No. 08-1532-cv(L)

No. 08-1534-cv(CON)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

April H. YOUNG, Alonzo Young, Michael Matthews, Rick A. Jennings, and Mary M. Brewer, individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,
v.
GENERAL MOTORS INVESTMENT MANAGEMENT CORPORATION, State Street Bank and Trust Company,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF *AMICI CURIAE* OF
AMERICAN BENEFITS COUNCIL AND
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA
IN SUPPORT OF DEFENDANTS-APPELLEES
URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *Amici* hereby certify that the American Benefits Council (the "Council") and the Chamber of Commerce of the United States of America (the "Chamber") are associations and have no parent corporations. No publicly held corporation owns any part of the Council or the Chamber.

Dated: July 24, 2008

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AMERICAN BENEFITS COUNCIL

CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA

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INTEREST OF THE *AMICI*

The American Benefits Council (the "Council") is a broad-based non-profit organization dedicated to protecting and fostering privately-sponsored employee benefit plans. The Council's approximately 270 members[1] are primarily large U.S. employers that provide employee benefits to active and retired workers. The Council's membership also includes organizations that provide services to employers of all sizes regarding their employee benefit programs. Collectively, the Council's members either directly sponsor or provide services to retirement and health benefits plans covering more than 100 million Americans.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of over three million businesses, state and local chambers of commerce, and professional organizations of every size, in every industry sector, and from every region of the country. Thousands of the Chamber's members sponsor ERISA defined contribution plans and will, therefore, be affected by the Court's decision on the statute of limitations issue.

The Council and the Chamber limit their *amicus* participation to cases that are of great significance for their member companies. This is such a case. The

[1] A full list of the Council's members is available at the Council's website, www.americanbenefitscouncil.org.

Council and the Chamber have a strong interest in this case because of its significance to employers and employees. As discussed below, under the rule proposed by Plaintiffs-Appellants and the Secretary of Labor, the three-year statute of limitations under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), would effectively be repealed with respect to claims regarding the prudence of an investment option. This is because, under their proposed rule, the statute of limitations could never run on a fiduciary breach claim based on investment options currently offered, regardless of when the decisions regarding those options were made and communicated to participants and beneficiaries. Such a rule would clearly have a very adverse effect on the entire defined contribution plan system. The greatest victims of this rule would be the millions of Americans who rely on the defined contribution plan system for their retirement security. For these reasons and others discussed herein, this case is of great interest to the Council and the Chamber, and to their member companies.

The Council and the Chamber respectfully submit to the Court this *amici curiae* brief pursuant to Federal Rule of Appellate Procedure 29. All parties have consented to the filing of this *amici curiae* brief, subject to the conditions set forth in the accompanying motion for leave to file a brief out of time as *Amici Curiae*.

SUMMARY OF ARGUMENT

The issue before the Court is whether the district court was correct in holding that Plaintiffs-Appellants' claims for breach of fiduciary duty under ERISA section 502(a)(2) were time-barred under the three-year statute of limitations of section 413(2) of ERISA. Such claims related to "single equity" funds and certain Fidelity funds (collectively "Plan Funds") disclosed to participants in certain defined contribution plans sponsored by General Motors Corporation and Delphi Corporation (collectively the "Plans") more than three years before the complaints in this case were filed. For the reasons set forth in the briefs submitted to the Court by Defendants-Appellees, and for the reasons set forth herein, the district court's judgment should be affirmed.

Section 413 of ERISA provides, in part, that "[n]o action may be commenced … with respect to a fiduciary's breach … or violation … after the earlier of" (i) six years after the date of the last action which constituted a part of the alleged breach or violation ("six-year statute of limitations"), or (ii) three years "after the earliest date on which the plaintiff had actual knowledge of the breach or violation" ("three-year statute of limitations"). 29 U.S.C. § 1113.

As discussed below, Plaintiffs-Appellants and the Secretary of Labor would effectively repeal the three-year statute of limitations for claims regarding the prudence of an investment option. Thus, every plan in the country would be

vulnerable to lawsuits based on its current investment menu regardless of when the decisions regarding that menu were made and communicated to participants and beneficiaries.

