Fund v. Mercer Investment Consultants, 635 F. Supp. 2d 1351, 1378 (N.D. Ga. 2009) (Evans, J).

Nellis establishes the controlling legal framework for assessing actual knowledge in this Circuit. There, the Secretary brought suit for violations of

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[8] Some courts distinguish "constructive knowledge" from "willful blindness." See Edes v. Verizon Communications, Inc., 417 F.3d 133, 142 (1st Cir. 2005) (stating that actual knowledge may encompass "willful blindness" by a plaintiff). Defendants have not asserted that Plaintiff engaged in "willful blindness" in this case.

ERISA against two attorneys who had breached their fiduciary duties to a union pension fund by counseling the fund's trustees to purchase property at a mortgage foreclosure sale at a price in excess of the appraised value. Defendants raised the time bar as an affirmative defense and argued at trial that the Secretary had knowledge that the fund purchased the property at an excessive cost, and the district court agreed.

On appeal, the Eleventh Circuit agreed with the Secretary that there was no direct or circumstantial evidence that the Secretary knew of defendants' involvement and the district court thus had actually found that the Secretary had "constructive knowledge," not "actual knowledge." Rejecting the district court's approach that the three-year statute was triggered if "the Secretary had knowledge of facts sufficient to prompt an inquiry which, if properly carried out, would have revealed appellees' misdeed," Nellis, 809 F.2d at 754, the Court stated that the three-year statute could not begin to run until the Secretary had knowledge that the defendants had advised the fund to purchase the property at the inflated price. It was not sufficient that the Secretary had knowledge of the inflated price. "The mere fact that the Secretary knew, more than three years before bringing this suit, that the price the Fund paid . . . was excessive does not necessarily mean that the Secretary also knew of [defendants'] involvement." Id. at 755. Therefore, the

Court reversed and remanded the case for a determination of the issue of actual knowledge.

At the time Nellis was decided, ERISA contained a second exception to the six-year statute based on the Secretary's constructive knowledge of reports filed with the Department of Labor. Thus, prior to December 21, 1987, section 413 specifically provided that the limitations period would begin to run on the date when the Secretary "could reasonably be expected to have obtained knowledge" of a breach or violation from a report filed with the Secretary. Id. at 754. This exception would have been entirely superfluous if the separate "actual knowledge" standard were triggered based on information the Secretary could have known (i.e., based on constructive knowledge). Effective December 21, 1987, Congress amended ERISA to eliminate this provision charging the Secretary with constructive knowledge based on reports filed with the Secretary. The provision's elimination is wholly consistent with Nellis's observation that Congress intended that the exceptions to the six-year provision be narrow and limited. Moreover, there has never been a "constructive knowledge" exception to the six-year statute of limitations applicable to private plaintiffs.

2. In the present case, the district court imputed to Plaintiff, without any evidence, circumstantial or otherwise, knowledge of facts contained in documents referred to by the district court as the plan documents. Setting aside the

evidentiary problem that the documents relied on by the district court were submitted as exhibits to Defendants' motion to dismiss, and therefore were outside the four corners of the complaint, there is no basis to conclude that the Plaintiff ever actually received or read the purported plan documents. Indeed, the Defendants completely fail to assert anywhere in their Motion to Dismiss that the purported plan documents were ever even transmitted to Plaintiff. See Defs' Motion to Dismiss, at 7-8 (Defendants alleged (i) that ERISA requires specific disclosures, including a plain language Summary Plan Description ("SPD") and (ii) that the Benefits Committee is responsible for preparing and distributing the SPD, but fail to allege that the SPD was actually distributed). Moreover, the district court also imputed to Plaintiff knowledge of documents that were incorporated by reference in the purported plan documents and made available on a SunTrust website. Id. at 8.[9] On the basis of these documents, "the district court determined that Plaintiff had "detailed descriptions of each available fund." Id. at 25.

