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,	)	
SUZANNE WILLINGHAM, individually and on behalf of all others similarly situated,	)	
DONALD KERR, individually and on behalf of all others similarly situated,	)	CASE NO: 2:13-cv-00685
Plaintiffs,	)	
v.	)	
ALLSTATE INSURANCE COMPANY,	)	
Defendant.	)	

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE AMENDED COMPLAINT

The Plaintiffs, by and through their attorneys, hereby respond to and oppose Defendant's motion to dismiss their Amended Complaint. That motion and the brief accompanying it, Docs. 23-24, are filed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

On November 15, 2013, Defendant filed a motion to dismiss Plaintiffs' original Complaint. Docs. 16, 16-1, 16-2, & 17. The Amended Complaint was

filed as allowed under Rule 15(a)(1)(B) of the Federal Rules of Civil Procedure, on November 27, 2013. Docs 19 & 19-1. On December 5, 2013, the Parties filed a joint motion asking the Court to permit Plaintiffs to cease responding to Defendant's first motion to dismiss and asking for additional time to permit the Defendant to respond to Plaintiffs' Amended Complaint. Doc 21. On December 6, 2013, the Court granted the Parties' joint motion. Doc. 22.

INTRODUCTION

The Amended Complaint sets forth numerous allegations against Allstate Insurance Company ("Allstate"). The Plaintiffs, for themselves and the class they propose to represent, sue Allstate for violations of the Employment Retirement Security Act of 1974 ("ERISA"). They seek equitable relief and attorney's fees based on violations of Allstate's fiduciary duties concerning its employees' and retirees' life insurance benefits. Plaintiffs set forth their facts below in a light most favorable to them as permitted. Fed. R. Civ. P. 12(b)(6).

Plaintiffs are Allstate retirees who dedicated their careers of over 26 years to Allstate. Amd. Compl. at ¶ 12-13. In exchange for this dedication, Allstate elected to provide and represented to Plaintiffs, that they would receive no cost life insurance benefits upon retirement. Amd. Compl. at ¶ 14. This benefit continued until on July 2, 2013, when Allstate made public its decision to cancel the benefit. Amd. Compl. at ¶ 23. Today, Plaintiffs are elderly and cannot afford to pay

current premiums and will be irreparably harmed as a result of Allstate's ERISA violations. Amd. Compl. at ¶ 26.

ERISA establishes "standards of conduct, responsibility, and obligation for fiduciaries . . . and … provide[s] [beneficiaries] appropriate remedies" in case of a breach of these duties. Jones v. Am. Gen. Life & Accident Ins. Co., 370 F.3d 1065, 1071 (11th Cir. 2004) (referencing 29 U.S.C. § 1132(a)(3)). Allstate breached its fiduciary duties to its employees and retirees by representing to them that their retiree life insurance benefits would be paid from their date of retirement until their death yet notifying them on July 2, 2013, that it would no longer provide this benefit. Amd. Complaint at ¶¶ 20 & 23. The Eleventh Circuit permits this suit under 29 U.S.C. § 1132(a)(3)) based on the facts alleged, namely a "pattern of misrepresentation that caused the [retirees] to believe that their insurance benefit would not be changed during their retirement." Jones, 370 F.3d at 1071-74.

Allstate attaches a "1991 Plan" alleging that it governs Plaintiff Kerr's retiree life insurance benefits and attaches a "1995 Plan" alleging that Plaintiffs Turner and Willingham's retiree life insurance benefits are governed by it. Docs. 23-1 & 23-2.[1] The 1991 Plan provides that Allstate "intends to continue the Plan indefinitely, but reserves the right to change, amend or terminate the Plan or the

[1] For the purposes of this motion, and prior to being served with discovery responses, the Plaintiffs will refer to these as the governing Plans but reserve the right to alter their position if discovery provides contradictory evidence.

provisions of the Plan at any time." Doc. 23-2 at 5. It also provides that "[t]his Retiree Life Insurance is provided at no further cost to [Plaintiffs]." Doc. 23-2 at 11. The 1995 Plan states that "[a]lthough Allstate intends to continue the Group Life … Plan, Allstate necessarily reserves the right to modify, amend, suspend, or terminate it at any time . . ." Doc. 23-1 at 5. It also provides that "Retiree Life Insurance is provided at no further cost to Plaintiffs." Doc. 23-1 at 15. The Plan's terms of perpetuity and intention with respect to retiree insurance – which are "intends to continue the Plan indefinitely, "no further cost to you," and "intends to continue" – are assurances of how Allstate would act in the future. Amd. Comp. at ¶¶ 14-18.

