IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

GARNET TURNER, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	
v.	)	**CIVIL ACTION NUMBER: 2:13-cv-00685-MEF-CSC**
ALLSTATE INSURANCE COMPANY,	)	
Defendant.	)	

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

Plaintiff is a former Allstate employee who alleges that he worked for the company from 1963 until his retirement in 1995. He filed this putative class action following Allstate's decision to cease paying life insurance premiums for retirees effective 2016. Plaintiff does not, and cannot dispute, that Allstate reserved the right to terminate its payment of the premiums for this benefit. Instead, Plaintiff attempts to assert a claim for breach of fiduciary duty under ERISA, alleging that at some unidentified point during his 32-year employment, unspecified persons at Allstate supposedly made intentionally false representations to him about the plan terms.

Plaintiff's claim is legally deficient and should be dismissed for multiple reasons. *First*, because Plaintiff has no right to free lifetime life insurance under the plan terms, his claim for declaratory relief must be denied. *Second*, Plaintiff's vague allegations that, at some unspecified point between 1963 and 1995, unidentified individuals represented that Allstate would provide no-cost life insurance to him for life, do not state a claim for breach of fiduciary duty. *Third*, because the alleged breach of fiduciary duty occurred not when Allstate decided to cease paying for retiree life insurance, but more than 18 years ago when the alleged misrepresentations were

supposedly made to Plaintiff and he relied on them, Plaintiff's claim is time-barred under ERISA's six-year statute of repose.

BACKGROUND

Plaintiff alleges that he began working at Allstate Insurance Company in 1963. (Compl. ¶ 12). He alleges that Allstate provided employees a company-paid retiree life insurance benefit under the Allstate Group Life and Accidental Death and Dismemberment Insurance Plan (the "Plan"). (*Id*. ¶ 13). According to the Complaint, the Plan provided that employees who met certain conditions were eligible to receive life insurance at no cost after retirement, and Plaintiff alleges that he satisfied these conditions. (*Id*. ¶¶ 14-17).

Plaintiff acknowledges that Allstate "may choose to cancel the no cost retiree life insurance benefit." (*Id*. ¶ 36). Specifically, the Plan contains an express reservation of rights provision stating that "[a]lthough Allstate intends to continue the Allstate Group Life and Accidental Death and Dismemberment Insurance Plan, Allstate necessarily reserves the right to modify, amend, suspend, or terminate it at any time." (Ex. A to Defendant's Motion to Dismiss (Plan) at § 6.04).[1] The Plan further provides: "The Plan's participants or beneficiaries do not have a vested right in any of the Plan's benefits." (*Id*.).

[1] The Plan document attached to Defendant's Motion to Dismiss as Exhibit A is the January 1995 version of the Plan, the version of the Plan in effect when Plaintiff alleges he retired. (Ex. B to Defendant's Motion to Dismiss (Declaration of Heather Dumas) ¶ 3). It served as both the governing Plan document and Summary Plan Description, a summary of the Plan furnished to participants under ERISA § 104. (Ex. A to Defendant's Motion to Dismiss (Plan) at § 6.03 ("Plan Document … This document contains the provisions of the Plan. It also serves as the Summary Plan Description and is the controlling document.")). The Complaint refers to and quotes extensively from the Plan document. (Compl. ¶¶ 13-16). Therefore, the Court may consider it on a motion to dismiss. *Bickley v. Caremark Rx, Inc.*, 461 F.3d 1325, 1330 n.7 (11th Cir. 2006) ("this court has held 'where the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff's claim, then the Court may consider the documents part of the pleading for purposes of Rule 12(b)(6) dismissal") (quoting *Brooks v. Blue Cross & Blue Shield, Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997)).

As the Plan authorized Allstate to do, Allstate announced that effective January 1, 2016, it will no longer pay the premium for Plaintiff's life insurance benefit. (Compl. ¶ 20). Plaintiff and other retirees are being given the opportunity to continue coverage at their own cost. (*Id.*).

Conceding that the Plan terms permitted Allstate to make this change (*id.* ¶ 36), Plaintiff does not allege that Allstate breached the terms of the Plan, and he does not assert a claim under ERISA § 502(a)(1)(B), the remedial provision that allows participants to recover benefits due under the terms of the Plan. To the contrary, the Complaint concedes that Plaintiff "is *not* entitled to relief under ERISA § 502(a)(1)(B)." (*Id*. ¶ 37 (emphasis added)).