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9 In their Motion to Dismiss, the Defendants stated that the Quarterly Investment Performance (QIP) booklets referenced in the SPD "were provided to participants and posted on the Plan's website." In support of this statement Defendants' cite page 126 of the SPD. The SPD on that page provides that the QIP "can be obtained" by telephone request or from the website. There is no evidence that the QIP was actually on the website, much less that the Plaintiff actually saw or read the QIP.

For example, the district court imputed to Plaintiff knowledge of facts contained in a document called the "Plan Prospectus."[10] The district court found that from the Plan Prospectus Plaintiff knew the following:

> (i) that the goal of the Classic Short Term Bond Fund was "[h]igh current income, while preserving capital" and the Fund's strategy was "to identify securities with a better return than similar securities of similar credit risk."
>
> (ii) a description of the risks of the Fund;
>
> (iii) the Fund's performance over ten years;
>
> (iv) that the Fund charges a .47% fee, of which .40% are advisory fees and .07% are operating expenses.

The district court noted that the QIP and the Plan Prospectus provided similar information for each of the SunTrust Funds and that "[i]n light of the comprehensive disclosures in these documents, Plaintiff has been aware of the performance and fees of these funds since at least 2005." 2012 WL 1432306, at *12.

Because the record contains no evidence that the SPD, the QIP and the Plan Prospectus were provided by the Defendants to the Plaintiff directly or upon request, or were received or read by the Plaintiff, the district court effectively

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[10] According to Defendants, the Plan Prospectus is referenced in the QIP and was "provided" to Plaintiff and available on the SunTrust website. Defs' Motion to Dismiss, at 9. However, the citation offered by Defendants to support their contention that the Plan Prospectus was "provided" is merely a reference to page 1 of the QIP, which instructs the reader how the Plan Prospectus may be obtained. <u>See</u> Defs' Motion to Dismiss, Exh. D, p.1.

based its holding on Plaintiff's constructive knowledge of the facts contained in those documents. And even if Plaintiff had actually received any of these documents, it cannot be assumed that she had actual knowledge of their contents. Before determining whether Plaintiff had actual knowledge of the documents' contents, there would have to be discovery and further litigation to establish the relevant facts. Nellis, which rejected the constructive knowledge standard as applied to the Secretary, requires no less. Nellis, 809 F.2d at 754 (reversing the district court because there was no direct or circumstantial evidence of actual knowledge and, therefore, the district court inappropriately found that the Secretary had "constructive knowledge" and not "actual knowledge").

3. The district court thus erred in imputing "actual" knowledge of the referenced documents without any evidence that Plaintiff saw, read, or comprehended any of them. Under similar circumstances, in Bona v. Barasch, 2003 WL 1395932 (S.D.N.Y. Mar. 20, 2003), the court concluded that on a Rule 12(b)(6) motion, it could not charge the plaintiffs with actual knowledge of a transaction merely because it had been described in plan documents. The court reasoned that "without any factual development on the issue," the defendants had "demonstrated only that plaintiffs could have examined [the] tax forms" and "[a]bsent a showing that plaintiffs actually did examine those forms and learned of the transactions, the court cannot impute actual knowledge to them." Id. at *16.

Similarly, in McConnell v. Costigan, 2002 WL 313528 at *7-8 (S.D.N.Y. Feb. 28, 2002), the court rejected the defendants' argument that the plaintiffs had actual knowledge of unpaid plan contributions because regular pay reports provided information from which they could have deduced that the contributions were inadequate. Although each plaintiff could have theoretically combined the reports with other information and gained actual knowledge, such "possible" actual knowledge did not, at summary judgment, satisfy the Second Circuit test of actual knowledge of each fact necessary to establish a claim. Id. See Reich v. Lancaster, 55 F.3d 1034, 1058 (5th Cir. 1995); Harris v. Finch, No. 05-951, slip op. at 7, 2008 WL 2064972 (N.D.N.Y. May 13, 2008); cf. MidAmerica Fed. Sav. & Loan Ass'n v. Shearson/American Express, Inc., 886 F.2d 1249, 1254-55 (10th Cir. 1989) (rejecting argument, in a securities case, that receipt of prospectus gives knowledge of its contents where no one reviewed the prospectus).