The Plans permitted Allstate two avenues to proceed, one whereby it would pay retirees insurance benefits for life (its stated intention) and one whereby it could cancel the benefits (not its stated intention). Docs. 23-1 at 5,15 & 23-2 at 5, 11. Allstate's fiduciaries made express oral and written representations consistent with the Plans' plain language expressing Allstate's intention to continue retiree life insurance benefits for their lifetime. Amd. Compl. at ¶¶ 20-22. The reversal occurred July 2, 2013.

Plaintiffs plead sufficient allegations and details that the persons who made representations to them were fiduciaries and that the written representations were drafted by Allstate's "Human Resources." Amd. Compl. at ¶ 20; Doc 19-1. It is

further alleged that these persons were acting in fiduciary capacities at the time. Amd. Compl. at ¶¶ 20-22.

Fiduciaries routinely reaffirmed to Plaintiffs the Plans' words of benefit perpetuity and even went so far as to represent in writing to Plaintiff Kerr that his "service and membership with [Allstate] entitles [him] to the amount of life insurance shown below" and that it "will remain at that figure without further contribution from [him]." Amd. Compl. at ¶ 22, Doc. 19-1. These representations became false, misleading, and a breach of Allstate's fiduciary duties on July 2, 2013, when the cancellation letter made them so. Amd. Compl. at ¶ 24. At that point, Allstate's representations became misrepresentations based upon it taking the alternative avenue provided in the Plans; that is, to cancel the benefits. Amd. Compl. at ¶ 24. Up to July 2, 2013, the Plaintiffs relied on these oral or written representations because those representations were consistent with the terms of perpetuity in the Plans, and specifically consistent with Allstate's expressly stated intention to continue the benefits for lifetime. Amd. Compl. at ¶ 24.

The Defendant seeks to convolute the fiduciary breach issue and persuade the Court that its fiduciaries' representations were always misleading to Plaintiffs. That is not so, as Plaintiffs have shown that the fiduciary representations were in fact consistent with the Plans' language until Allstate decided to make public on

July 2, 2013, its decision to cancel the Plaintiffs' long held and relied upon retiree life insurance benefits.

RULES OF DECISION

When ruling on a motion to dismiss, the court "accept[s] the allegations in the complaint as true and construe[s] them in the light most favorable to the plaintiff." Redland Co., Inc. v. Bank of Am. Corp., 568 F.3d 1232, 1234 (11th Cir. 2009). "To survive [a motion for] dismissal, the complaint's allegations must plausibly suggest that the plaintiff has a right to relief, raising that possibility above a speculative level; if they do not, the plaintiff's complaint should be dismissed." Id. (quoting James River Ins. Co. v. Ground Down Eng'g, Inc., 540 F.3d 1270, 1274 (11th Cir. 2008) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) (quotation marks omitted)).

"While Plaintiffs are not required to negate an affirmative defense in their complaint, an affirmative defense can serve as a basis for dismissal under Rule 12(b)(6). A Rule 12(b)(6) dismissal on statute of limitations grounds is appropriate only if it is apparent from the face of the complaint that the claim is time barred." Stargel v. SunTrust Banks, Inc., 2013 WL 4775918 at *6 (N.D. Ga. Aug. 7, 2013) (emphasis added) (quoting Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment CSX Trans. N. Lines v. CSX Transp., Inc., 522 F.3d 1190, 1194 (11th Cir. 2008)).

The Plaintiffs' causes of action arise under ERISA so federal substantive law controls and must be applied to determine whether, under Redland Co., Inc., ante, their allegations plausibly suggest a right to relief. Erie R.R. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817 (1938).

ARGUMENT

For the reasons below, the Amended Complaint passes the test of Fed. R. Civ. P. 12(b)(6), and the Defendant is not entitled to have Plaintiffs' Amended Complaint dismissed.