Rather than contesting the Plan's right to terminate payment of retiree life insurance, Plaintiff alleges that at some unidentified time "[t]hroughout Plaintiff's employment, Allstate represented and promised that Plaintiff and other retirees would receive retiree life insurance benefits paid for by Allstate until death." (*Id*. ¶ 18). Plaintiff alleges that these "promises and representations were made by Plaintiff's superiors and managers who were in seniority positions" (*id*.), but he does not identify whom those individuals were, when they supposedly made these statements, or provide any detail about them. Plaintiff asserts that he relied on these alleged misrepresentations "up to the date of his retirement" in 1995 by continuing to work for Allstate and by foregoing insurance from other sources while he was younger. (*Id*. ¶¶ 12, 19). Now, 18 years after he claims to have relied on these alleged misrepresentations, he has sued, alleging that Allstate breached its fiduciary duty to provide Plaintiff with complete and accurate information about his retiree life insurance benefits. (*Id*. ¶¶ 27(d), 40).

ARGUMENT

I. Plaintiff's First Cause Of Action For Declaratory Relief Must Be Dismissed.

Plaintiff's first claim for declaratory relief, which seeks a judgment declaring "[t]hat Allstate violates ERISA by cancelling Plaintiff's Allstate paid retiree life insurance benefits" and

"[t]hat Allstate, under ERISA, must continue to pay Plaintiff's retiree life insurance benefits until his death" (*id.* ¶ 27), fails to state a claim upon which relief can be granted.[2]

Unlike pension benefits, welfare benefits such as life insurance benefits are not "vested" benefits, *i.e.*, they can be revoked, unless the plan document expressly confers a right to vested, irrevocable benefits. The Eleventh Circuit agrees with "other courts of appeals [which] have consistently rejected the notion that welfare benefits may vest simply because they continue into retirement, particularly when other plan provisions establish that benefits are generally terminable." *Jones v. Am. Gen. Life & Accident Ins. Co.*, 370 F.3d 1065, 1070 (11th Cir. 2004) (citing cases). Therefore, whether Allstate could terminate the no-cost retiree life insurance benefit depends on the terms of the Plan.

Plaintiff concedes, as he must, that the terms of the Plan allow Allstate to "choose to cancel the no cost to retiree life insurance benefit." (Compl. ¶ 36). Under the heading "Plan Amendment and Termination," the Plan expressly states that "[a]lthough Allstate intends to continue the Allstate Group Life and Accidental Death and Dismemberment Insurance Plan, Allstate necessarily reserves the right to modify, amend, suspend, or terminate it at any time." (Ex. A to Defendant's Motion to Dismiss (Plan) at § 6.04). The Plan also states that "[t]he Plan's participants or beneficiaries do not have a vested right in any of the Plan's benefits." (*Id.*)

The Eleventh Circuit, "agree[ing] with the overwhelming authority from [its] sister circuits," has held that similar reservation of rights language was "unambiguous and precludes vesting of the retiree group life benefit." *Jones*, 370 F.3d at 1071 (plan's reservation of rights provision stating that "[a]lthough the Company has established this Group Insurance Plan with

[2] To the extent this count seeks a declaratory judgment that Allstate breached its fiduciary duty by failing to communicate accurate information concerning the retiree life insurance benefit, (Compl. ¶ 27(d)), it is duplicative of Plaintiff's second cause of action for breach of fiduciary duty and should be dismissed for the reasons explained below.

the intention of continuing it indefinitely, the uncertainty under which all businesses operate, as well as possible future changes in the law, make it necessary for the Company to reserve the right to amend or terminate the Plan at any time" precludes plaintiff's claim to irrevocable lifetime retiree life benefits). *See also In re Unisys Corp. Retiree Med. Benefit ERISA Litig.*, 58 F.3d 896, 904 (3d Cir. 1995) ("An employer who promises lifetime medical benefits, while at the same time reserving the right to amend the plan under which those benefits were provided, has informed plan participants of the time period during which they will be eligible to receive benefits *provided* the plan continues to exist.").