Conflating constructive knowledge with actual knowledge is never appropriate. It is especially egregious, however, at the motion to dismiss stage, where the court must accept all well-pleaded facts as true, and draw reasonable inferences in the light most favorable to the plaintiff. Garfield v. NDC Health Corp., 466 F.3d 1255, 1261 (11th Cir. 2006). This obligation is incompatible with presuming actual knowledge when nothing in the complaint indicates that the Plaintiff actually received or read the relevant disclosures and when such presumption supported, at most, a finding of constructive knowledge inadequate to satisfy the actual knowledge standard. Imputing knowledge of facts in documents that were merely cited by reference to a website address was doubly inappropriate. The district court thus erred in finding the requisite actual knowledge, even before reaching the question whether the facts available in those disclosures provided all the essential facts necessary to state the claims that the Plaintiff subsequently brought.

B. Even If The Plaintiff Had Actual Knowledge Of The Facts Relied On By The District Court, Those Facts Were Not Sufficient To Find That Plaintiff Had Actual Knowledge Of The Breach Or Violation As Required By Section 413(2).

Nothing in the documents submitted as exhibits to Defendants' Motion to Dismiss, and relied upon by the district court, provided Plaintiff with "actual knowledge" that Defendants acted disloyally or imprudently, which is the core of Plaintiff's Count II. This is true even if Plaintiff had read the documents more than three years before this suit commenced (a fact Plaintiff contests).

Count II of Plaintiff's Amended Complaint alleges that Defendants breached their duties of prudence and loyalty owed to the Plan under section 404 of ERISA, 29 U.S.C. § 1104, by failing to monitor the performance of the SunTrust Funds or to remove them from the Plan's investment lineup. Section 404(a)(1) of ERISA imposes a basic duty of loyalty on plan fiduciaries to act "solely in the interest" of plan participants and beneficiaries. 29 U.S.C. § 1104(a)(1). Subsection (A) further codifies this duty by requiring that the fiduciaries discharge their duties to the plan "for the exclusive purpose of . . . (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan." 29 U.S.C. §§ 1104(a)(1)(A)(i) and (ii). Subsection (B) codifies the trust law duty of prudence by requiring fiduciaries 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." 29 U.S.C. § 1104(a)(1)(B). Thus, in order to establish a breach of duty under section 404(a), Plaintiff must show that Defendants disloyally sought to subordinate the interests of plan participants to their or the company's own interests or failed to prudently manage the Plan or its assets. It was not enough to show that Defendants authorized the inclusion of the proprietary funds in the Plan or failed to remove them during the Class Period. It was necessary to show that their conduct or decision-making in doing so was disloyal or imprudent.

ERISA's obligations of prudence and loyalty are "the highest known to the law." ITPE Pension Fund v. Hall, 334 F.3d 1011, 1013 (11th Cir. 2003) (citation omitted). A finding of a violation of section 404(a) ordinarily requires consideration of both merits and process. See Donovan v. Cunningham, 716 F.2d 1455, 1467 (5th Cir. 1983) (imprudence violations under § 404 should be evaluated both for the merits of a particular investment and the fiduciary's independent investigation of the merits). Similarly, 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. C.I.R., 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. Yeager, 444 F.3d 916, 927-28 (7th Cir. 2006) (same). The district court decision does not address these necessary elements of Plaintiff's claim.

In their motion to dismiss, Defendants fail to assert that Plaintiff had any knowledge of Defendants' alleged disloyalty or inadequate evaluation in failing to remove the SunTrust Funds from the Plan:

> Plaintiff's assertion that "[p]rior to March 2011" she "was unaware . . . of facts relating to the processes Defendants employed or failed to employ" in selecting the [SunTrust Funds] is also unavailing. For even if Plaintiff did lack detailed information about the process used to select the [SunTrust Funds] until she filed her Complaint, that does not alter that the results of that process were known to her before: that [SunTrust Funds] were selected as Plan investments and that the fees, expenses, and performance of those Funds was routinely disclosed in Plan documents.