I. The Facts Alleged Plausibly Suggest a Right to Relief, Satisfying the Rule of Decision

ERISA was enacted "to protect…the interests of participants in employee benefit plans and their beneficiaries…by establishing standards of conduct, responsibility, and obligations for fiduciaries of employee benefit plans …and providing for appropriate remedies…and ready access to the Federal Courts." Jones v. Am. Gen. Life & Accident Ins. Co., 370 F.3d 1065, 1071 (11th Cir. 2004) (quoting Varity Corp. v. Howe, 516 U.S. 489, 513 (1996) (quoting ERISA § 2(b), 29 U.S.C. § 1001(b))).

a. Allstate Breached its Fiduciary duty under ERISA 502(a)(3)

ERISA requires plan fiduciaries to discharge their duties "solely in the interests of the participants and beneficiaries" and "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).

i. Allstate Acted as a Fiduciary when it Made Representations

The Defendant argues that Plaintiffs "do not allege that Messrs. Shepherd, Wilkerson and Pastereo were the Plans' fiduciaries." Doc. 24 at 23. This is blatantly false: "The promises and representations were made by Plaintiffs' superiors, managers, and plan administrators who were in seniority positions acting on behalf of the Allstate Plan administrator and as a fiduciary." Amd. Compl. at ¶ 20. Furthermore, Plaintiffs expressly allege that "William Gregg . . . [was] acting in a fiduciary capacity" at the time he made representations. Amd. Compl. at ¶ 20. On the face of the complaint, Plaintiffs plead sufficient allegations that Allstate breached their fiduciaries to suggest that the Plaintiffs have a right to relief.

ERISA defines "fiduciaries" to include persons identified as such in the plan, ERISA § 402(a), 29 U.S.C. § 1102(a), and persons who exercise any discretionary authority or responsibility concerning the management or administration of the plan. 29 U.S.C. § 1002(21)(A) .

> The weight of authority recognizes that the term "fiduciary" is to be liberally construed, a position that is consistent with the remedial purposes of ERISA. See In re Enron Corp. Sec., Derivative & ERISA Litig., 284 F. Supp. 2d 511, 544 (S.D. Tex. 2003), quoting Ariz. State Carpenters Pension Trust Fund v. Citibank, 125 F.3d 715, 720 (9th Cir. 1997), citing John Hancock Mut. Life Ins. v. Harris Trust & Sav. Bank, 510 U.S. 86, 96, 114 S. Ct. 517, 126 L. Ed. 2d 524 (1993), and quoting Mertens v. Hewitt Associates, 508 U.S. 248, 262, 113 S. Ct.

> 2063, 124 L.Ed.2d 161 (1993) ("'Fiduciary status under ERISA is to be construed liberally, consistent with ERISA's policies and objectives,' and is defined 'in functional terms of control and authority over the plan,…thus expanding the universe of persons subject to fiduciary duties-and to damages-under § 409(a).'")

Eslava v. Gulf Telephone Co., Inc., 418 F. Supp. 2d 1314, 1321-22 (S.D. Ala. 2006).

Employers that retain responsibility for administering their own benefit plans are considered fiduciaries under ERISA. Varity Corp. v. Howe, 516 U.S. 489, 498 (1996); Hamilton v. Allen-Bradley Co., Inc., 244 F.3d 819, 824-26 (11th Cir. 2001). The 1995 Plan provides that the "Employee Benefits Division Director" at "Allstate Insurance Company" is the "Plan Administrator" and "fiduciary." Doc 23-1 at 4. In addition to the "Plan Administrator," other "Plan fiduciaries shall have discretionary authority to interpret the terms of the Plan." Doc 23-1 at 4 (emphasis added). It does not further define who other "Plan fiduciaries" are. Doc 23-1 at 4. Allstate, by its own Plan language, retains responsibility as a fiduciary over the Plans and accordingly is considered a Plan fiduciary under ERISA.

Employers act in a fiduciary capacity when communicating with employees about plan benefits. Varity, 516 U.S. at 502-03; Hamilton, 244 F.3d at 827; In re Unisys Corp. Retiree Medical Benefit "ERISA" Litig., 57 F.3d 1255, 1261, n. 10 (3d Cir. 1995); McMunn v. Pirreli Tire, LLC, 161 F. Supp. 2d 97, 129-30 (D.