Because the Plan unambiguously reserves Allstate's right to cancel the paid retiree life insurance benefits, Allstate's decision to terminate that benefit does not violate ERISA. Indeed, Plaintiff concedes that he "is not entitled to relief under ERISA § 502(a)(1)(B)," (Compl. ¶ 37), which "empowers ERISA participants and beneficiaries to bring a civil action in order to recover benefits, enforce rights to benefits, or to clarify rights to future benefits due under the terms of an ERISA-governed welfare benefit plan." *Jones*, 370 F.3d at 1069. The clear terms of the Plan and Plaintiff's own admissions defeat his first claim for declaratory relief.

II. Plaintiff's Second Cause Of Action For Breach Of Fiduciary Duty Fails To State A Claim.

Plaintiff's second cause of action for breach of fiduciary duty under ERISA § 502(a)(3) must also be dismissed for two reasons.[3] *First*, Plaintiff's vague allegations that unidentified individuals knowingly represented that Allstate would continue to provide no-cost retiree life insurance to him for life at some unspecified time during his 32-year employment do not state a claim for breach of fiduciary duty. Plaintiff's claim sounds in fraud and must be pleaded with

[3] The Complaint references ERISA § 502(a)(5) (Compl. ¶ 39), but that subsection by its terms provides only for a cause of action brought by the Secretary of Labor. Plaintiff plainly lacks statutory standing to sue under that subsection.

particularity under Rule 9(b). But even if Rule 9(b) did not apply, Plaintiff's pleading fails to allege sufficient facts to satisfy the Rule 8 pleading standard because he has not even alleged a breach by a Plan fiduciary. Second, Plaintiff's claim, which is based on alleged misrepresentations and reliance that occurred more than 18 years ago, is barred by ERISA's six-year statute of repose.

A. Plaintiff Does Not Allege Sufficient Facts To State A Claim For Breach Of Fiduciary Duty.

1. Plaintiff's Allegations Fail To Satisfy Rule 9(b).

A claim for breach of fiduciary duty under ERISA that sounds in fraud must meet the heightened pleading requirements of Rule 9(b). *In re ING Groep, N.V. ERISA Litig.*, 749 F. Supp. 2d 1338, 1349-50 (N.D. Ga. 2010) (Rule 9(b) applies to ERISA fiduciary claim for failure to provide accurate information where "misrepresentations alleged by plaintiffs sound in fraud"); *In re Coca-Cola Enters., ERISA Litig.*, No. 06-cv-953, 2007 U.S. Dist. LEXIS 44991, at *18-19 (N.D. Ga. Jun. 20, 2007) (Eleventh Circuit's holding in *Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273, 1277 (11th Cir. 2006) "provides clear instruction" that Rule 9(b) applies where allegations of fraud "form the factual predicate" for ERISA fiduciary claims); *Rogers v. Baxter Int'l Inc.*, 417 F. Supp. 2d 974, 984 (N.D. Ill. 2006) ("While claims for breach of fiduciary duty under ERISA generally are not subject to heightened pleading standards, Rule 9(b) does apply where the plaintiff alleges that a defendant's breach of fiduciary duty took the form of a fraudulent act."); *Pietrangelo v. NUI Corp.*, No. 04-3223, 2005 U.S. Dist. LEXIS 40832, at *31-32 (D.N.J. Jul. 18, 2005) ("However, when the alleged breach of the fiduciary is the fraudulent act, Plaintiffs are required to plead with particularity.") (internal quotations omitted).

Here, Plaintiff's claim for breach of fiduciary duty sounds in fraud. Plaintiff alleges that unidentified "superiors and managers" allegedly misrepresented that the Plan gave Plaintiff

lifetime life insurance coverage at no cost. (Compl. ¶¶ 1, 18). Plaintiff alleges that the alleged representations were not only false, but *intentionally* false, made in order to induce Plaintiff to continue to work for Allstate until his retirement. (*Id*. ¶ 18, 19). Specifically, Plaintiff alleges that unspecified individuals at Allstate promised him lifetime life insurance coverage when they "*knew it was not true*," and that they "remained silent" about the actual Plan terms even though they "*knew* that [Plaintiff] was relying upon Allstate's misrepresentations as to retiree's true and accurate life insurance benefits." (*Id*. ¶ 40) (emphasis added). *See also id*. ¶ 18 ("Allstate was aware that their employees were relying upon such misrepresentations to their detriment"); ¶ 24 ("Allstate was aware of [Plaintiff's] reliance"). Accordingly, the heightened pleading standards of Rule 9(b) apply.