Defs' Motion to Dismiss, at 21-22. Similarly, the district court held that:

> Plaintiff was aware of the performance of the funds, even if she was unaware of the existence of a potential cause of action. Although Plaintiff claims knowledge of the monitoring process is required to trigger the

> limitations period, Plaintiff was aware of relevant facts underlying the alleged breach of duty sufficient to trigger the limitations period.

2012 WL 1432306 at *12 (emphasis added).

The district court clearly failed to apply the appropriate analysis. The three-year limitations period is not triggered unless the plaintiff possesses "'specific knowledge of the actual breach of duty upon which [the plaintiff] sues.'" Martin, 966 F.2d at 1086 (citations omitted); accord Brown v. Owens Corning Investment Review Committee, 622 F.3d 564, 570 (6th Cir. 2010) ("[a]n ERISA plaintiff has actual knowledge when he or she has 'knowledge of all the relevant facts,'" even if it is not known "that the facts establish a cognizable legal claim under ERISA").[11]

This is not a case where Plaintiff was aware of all of the facts, but did not have knowledge that such facts constituted an ERISA violation (i.e., a "cognizable claim"). Rather, this is a case where Plaintiff was unaware of facts necessary to prove her claim that Defendants acted contrary to the interests of the Plan and did not act with the "care, skill, prudence and diligence" that section 404 demands of plan fiduciaries. It is not enough that Plaintiff arguably knew that the SunTrust Funds were performing poorly:

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[11] Brown also held that "[w]hen a plan participant is given specific instructions on how to access plan documents, their failure to read the documents will not shield them from having actual knowledge of the documents' terms." Id. at 571. That holding clearly conflicts with Nellis and erases the generally recognized distinction between actual and constructive knowledge.

> When evaluating an alleged breach of fiduciary duty under ERISA, courts use an objective standard, focusing on whether the fiduciary employed appropriate methods to reach an investment decision. In re Unisys Saving Plan Litig., 74 F.3d 420, 434 (3d Cir. 1996). The results of the fiduciary's investment decision are not the focus of the inquiry. Id.

New Orleans Employers Int'l Longshoremen's Ass'n, 635 F. Supp. 2d at 1372. Investments may perform poorly without any breach of fiduciary duty transpiring. Cunningham, 716 F.2d at 1467 ("The focus of the inquiry is how the fiduciary acted in his selection of the investment, and not whether his investments succeeded or failed."); see also Fink v. Nat'l Sav. And Trust Co., 772 F.2d 951, 957 (D.C. Cir. 1985).[12] The converse is also true: investments that perform well through "blind luck" do not exempt the fiduciary from potential liability for imprudence. See LaScala v. Scruferi, 479 F.3d 213, 221 (2d Cir. 2007) ("The fact that the [pension funds] may not have suffered any loss . . . may bear on the question of damages, but has no bearing on whether [the defendant] breached his fiduciary duties in the first place.").

The case law generally holds that knowledge of a transaction "standing alone" does not constitute actual knowledge of an imprudence claim. "[T]he

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[12] At best it could be argued that Plaintiff might have known facts sufficient to prompt her to investigate whether the Defendants' were properly administering the Plan, but this is precisely the type of constructive knowledge uniformly rejected by courts. See 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.").

disclosure of a transaction that is not inherently a statutory breach of fiduciary duty . . . cannot communicate the existence of an underlying breach." Caputo, 267 F.3d at 193 (quoting Fink, 772 F.2d at 957). Courts are particularly averse to cursory findings of "actual knowledge" when the transaction at issue is not inherently suspicious. In Caputo, for example, the court noted that because the subsequently offered "golden handshake" from which the breach derived was not itself "inherently suspect," knowledge of its existence standing alone "was insufficient" to trigger the statute of limitations. 267 F.3d at 193.