Conn. 2001). Plaintiffs sufficiently plead in numerous places that the Allstate employees who made representations to them interpreting the Plans were acting in a fiduciary capacity. Amd. Compl. at ¶¶ 12, 13, & 20-22. They meet their 12(b)(6) burden, and more, by naming Allstate employees in seniority positions who are alleged to have communicated to Plaintiffs about the Plans and exerted management and administration over it as fiduciaries. Amd. Compl. at ¶¶ 20-22.

ii. Allstate's Representations were Consistent with the Plans until July 2, 2013, when Plaintiffs Actually Learned They Were Misrepresentations

Throughout Plaintiffs' Allstate tenure, they were told that their retiree life insurance benefits would continue for their lifetime from the date of their retirement. Amd. Compl. at ¶¶ 20-22. The Plans' words of perpetuity and intention, "no further cost to you," "indefinitely," and "intends to continue" were assurances of how Allstate would act in the future with respect to Plaintiffs' retiree life insurance benefits. Amd. Comp. at ¶¶ 14-18. These representations, at the times made, were not false but rather Allstate fiduciaries' interpretations and expressions of Allstate's intention and plan. Plaintiffs relied upon these statements. Amd. Comp. at ¶ 27.

The July 2, 2013, letter from Allstate's Executive Vice President, communicating information in a fiduciary capacity, effectively terminated the promised retiree life insurance benefits and made all prior representations

misrepresentations. It was on this date that the breach of fiduciary duties became known.

An ERISA plan fiduciary's "responsibility when communicating with the beneficiary encompasses more than merely a duty to refrain from intentionally misleading a beneficiary. ERISA administrators have a duty not to misinform employees through material representations and incomplete, inconsistent or contradictory disclosures." Griggs v. E.I. Dupont De Nemours & Co., 237 F.3d 371, 380 (4th Cir. 2001) (citation and internal quotations omitted). Allstate's prior representations of perpetual life insurance benefits and its July 2, 2013, Plans' informational letter are contradictory. The earlier representations interpreted the Plans and informed Plaintiffs of Allstate's intention to continue their benefits forever; the July 2, 2013, letter effectively made those earlier representations incomplete, inconsistent, and misrepresentations.

iii. Allstate's Breach of its Fiduciary Duties under ERISA § 502(a)(3) Warrants Plaintiffs' Requested Equitable Relief

ERISA § 502(a)(3) authorizes awards of "appropriate equitable relief" to plan participants and beneficiaries who rely to their detriment on inaccurate information from plan fiduciaries about plan benefits. Jones, 370 F. 3d at 1071-74. Section 502(a)(3) is a "catchall" provision and was to "act as a safety net, offering appropriate equitable relief for injuries caused by violations [of ERISA] that § 502 does not elsewhere adequately remedy." Varity, 516 U.S. at 512, 515. Plaintiffs

relied to their detriment on Allstate's representations that became misrepresentations on July 2, 2013. Jones specifically, if narrowly, permits these Plaintiffs to sue under 502(a)(3) based on the facts alleged, namely a "pattern of misrepresentation that caused the [retirees] to believe that their insurance benefit would not be changed during their retirement." 370 F.3d at 1071-74.

An injunction enforcing a plan fiduciary's representation to plan participants about their benefits constitutes "appropriate equitable relief" under ERISA. Unisys, 57 F.3d at 1269 (holding retirees' claims for "an injunction ordering specific performance of the assurances Unisys made…are restitutionary in nature and thus equitable."); Gregg v. Transportation Workers of Am . Int'l, No. 1 :99-CV-02659-PAG, Memorandum of Opinion and Order, pp . 6-10 (M.D . Tenn . June 24, 2004) (holding that an order requiring the defendants to provide the plaintiffs the coverage they had been promised constituted "appropriate equitable relief") (citing Brown v. Aventis Pharmaceuticals, Inc., 341 F.3d 822 (8th Cir. 2003)). The Plaintiffs are entitled to relief for Allstate's breach and specific performance restoring Allstate's promised and intended retiree benefits is due.