To satisfy Rule 9(b), a complaint must allege "(1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud." *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001) (quoting *Brooks*, 116 F.3d at 1371). In other words, the plaintiff must plead "all the elements of the first paragraph of a newspaper story: 'the who, what, when, where and how.'" *In re Coca-Cola Enters.*, 2007 U.S. Dist. LEXIS 44991, at *12 (quoting *Garfield v. NDC Health Corp.*, 466 F.3d 1255, 1262 (11th Cir. 2006)).[4]

[4] Rule 9(b) "requires this particularity in order to alert[] defendants to the precise misconduct with which they are charged and [to] protect[] defendants against spurious charges of immoral and fraudulent behavior." *Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273, 1277 (11th Cir. 2006) (internal quotation marks and citation omitted). "[T]he rule ensures that the defendant has sufficient information to formulate a defense by putting it on notice of the conduct complained of … [and] protects defendants from harm to their goodwill and reputation." *Id*. It also serves to prevent "an impermissible fishing expedition by" plaintiffs. *In re Coca-Cola Enters.*, 2007 U.S. Dist. LEXIS 44991, at *19.

Plaintiff's allegations that unidentified people made general representations to Plaintiff that he would receive lifetime benefits at unspecified times between 1963 and 1995 and in an unspecified manner do not come close to meeting this standard. Nowhere does the Complaint allege "precisely what statements were made," whether the alleged statements were written or oral, or "the time and place of each such statement." Nor does Plaintiff identify who made the alleged misrepresentations. The Complaint's vague allegations that representations "were made by Plaintiff's superiors and managers who were in seniority positions" (Compl. ¶ 18), are insufficient. *See, e.g., Ferrell v. Durbin*, 311 Fed. Appx. 253, 260 n.9 (11th Cir. 2009) (unpublished) (allegation that "one or more Defendants" made a misrepresentation "does not sufficiently identify … the person responsible for it"); *Watson v. Consol. Edison of N.Y.*, 594 F. Supp. 2d 399, 411 (S.D.N.Y. 2009) (complaint failed to satisfy 9(b) because it "does not allege the names of the individuals who made the alleged misrepresentations [and] only broadly describes the alleged misrepresentations and omissions").

Because Plaintiff fails to allege with particularity "the who, what, when, where and how" required by Rule 9(b), *In re Coca-Cola Enters.*, 2007 U.S. Dist. LEXIS 44991, at *12, his fiduciary duty claim must be dismissed.

2. Plaintiff's Allegations Fail To Satisfy Rule 8.

In addition to failing to satisfy the heightened Rule 9(b) pleading standards, Plaintiff's claim for breach of fiduciary duty must be dismissed because Plaintiff has not alleged facts sufficient to satisfy the Rule 8 pleading standards. To survive a Rule 12(b)(6) motion to dismiss, a complaint "must contain something more … than … a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations omitted). A complaint does not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678

(2009) (quoting *Twombly*, 550 U.S. at 557). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id*. (quoting *Twombly*, 550 U.S. at 555). *See also Snow v. DirecTV, Inc.*, 450 F.3d 1314, 1320 (11th Cir. 2006) ("[Our] duty to liberally construe a plaintiff's complaint in the face of a motion to dismiss is not the equivalent of a duty to re-write it for [the plaintiff]."); *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 960 (11th Cir. 2009) ("The absence of . . . factual allegations to support . . . legal conclusions is fatal and the district court properly dismissed his claim for breach of a fiduciary duty on this basis.").

Plaintiff's vague and unspecific allegations of misstatements allegedly made by unidentified persons at some point during his 32-year employment are precisely the type of "unadorned, the-defendant-unlawfully-harmed-me accusation" that the Supreme Court found insufficient in *Twombly* and *Iqbal*. *Iqbal*, 556 U.S. at 678. Because Plaintiff fails to allege "enough facts to state a claim to relief that is plausible on its face," he should not be permitted to needlessly consume the Court's and the parties' time and resources in discovery and further motion practice. *Twombly*, 550 U.S. at 570. The Complaint should be dismissed.