Contrary to Plaintiffs-Appellants' assertions and those of the Secretary of Labor:

- ERISA's three-year statute of limitations begins when a claimant has knowledge of facts sufficient to constitute a claim. That does not mean that a claimant must have analyzed all such information and be fully prepared to file a lawsuit. Otherwise, there would be no statute of limitations at all.

- If an employer fully discloses all relevant facts to a participant, a participant cannot avoid the running of the three-year statute of limitations by not reading the disclosure. That would reward the wrong behavior and again effectively repeal the statute of limitations.

- The failure to cure an alleged breach is not a new breach every day; if it were, the statute of limitations would be kept open forever.

- Plaintiffs are not allowed to circumvent ERISA's three-year statute of limitations through incomplete pleading. If a plaintiff could avoid

> dismissal by simply omitting all facts regarding the timing and origin of the alleged breach, the legal system and the defined contribution plan system would suffer a great injustice.

Where a plan sponsor makes a clear disclosure regarding plan investment options in accordance with all applicable laws, the statute of limitations with respect to those options commences at that time. Under the contrary rules proposed by Plaintiffs-Appellants and the Secretary of Labor, defined contribution plans would be vulnerable every day with respect to decisions made long ago**.** That would be a sad state of affairs for all involved, including the millions of participants and beneficiaries who rely on the defined contribution plan system for their retirement security.

ARGUMENT

I. The District Court's Ruling That the Three-Year Statute of Limitations Bars Plaintiffs' Claims Should Be Affirmed.

The district court in this case held that Plaintiffs-Appellants' claims were barred by ERISA's three-year statute of limitations. Specifically, section 413 of ERISA provides, in part, that "[n]o action may be commenced . . . with respect to a fiduciary's breach . . . or violation . . . after the earlier of" (i) six years after the date of the last action which constituted a part of the alleged breach or violation ("six-year statute of limitations"), or (ii) three years "after the earliest date on which the plaintiff had actual knowledge of the breach or violation" (three-year statute of limitations). 29 U.S.C. § 1113.

Both Defendants-Appellees – General Motors Investment Management Corporation ("GMIMCo") and State Street Bank and Trust Company ("State Street") – have explained in detail why the district court's ruling was rightfully decided based on clear legal precedent. The Council and Chamber write separately to address the importance of following this precedent.

A. Statutes of Limitations Are Not Mere "Technicalities," and Are "Fundamental to a Well-Ordered Judicial System."

Statutes of limitations serve several important policies, including rapid resolution of disputes, repose for those against whom a claim could be brought,

and avoidance of litigation involving lost evidence or distorted testimony of witnesses. *See Carey v. IBEW Local 363 Pension Plan*, 201 F.3d 44, 47 (2d Cir. 1999) (*citing Wilson v. Garcia*, 471 U.S. 261, 271 (1985)). Statutes of limitations are especially important with respect to ERISA retirement plans because plan sponsors need reasonable certainty and predictability to ensure the consistent and ongoing administration of their retirement plans. *See Wright v. Heyne*, 349 F.3d 321, 330 (6th Cir. 2003).

The Supreme Court of the United States has spoken repeatedly regarding the critical role of statutes of limitations. According to the Court, the length of a limitations period for instituting suit in federal court "inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975). For these reasons, statutes of limitations "are not to be disregarded by the courts out of a vague sympathy for particular litigants." *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984) (per curiam). Moreover, "[s]tatutes of limitations are not simply technicalities"; to the contrary, "they have long been respected as fundamental to a well-ordered judicial system." *Bd. of Regents of Univ. of State of N.Y. v. Tomanio*, 446 U.S. 478, 487 (1980). Thus, strict adherence to such

limitations periods "is the best guarantee of evenhanded administration of the law." *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980).

B. This Case Demonstrates the Need For a Meaningful Statute of Limitations with Respect to ERISA Retirement Plans.

The law, as outlined in convincing fashion in the briefs authored by Defendants-Appellees GMIMCo and State Street, clearly supports the judgment of the district court in this case. Moreover, if the judgment of the district court is not affirmed, this case could have very troubling effects on the private retirement plan system – a system which is relied upon by millions of American families.