A fiduciary's duty of disclosure entails not only a negative duty not to misinform, but also an affirmative duty to inform when it knows that silence might be harmful. Unisys, 57 F.3d at 1262; James v. Pirelli Armstrong Tire Corp., 305 F.3d 439, 452 (6th Cir. 2002). In this action, Allstate was required to not only

provide accurate information concerning the Plans but also inform its employees of its intentions, as stated in the Plans, to continue in perpetuity retiree life insurance benefits at no cost were inaccurate. It failed to do that and violated ERISA when it sent the July 2, 2013, letter that made Allstate's earlier representations false and misleading. This affirmative duty was breached and entitles Plaintiffs to equitable relief.

II. ERISA's Statute of Repose Began to Run Only in July 2013, When Allstate's Actions Created Misrepresentations

"While Plaintiffs are not required to negate an affirmative defense in their complaint, an affirmative defense can serve as a basis for dismissal under Rule 12(b)(6). A Rule 12(b)(6) dismissal on statute of limitations grounds is appropriate only if it is apparent from the face of the complaint that the claim is time barred." Stargel v. SunTrust Banks, Inc., 2013 WL 4775918 at *6 (N.D. Ga. Aug. 7, 2013) (emphasis added) (quoting Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment CSX Trans. N. Lines v. CSX Transp., Inc., 522 F.3d 1190, 1194 (11th Cir. 2008)).

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, or
>
> (2) three years after the earliest date on which the plaintiff had actual knowledge of 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.

29 U.S.C. § 1113.

a. ERISA's Three Year Limitation Period and Actual Knowledge Apply to Plaintiffs' Claims

The face of the Amended Complaint sufficiently pleads facts that do not give rise to dismissal based upon ERISA's Statute of Repose. Allstate's contention that "[t]he relevant events here occurred decades ago," barring the suit under the six-year repose limitation of 29 U.S.C. § 1113, Doc. 24 at 11, is wishful thinking. It ignores the full text of the repose period which states that the repose period is triggered from the "earlier of" (a) "the last action which constituted a part of the breach," id. at § 1113(1), for which six years is the limitation, or (b) the plaintiff's "actual knowledge" of the breach, for which a shorter limitation of three years is fixed, id. at § 1113(2). Here, as in other cases, the Plaintiffs' actual knowledge of the lost benefit is the earliest event, making the three-year limit of § 1113(2) the time bar.

This published Seventh Circuit decision demonstrates that conclusion:

> Suppose the employer says: "Your job ends 12 months from today; start looking for work." Does the statute of limitations begin to run immediately, or does the claim accrue only when the paychecks stop? Under Delaware State College v. Ricks, 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980), and Chardon v. Fernandez, 454 U.S. 6, 102 S.Ct. 28, 70 L.Ed.2d 6 (1981), it begins on the date the employee learns about the adverse decision-when the federal law was (or was not) violated-rather than when the financial consequences of the decision are felt. If the employer allows an appeal of the decision, as many do (arbitration under collective bargaining agreements, or appeals by faculty to college presidents), the time to sue is unaffected-for failure to correct a violation of federal law is not itself a violation of that law. Lever v. Northwestern University, 979 F.2d 552 (7th Cir.1992). Cf. Moskowitz v. Purdue University, 5 F.3d 279 (7th Cir. 1993).
>
> Well, that's the position Librizzi was in. He received bad advice in July 1990, which may have led to a bad decision in January 1991; he learned no later than October 1991 that he could have done better financially, but the employer refused to make amends. The "breach or violation" for purposes of § 1113(2) was the bad advice in July 1990, or (most favorably to Librizzi) the failure to provide accurate information in time to affect the irrevocable election made in January 1991. Actual knowledge in October 1991 started the three-year period of § 1113(2).

Librizzi v. Children's Mem'l Med. Ctr., 134 F.3d 1302, 1306-07 (7th Cir. 1998). Other appellate courts take that same approach. Landwehr v. DuPree, 72 F.3d 726, 732 (9th Cir. 1995) ("We now expressly hold that the limitations period in an ERISA action begins to run on the date that the person bringing suit learns of the

breach or violation."). Three years have not passed since the Plaintiffs received the July 2, 2013, letter, so the suit is not time barred.