The threshold question for any claim for breach of fiduciary duty is "whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000); *Cotton v. Mass. Mut. Life Ins. Co.*, 402 F.3d 1267, 1277 (11th Cir. 2005) ("To establish liability for a breach of fiduciary duty under any of the provisions of ERISA § 502(a), a plaintiff must first show that the defendant is in fact a fiduciary with respect to the plan."). Therefore, to state a claim for breach of fiduciary duty based on misrepresentations, a plaintiff must, at a minimum, allege that a "*plan fiduciary* made material misrepresentations about the plan to the plan participants." *Hammond v.*

Reynolds Metals Co., 219 Fed. Appx. 910, 916-17 (11th Cir. 2007) (unpublished) (emphasis added). Because Plaintiff's Complaint fails to allege facts sufficient to show that a Plan fiduciary made the alleged misrepresentations upon which his claim is based, it must be dismissed.

"A person or entity becomes an ERISA fiduciary either (1) by being named as a fiduciary in written instruments that govern how an employee benefit plan is established or maintained, or (2) by exercising discretionary authority or control over the management, administration, or assets of a plan." *In re SunTrust Banks, Inc. ERISA Litig.*, 749 F. Supp. 2d 1365, 1372 (N.D. Ga. 2010). The Complaint does not allege that the Plan Administrator (identified in Complaint paragraph 13 as the Employee Benefits Division Director in Northbrook, Illinois) or any named Plan fiduciary made any misrepresentations. Instead, Plaintiff alleges only that "[t]he promises and representations were made by Plaintiff's superiors and managers who were in seniority positions so that Plaintiff understood they were acting on behalf of the Allstate Plan administrator." (Compl. ¶ 18). But the Complaint does not allege that these unidentified "superiors and managers" *actually were* acting on behalf of the Plan Administrator, and it contains absolutely no factual allegations to support such an assertion. *In re SunTrust Banks*, 749 F. Supp. 2d at 1376 (allegations in complaint that "Defendants were clearly speaking as both Plan fiduciaries and as corporate representatives when issuing the public statements" do not suffice; "simply asserting as much, without any factual underpinning for the assertion, does not make it so.").

The Complaint is also devoid of allegations that these "superiors and managers" were performing fiduciary functions when they allegedly made these misrepresentations. The fiduciary function is not an "all-or-nothing concept" and a person is only acting as a fiduciary to

the extent that he exercises discretionary authority "with respect to the particular activity at issue." *Cotton*, 402 F.3d at 1277. The mere conveyance of information about a benefit program does not make one an ERISA fiduciary unless the person communicating has "discretionary authority" respecting the plan's "management" or "administration." ERISA § 3(21)(A); *Varity Corp. v. Howe*, 516 U.S. 489, 498 (1996). Thus, in *Malone v. Commonwealth Edison Co.*, No. 98 C 2812, 1999 U.S. Dist. LEXIS 16172 (N.D. Ill. Sept. 30, 1999), the court held that an employer could not be liable for breach of fiduciary duty based on alleged misrepresentations made by the company's personnel manager to whom the plaintiff was directed to answer his retirement inquiries. Because there was no evidence that the manager "had any discretionary authority in or control over the tasks to which he was assigned; or that [company] officials 'either authorized, participated in, or had knowledge of [the manager's alleged] misstatement,'" the court held that the company "could not be said to have breached its fiduciary duties solely by virtue of [the manager's] alleged misstatements." *Id.* at *14 (quoting *Schmidt v. Sheet Metal Workers' Nat'l Pension Fund*, 128 F.3d 541, 547 (7th Cir. 1997)).

Here, Plaintiff does not allege that the unidentified managers and superiors had any discretionary control over the plan's management or administration. Nor does he allege that the Plan Administrator authorized, participated in, or had knowledge of the alleged misstatements. *Compare Varity Corp. v. Howe*, 516 U.S. 489 (1996) (plan administrator breached fiduciary duty when it communicated benefit options in a misleading fashion through individuals it authorized to communicate as fiduciaries). Therefore, the Complaint must be dismissed.