This is frequently true of imprudence allegations, which can turn on complex facts, including process considerations, not evident from the transaction or investment performance alone. See Brown v. American Life Holdings, Inc., 190 F.3d 856, 859-60 (8th Cir. 1999) (because the nature of an allegedly imprudent fiduciary's investment decision is critical to the actual knowledge issue, "actual knowledge of the breach would usually require some knowledge of how the fiduciary selected the investment" and "there may be breaches of duty as to which a plaintiff will not have 'actual knowledge' until he or she learns of the reasons for the fiduciary's decision, or the nature of a complex transaction"); see also Waller v. Blue Cross, 32 F.3d 1337, 1339-41 (9th Cir. 1994); Maher v. Strachan Shipping Co., 68 F.3d at 953-56 (in both, knowledge of annuity purchase standing alone does not constitute actual knowledge of imprudence because factors outside the transaction are material to the alleged breach). Thus, where the alleged ERISA violation turns on facts not disclosed by the transaction itself, courts cannot logically find "actual knowledge" based solely upon plan documents disclosing only the fact of the transaction.

Here, there is no basis for concluding that the Plaintiff had knowledge of the Defendants' process for monitoring and selecting the investment funds offered by the Plan or of the merits of the Defendants' decisions on the retention of plan funds. The Plan fiduciaries' monitoring process was essential to the Plaintiff's claim, but not even Defendants assert that Plaintiff had knowledge of that process more than three years before this lawsuit was filed. Fuller, 2012 WL 1432306, at *12. Similarly, the documents relied on by Defendants and the district court do not establish that the Plaintiff had actual knowledge that the fees paid by the Plan to Trusco were excessive or that the Defendants failed properly to monitor and evaluate the performance of the funds. Such a finding is also a necessary element of Plaintiff's imprudence claim. While the documents offered some information regarding the fees paid to Trusco, such information would not provide Plaintiff with knowledge that the fees were unduly high. Unless the fees were obviously excessive for the investment management and other services provided to the Plan under any reasonable measure, actual knowledge of a fiduciary breach could not be deduced from bare knowledge of the size of the fees. Before a plan participant could conclude that a particular fund was a poor investment he or she would need to know, for example, the range of services provided to the fund (e.g., investment management, recordkeeping, advice), the quality of those services, the price and attributes of comparable funds, and the cost and quality of the arrangements that the fiduciaries could have entered into with other funds if they had acted in accordance with their fiduciary obligations. Similarly, the participant would have needed to know whether Defendants analyzed the fees, undertook to monitor the fee rates and compare them to competitive fee rates, and considered the comparative advantages of the SunTrust Funds over lower-cost investment structures. Absent actual knowledge of some or all of these facts, the Plaintiff lacked knowledge of all the facts relevant to her imprudence claim.

Finally, the district court wrongly distinguished Nellis, stating that this is not a case "in which Plaintiff was misled about the performance or potential returns of the funds." 2012 WL 1432306 at *12 and n.11. This purported distinction is misplaced. In Nellis, this Court observed that even though the Secretary had knowledge more than three years prior to bringing suit that the union purchased property for more than the appraised value, the Secretary was not aware that the attorney defendants had advised the union to purchase the property. The Court's decision was not based on the concealment of this latter fact, but upon the Secretary's lack of knowledge of defendants' role in advising the plan. Speculating that the Secretary knew enough to "prompt an inquiry which, if properly carried out, would have revealed appellees' misdeed," Nellis, 809 F.2d at 754, was insufficient to establish actual knowledge.

Thus, the district court's opinion here should be reversed for the same reason that this Court reversed the district court’s opinion in Nellis. It is impossible to conclude based on the pleadings that the Plaintiff had "actual knowledge" of a breach as required by the text of ERISA and this Circuit’s opinion in Nellis. In particular, there is no basis to conclude that the Plaintiff knew that the fees were excessive or that the funds were underperforming, and she was completely in the dark about the process by which Defendants decided to keep the proprietary funds in the Plan's lineup. As a result, the gap between what Plaintiff actually knew and what she would have needed to know to meet the "actual knowledge" standard was much too great to permit dismissal on timeliness grounds.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,989 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: March 12, 2013

CERTIFICATE OF SERVICE

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