These additional published appellate decisions support the conclusion:

> It is difficult to say in the abstract precisely what constitutes "actual knowledge" of a "breach or violation." As the DOL correctly insists, actual knowledge must be distinguished from constructive knowledge. "'To charge [plaintiff] with actual knowledge of an ERISA violation, 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.'" Radiology Center, S.C. v. Stifel, Nicolaus & Co., 919 F.2d 1216, 1221 (7th Cir.1990) (quoting Brock v. Nellis, 809 F.2d 753, 755 (11th Cir.), cert. dismissed, 483 U.S. 1057, 108 S.Ct. 33, 97 L.Ed.2d 821 (1987)).

Martin v. Consultants & Administrators, Inc., 966 F.2d 1078, 1086 (7th Cir. 1992); Accord Edes v. Verizon Commc'ns, Inc., 417 F.3d 133, 142 (1st Cir. 2005) ("We also agree that there cannot be actual knowledge of a violation for purposes of the limitation period unless a plaintiff knows the essential facts of the transaction or conduct constituting the violation. Martin, 966 F.2d at 1086. And, like the Martin court, we recognize that determining the meaning of complex transactions may take some time; mere knowledge of facts indicating that something was awry does not always mean there is actual knowledge of a violation. Id. (quoting Radiology Ctr., S.C. v. Stifel, Nicolaus & Co., 919 F.2d 1216, 1221 (7th Cir.1990)." (internal quotation marks omitted)).

b. Allstate's Position is Wrong and Contrary to Law

Allstate wields 29 U.S.C. § 1113 as a sword, or tries to use it in that manner, contrary to the purpose of that section of ERISA. "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. Thus, Congress evidently did not desire that those who violate that trust could easily find refuge in a time bar." Brock v. Nellis, 809 F.2d 753, 754 (11th Cir. 1987). Jurisdictional trial courts apply that principle. "A fiduciary who violates the trust placed in him by the Plan will not easily find protection from a time bar." Useden v. Acker, 734 F. Supp. 978, 980 (S.D. Fla. 1989) aff'd, 947 F.2d 1563 (11th Cir. 1991) (citing Brock, 809 F.2d at 754). Accord Dist. 65 Ret. Trust for Members of Bureau of Wholesale Sales Representatives v. Prudential Sec., Inc., 925 F. Supp. 1551, 1560 (N.D. Ga. 1996) ("As the plaintiffs in this action, it is appropriate to ascertain when the current trustees had actual knowledge of the breach of fiduciary duties. . . Moreover, this is in keeping with the policy of ERISA evidenced by § 1113 to prevent fiduciaries who have breached their duties to the plan and the participants from escaping liability."). Allstate's position subverts the principle and should be rejected.

Its argument defies common sense and a plain reading of § 1113, also contrary to jurisdictional precedent. Allstate ignores (of necessity) the words of §

1113 that plainly state that the time limitations set forth run from the earlier of "the last action which constitutes a part of the breach" or the plaintiff's "actual knowledge" of the breach. The last action here is the letter on July 2, 2013, and the Plaintiffs' actual knowledge of the breach is their receipt of the letter. So, the limitation provision that applies is the three-year limit set by § 1113(2), and their suit is timely under it.[2]

Allstate's elaborate, cobbled-together formulation of a contrary conclusion ignores and defies the foregoing plain words of § 1113. The Defendant fails even to acknowledge § 1113(2). The Eleventh Circuit rejects such an approach. It requires the clear words of the statute to be applied with their plain meaning, no more and no less:

> We have no license to assume that Congress did not mean what it said in § 547(c)(1)(B), but we are instead bound to assume that it meant exactly what it said. See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6, 120 S.Ct. 1942, 1947, 147

[2] The suit is timely under § 1113(1) as well, because, as shown, the July 2, 2013, letter is the last action which is part of the breach, and six years have not run since. See e.g., Larson v. Northrop Corp., 21 F.3d 1164, 1171 (D.C. Cir. 1994) ("In keeping with Ziegler, Gluck, and Murata, we find that the last action that constituted a part of Northrop's purported breach of fiduciary duties under 29 U.S.C. § 1104(a) occurred on December 21, 1981, when Northrop purchased the allegedly deficient group annuity contract from Principal in substitution for the plan it had terminated. There was no further action left to be taken by way of completing the alleged breach." (emphasis added)). The exposition in Larson, ante, and the authorities it is based on are far more persuasive than Allstate's primary published authority on § 1113(1), which is the non-jurisdictional district court decision Fulghum v. Embarq Corp., 938 F. Supp. 2d 1090 (D. Kan. 2013).