C. Plaintiff's Claim Is Barred By ERISA's Six-Year Statute Of Repose.

Although Plaintiff fails to identify the specific dates of the alleged misrepresentations forming the basis for his breach of fiduciary duty claim, it is clear from the Complaint that any

such representations occurred, if at all, more than 18 years ago. (Compl. ¶¶ 12, 18-19 (alleging that misrepresentations were made by "superiors and managers" during Plaintiff's employment, which ended in 1995)). Plaintiff's claim is therefore barred by ERISA's six-year statute of repose.

ERISA § 413 provides:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of –
>
> (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
>
> …
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

ERISA § 413, 29 U.S.C. § 1113. "As a statute of repose, § 413 serves as an absolute barrier to an untimely suit." *Fulghum v. Embarq Corp.*, No. 07-2602, 2013 U.S. Dist. LEXIS 20930, at *93 (D. Kan. Feb. 14, 2013) (quoting *Radford v. Gen. Dynamics Corp.*, 151 F.3d 396, 400 (5th Cir. 1998)).

"Statutes of limitations are primarily designed to assure fairness to defendants," *Burnett v. New York C. R. Co.*, 380 U.S. 424, 428 (1965), by "preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944). Because Plaintiff's claim arises from purported misrepresentations that allegedly occurred sometime between 18 and 50 years ago, the reasons for limitations

periods – that "[m]emories fade; witnesses move from their jobs and homes; documents may be misplaced or destroyed" – take on particular significance in this case. *Hembree ex rel. Hembree*, 127 F. Supp. 2d 1265, 1269 (N.D. Ga. 2000).

1. Plaintiff's Claim Is Not Tolled By The "Fraud Or Concealment" Provision Of Section 413.

The limited exception in Section 413 that tolls the statute of repose for cases of "fraud or concealment" does not apply merely because Plaintiff alleges a purported misrepresentation. "With rare exceptions, the courts of appeals have interpreted the final clause of § 413[] as incorporating the federal doctrine of fraudulent concealment." *Kurz v. Philadelphia Elec. Co.*, 96 F.3d 1544, 1552 (3d Cir. 1996) (collecting cases and noting five other circuits' application of tolling only in the case of fraudulent concealment). Thus, "[t]he relevant question is … not whether the complaint 'sounds in concealment,' but rather whether there is evidence that the defendant took affirmative steps to hide its breach of fiduciary duty." *Id.*; *Lockhart v. Southern Health Plan, Inc.*, No. 04-cv-6, 2012 U.S. Dist. LEXIS 63265, at *18 (M.D. Ga. May 4, 2012) (plaintiff must establish that the defendant took "affirmative steps … to hide its breach of fiduciary duty"). Such affirmative steps must consist of "conduct *beyond the breach itself* that has the effect of concealing the breach from its victims." *Lockhart*, 2012 U.S. Dist. LEXIS 63265, at *17-18 (emphasis added, internal citation omitted); *Fulghum*, 2013 U.S. Dist. LEXIS 20930, at *96 ("[T]he fraud or concealment provision is inapplicable because there is no evidence that Defendants actively concealed their alleged breach of fiduciary duty… Instead, they contend that Defendants' underlying misrepresentations were the 'fraudulent' acts."); *Keen v. Lockheed Martin Corp.*, 486 F. Supp. 2d 481, 493 (E.D. Pa. 2007) (for exception to apply, plaintiff must establish "that the defendant took affirmative steps to conceal its breach *apart from* the initial misrepresentation") (emphasis added).

In language that applies with equal force here, the Third Circuit concluded that

> *if all that a plaintiff can show is that a counselor represented to him that he had guaranteed lifetime health care benefits* or failed to give him accurate advice knowing that he believed he had such benefits, *the fraud or concealment clause is inapplicable.* In such cases, [defendant] cannot be said to have taken affirmative steps, either as a part of the original breach of duty or thereafter, to cover up its breach.

In re Unisys Corp. Retiree Med. Benefits ERISA Litig. (Unisys III), 242 F.3d 497, 503 (3d Cir. 2001) (emphasis added).