> L.Ed.2d 1 (2000) ("[W]e begin with the understanding that Congress says in a statute what it means and means in a statute what it says there .... [W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." (citations and internal quotation marks omitted)); United States v. LaBonte, 520 U.S. 751, 757, 117 S.Ct. 1673, 1677, 137 L.Ed.2d 1001 (1997) ("We do not start from the premise that this language is imprecise. Instead, we assume that in drafting this legislation, Congress said what it meant."); see also United States v. Fisher, 289 F.3d 1329, 1338 (11th Cir.2002) ("The plain language is presumed to express congressional intent and will control a court's interpretation.").

In re Hedrick, 524 F.3d 1175, 1186-87, amended on reh'g in part, 529 F.3d 1026 (11th Cir. 2008).

c. Allstate's Argument that the Six Year Limitation Period has Run is Flawed because the Last Action Occurred on July 2, 2013.

In the event that the Court gives weight to Defendant's six year limitation period argument, there exist factual questions concerning when Allstate made misrepresentations to Plaintiffs and the Court must take the Plaintiffs allegations in the Amended Complaint as true, construing them in a light most favorable to them. Redland Co, 568 F.3d at 1234. Defendant argues that the "misrepresentations" Plaintiffs allege occurred more than six years ago and that they were the triggering event for ERISA's six year limitation period. Doc. 24 at 10 & 13. It goes further, arguing that the "relevant events here occurred decades ago." Doc. 24 at 11. Plaintiffs disagree and the Amended Complaint clearly alleges otherwise.

Allstate's fiduciaries' representations to Plaintiffs, some of which occurred more than six years ago, were consistent with the Plans and were interpretations of the Plans that were corroborated by the Plans' language. Amd. Compl. at ¶ 19-23. In direct contradiction to Defendant's argument in Doc. 24 at 10, Plaintiffs plead that some representations were made "even during retirement," which is necessarily more recent than "17 years ago" as Defendant argues, and that they relied on them. Amd. Compl. at ¶ 20.

Most importantly, it was not until July 2, 2013, that Allstate's public announcement of its changed intentions created misrepresentations that were the "last action which constituted a part of the breach." ERISA § 413. There was no breach of a fiduciary duty until the representations became misrepresentations as a result of Allstate's decision to cancel its retiree life insurance benefits in contradiction to what it previously represented as benefits of perpetual existence.

The Plaintiffs do not dispute that they 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 v. Reynolds Metals Co., 219 Fed. Appx. 910, 916-17 (11th Cir. 2007) (unpublished). However, what they do dispute is the Defendant's mischaracterization of the plain language of the Amended Complaint which alleges that Allstate's representations

did not become misrepresentations which trigger that limitation period until July 2, 2013. Amd. Compl. at ¶ 23.

Defendant relies heavily on the Fulgham case, a District of Kansas case which is distinguishable from the instant case and without precedential value. 938 F. Supp. 2d 1090. Firstly, Defendant fails to mention that the Fulgham opinion concerns a defendants' motion for summary judgment, and not a motion to dismiss, as is before the Court in the instant case. Id. at 1097-98. The Fulgham court also declined to enter summary judgment on statute of limitations grounds against plaintiffs Barnes and Dillon because there were factual questions concerning when misrepresentations were made to them. Id. at 1123. There are factual questions on the face of the Amended Complaint which preclude the granting of Defendant's motion to dismiss. Finally, the Fulgham plaintiffs did not argue, as the Plaintiffs do here, that no cause of action accrued until the employer took an action which transformed its prior representations into misrepresentations. There was no breach in the instant case until Allstate's July 2, 2013, actions created one. Amd. Compl. at ¶ 23.