In this case, the fraud or concealment provision does not apply because there is no allegation that, after the alleged misrepresentations were made to Plaintiff, Allstate actively concealed or covered up its breach to prevent Plaintiff from discovering the truth. To the contrary, as Plaintiff concedes, Allstate made clear in the SPD that Allstate "may choose to cancel the no cost to retiree life insurance benefit." (Compl. ¶ 36).[5]

2. ERISA's Six-Year Repose Period Is Triggered Upon The Date Of The Alleged Misrepresentations, Or, At The Latest, The Date On Which Plaintiff First Relied On The Alleged Misrepresentations.

Because tolling by fraudulent concealment is inapplicable in this case, the relevant limitation period runs "six years after ... the date of the last action which constituted a part of the breach or violation." ERISA § 413, 29 U.S.C. § 1113. Where, as here, a plaintiff alleges that a defendant breached its fiduciary duty by misrepresenting the longevity of retiree benefits, "the date of the last action which constituted a part of the breach" is the date of the alleged

[5] Even if it did apply, Plaintiff could not take advantage of the fraud or concealment exception because, as demonstrated above, he failed to plead fraud with particularity. As with any allegation of fraud, a plaintiff who seeks to invoke the ERISA § 413 fraud or concealment exception must plead those allegations with particularity under Rule 9(b). *Bleier v. Coca-Cola Co.*, No. 06-cv-697, 2006 U.S. Dist. LEXIS 75171, at *11 n.3 (N.D. Ga. Oct. 16, 2006); *Fulghum*, 2013 U.S. Dist. LEXIS 20930, at *97 n.124; *Watson*, 594 F. Supp. 2d at 411 (plaintiff must plead "with the particularity required by Fed. R. Civ. P. 9(b) in order to be eligible for the six year 'fraud or concealment' exception … Here, the Complaint does not allege the names of the individuals who made the alleged misrepresentations" and

misrepresentation, or, at the very latest, the date upon which the plaintiff first relied to his detriment on the misrepresentation, not the date upon which the benefits were terminated.

To state a claim for breach of fiduciary duty, a plaintiff must allege that "the plan fiduciary made material misrepresentations about the plan to the plan participants and the participants relied on that misrepresentation to their detriment." *Hammond*, 219 Fed. Appx. at 916-17. Given these elements, courts have held that "any breach that may have occurred was completed, and a claim based thereon accrued, no later than the date upon which the employee relied to his detriment on the misrepresentations." *Unisys III*, 242 F.3d at 505-06; *see Fulghum*, 2013 U.S. Dist. LEXIS 20930, at *101("the date of the last action" is "the date the alleged misrepresentations were made"); *Watson*, 594 F. Supp. 2d at 411 (ERISA six-year repose period commenced "no later than" the time plaintiffs relied on alleged misrepresentations); *Spangler v. Altec Int'l L.P.*, No. 98-2437, 1998 U.S. App. LEXIS 2114, at *9-10 (7th Cir. Feb. 9, 1999) (unpublished) (ERISA six-year period began to run on fiduciary claims when plaintiffs relied on alleged misrepresentations).

In the strikingly similar *Fulghum* case, the district court held that the six-year statute of repose barred plaintiffs' breach of fiduciary duty claims because they were based on alleged misrepresentations that occurred more than six years before plaintiffs brought suit. *Fulghum*, 2013 U.S. Dist. LEXIS 20930, at *102-03. Plaintiffs in *Fulghum* alleged that defendants "breached their fiduciary duty by making misrepresentations that they were entitled to lifetime" life insurance benefits and by "fail[ing] to inform them that their benefits could change." *Id.* at *86, 91, 93. After defendants terminated these benefits, plaintiffs brought suit, asserting that they detrimentally relied on the misrepresentations in that they would have made different

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"only broadly describes the alleged misrepresentations").

retirement and post-retirement decisions had they known their benefits could be terminated. *Id*. at *94. The court held that the six-year limitations period began to run on "the date of Defendants' misrepresentations," all of which necessarily occurred before plaintiffs retired, which was more than six years before they sued. *Id.* at *102-03.