The Defendant also relies on the unreported Spangler case, dealing with the calculation of pension benefits. Doc. 24 at 16 (citing Spangler v. Altec Int'l Ltd. Part., 1999 WL 66189 (7th Cir. Feb. 9, 1999)). Spangler's facts are inapposite to Plaintiffs'. The plaintiffs in Spangler, unlike the instant Plaintiffs, were employees

who were transferred between two entities that did not appear to have Plans defining the calculation of their benefits if transferred. Spangler, 1999 WL at *1-2.

For years, the Spangler plaintiffs were promised a favorable calculation method without reference to a plan that contained any consistent language. More than six years prior to bringing their suit, the Spangler plaintiffs were provided a Plan that expressly disclaimed the employer's prior statements concerning the calculation of benefits. Id. at *2. The Spangler court found that the limitation period had run . Id. at *2. In the instant case, the Plaintiffs clearly pled facts that show Defendant's representations until July 2, 2013, were consistent with its long existing Plans. If this Court considers Spangler's holding, then it should take the July 2, 2013, date as the date on which the six year limitation period begins to run as that is the date on which Allstate disclaimed its prior representations and the "last action which constituted a part of the breach." See id. at *3.

III. The Particularity Requirement of Fed. R. Civ. P. 9(b) Does Not Apply, But If Particularity Is in Order, the Plaintiffs Should Be Allowed to Add It

No count of fraud is asserted by the Plaintiffs. Allstate's decision last year to cancel Plaintiffs' insurance in the future establishes the falsity of prior representations on that subject, according to the Plaintiffs. The circumstances are pled specifically, consistent with Fed. R. Civ. P. 9(b). The falsity may be averred generally and is not subject, according to the plain language of Fed. R. Civ. P. 9(b),

to the particularity requirement of the rule. It states: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Id. (emphasis added).

But if more particularity is in order, the Plaintiffs should be allowed to amend its Amended Complaint to add it. That is the general rule of the case law, specifically applied when, as here, the pleader has not already amended in a bid to cure deficiencies found by the court. See 5A Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure Civ. 3d ed. § 1300 (2004) ("Consequences of Failing to Plead Fraud or Mistake With Particularity").

IV. The Plaintiffs' Request Leave to Amend If Further Allegations Are Necessary.

The Plaintiffs maintain, for the reasons given, that their pleading passes Rule 12(b)(6) muster. However, should this Court decide that Rule 9(b) applies and greater particularity is in order or that the present pleading falls short for some other reason, the Plaintiffs expressly request leave to re-plead. Such leave would honor the liberal allowance of Rule 9(b) explained in Federal Practice and Procedure Civ. 3d ed., ante, and it would fit within the more general allowance which operates. That allowance is this: "Ordinarily, a party must be given at least one opportunity to amend before the district court dismisses the complaint."

Corsello v. Lincare, Inc., 428 F.3d 1008, 1014 (11th Cir. 2005). The "one opportunity" referred to means amendment to cure specific deficiencies. Bryant v. Dupree, 252 F.3d 1161, 1163-64 (11th Cir. 2001) (cited in Corsello, ante).

A motion for leave or an express request, as made here, suffices to invoke the allowance. See Wagner v. Daewoo Heavy Indus. Am. Corp., 314 F.3d 541, 544-45 (11th Cir. 2002) (trial court not required to grant leave to amend if plaintiff has not moved to amend or requested leave to amend). The allowance should not prejudice the Defendant -- indeed the parties propose it. Doc. 26 at 6-7 ("Plaintiffs should be allowed until 30 days after the Court's decision on the Defendant's pending motion to dismiss, Doc. 23, to join additional parties and otherwise amend their complaint.").[3]

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendant's motion to dismiss the Amended Complaint.

[3] Additionally, the Plaintiffs are prepared to file a motion for leave to amend, if necessary, pursuant to Local Rule 15.1, to meet the requirements of Rule 9(b) or otherwise state such allegations necessary to proceed. Because Local Rule 15.1 requires a copy of the amended pleading to be filed before leave is granted, it behooves the Plaintiffs to learn first if Rule 9(b) applies to their claims or if other allegations are necessary for their counts to pass muster.

BY: /s Taylor C. Bartlett

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CERTIFICATE OF SERVICE

I certify that on January 10, 2014, a copy of the foregoing was filed with the Clerk of Court using the CM/ECF system, which will send notice of such filing to the following counsel of record:

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