Consistent with this authority, courts have repeatedly rejected assertions that an employer's decision to terminate or amend a plan constitutes "the last action" for purposes of the statute of repose. *Id.* at *98 (expressly rejecting plaintiffs' argument that "the last action occurred when Defendants reduced or terminated the benefits because that is when the harm occurred"); *Spangler*, 1998 U.S. App. LEXIS 2114, at *8; *Unisys III*, 242 F.3d at 506. Indeed, the act of terminating or amending a plan is not even a fiduciary act. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995) (under ERISA, employers are generally free to modify or terminate welfare plans and "a company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan") (internal quotations omitted). Because "the termination of the plan is a non-fiduciary act … it cannot be considered a part of the breach of fiduciary duty, and the date that benefits were terminated cannot be considered the 'last action which constituted a breach' under § 413(1)." *Fulghum*, 2013 U.S. Dist. LEXIS 20930, at *98; *Unisys III*, 242 F.3d at 506 ("the denial of free health care coverage was not an element of the plaintiffs' claim" for breach of fiduciary duty because the defendant "had a right to terminate free health care coverage, and it exercised that right in a non-fiduciary capacity").

The Seventh Circuit has similarly held that the statute of limitations begins to run on fiduciary claims when plaintiffs first relied on the alleged misrepresentations, not when the defendant denied plaintiffs the benefits to which they believed they were entitled, reasoning that

> [i]ntentional misrepresentation, which is the sole basis for the breach of fiduciary duty claim, is a tort action, not a contract

> action; thus, … a failure to perform is not a necessary element of the cause of action. *A plaintiff alleging intentional misrepresentation has a viable cause of action when he or she acts in reliance on the defendant's misleading statements.* The timing of the injury caused by such representations is irrelevant. *In analogous ERISA cases, courts have uniformly recognized that the fact that an injury may not be felt for many years does not mean that a violation or breach has not yet occurred.*

Spangler, 1998 U.S. App. LEXIS 2114, at *7-8 (internal citations omitted, emphasis added); *see Fulghum*, 2013 U.S. Dist. LEXIS 20930, at *98 (even if "harm is the final element of [Plaintiff's] breach of fiduciary duty claim, some circuits have determined that it is unnecessary for actual harm to occur before the statute of limitations can begin to run.") (citing *Ziegler v. Connecticut Gen. Life Ins. Co.*, 916 F.2d 548, 550-51 (9th Cir. 1990) and *Larson v. Northrop Corp.*, 21 F.3d 1164, 1170 (D.C. Cir. 1994)).

The Third Circuit likewise held that "ERISA's general six-year statute of limitations is triggered by a fiduciary's action, not a beneficiary's discovery of the breach." *Ranke v. Sanofi-Synthelabo Inc.*, 436 F.3d 197, 205 (3d Cir. 2006). In *Ranke*, the court also rejected plaintiffs' argument that the date of the last action should be the last date that they acted in detrimental reliance on the alleged misrepresentations, agreeing with defendants that "allowing the last date of detrimental reliance to be the starting date for the running of the statute of limitations would potentially allow a beneficiary to extend the statute indefinitely, as reliance can be said to occur continuously into the future." *Id.* at 202. Thus, the court held that plaintiffs' ERISA breach of fiduciary duty claims arose at the time the alleged misrepresentations were made and plaintiffs first relied to their detriment on those representations, and that plaintiffs may not "'reset the clock' by later detrimental reliances occurring after their claims first accrued." *Id.* at 203.

Here, "the date of the last action" that triggered the ERISA § 413(1) statute of repose on Plaintiff's breach of fiduciary duty claim was no later than 1995. Plaintiff alleges that Allstate

breached its fiduciary duty by making alleged representations "[t]hroughout Plaintiff's employment," which ended in 1995. (Compl. ¶¶ 12, 18-19). Plaintiff asserts that he relied on these alleged misrepresentations "up to the date of his retirement" in 1995 by continuing to work for Allstate and by foregoing insurance from other sources while he was younger. (*Id*. ¶¶ 12, 19). He alleges no misrepresentations after his retirement in 1995. Accordingly, the six-year statute of repose began to run at the latest in 1995 and expired at the very latest in 2001. Plaintiff's breach of fiduciary duty claim is time-barred.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court dismiss the Class Action Complaint with prejudice.

Dated: November 15, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2013, I electronically filed the foregoing with the Clerk of the court using the CM/ECF system which will send notification of such filing to the following:

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