1. State of the Defined Contribution Plan System.

Very recently, sponsors of defined contribution plans[2] have been identified as targets for a series of lawsuits regarding the prudence of the investment options offered to participants. One law firm in particular has taken out ads seeking

[2] In general, there are two types of retirement plans: defined contribution plans and defined benefit plans. In a defined contribution plan, each participant has an account to which contributions and actual plan earnings or losses are allocated. A section 401(k) plan is a type of defined contribution plan. It is quite common today for defined contribution plans to permit participants to direct the investment of their own accounts among a menu of investment options offered by the plan.

A defined benefit plan is any retirement plan that is not a defined contribution plan. Generally, under defined benefit plans, the plan promises a specific benefit and the sponsoring employer is responsible for ensuring that the plan has sufficient assets to pay the benefits. Thus, the employer bears the risk of investment losses. Investments under a defined benefit plan are directed by a plan fiduciary, not by the participants.

plaintiffs to sue major companies across the country.[3] Naturally, the firm has found willing plaintiffs with respect to a number of companies.[4] At least certain lawsuits filed on behalf of these individuals appear to include boilerplate language and conclusory allegations.[5] This could be suggestive of lawsuits that are fishing

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[3] *See, e.g.*, Advertisement, *Attention Bechtel Employees and Retirees*, Santa Monica Times, Aug. 15, 2006, at 6 ("If you are a retiree or a current participant in Bechtel's 401K plan, we would like to speak with you about your benefits."); Advertisement, *Attention McDonough Power*, McDonough County This Week, Oct. 23, 2006, at 11 ("If you are a retiree or a current employee of McDonough Power, and participate in the 401k Plan, we would like to speak with you about your benefits."); Advertisement, *Attention: Scientific Atlanta*, Metro Silicon Valley, Jan. 10-16, 2007, at 86 ("We are representing employees in matters involving other 401k plans. If you are a current participant in the Cisco Systems 401k plan we would like to speak to you[.]"); Advertisement, *Attention Amgen, Inc. Retirees*, Santa Monica Daily Press, Nov. 24, 2006, at 5 ("If you are a retiree or a current participant in Amgen, Inc.'s 401k plan, we would like to speak to you about your benefits.").

[4] *See, e.g.*, *Kanawi v. Bechtel Corp.*, No. 3:07-cv-05566-CRB (N.D. Cal. Sept. 11, 2006); *Renfro v. Unisys Corp.*, No. 2:07-cv-02098-BWK (E.D. Pa. Dec. 28, 2006) (formerly No. 2:06-cv-08268-FMC-FFM (C.D. Cal.)); *Kennedy v. ABB, Inc.*, No. 2:06-cv-04305-NKL (W.D. Mo. Dec. 29, 2006); *Taylor v. United Tech. Corp.*, No. 3:06-cv-01494 (D. Conn. Sept. 22, 2006); *Abbott v. Lockheed Martin Corp.*, No. 06-701-MJR (S.D. Ill. Sept. 11, 2006).

[5] *See, e.g.*, Second Amended Complaint, at ¶ 84, *Hecker v. Deere & Co.*, 496 F. Supp. 2d 967 (W.D. Wis. 2007) (No. 06-C-0719-S); Complaint, at ¶ 80, *Renfro v. Unisys Corp.*, No. 2:07-cv-02098-BWK (E.D. Pa. Dec. 28, 2006) (formerly No. 2:06-cv-08268-FMC-FFM (C.D. Cal.)) (each containing the following passage: "participants and beneficiaries of the [p]lans have been charged fees and expenses that include monies with which to make [r]evenue [s]haring payments"). *See also* Complaint, at ¶ 79, *Kennedy v. ABB, Inc.*, No. 2:06-cv-04305-NKL (W.D. Mo. Dec. 29, 2006); Complaint, at § 103, *Taylor v. United Tech. Corp.*, No. 3:06-cv-01494 (D. Conn. Sept. 22, 2006) (each containing a similar passage to the one contained in the *Deere* and *Renfro* complaints).

expeditions, based less on actual facts and more on the hope that companies will settle in lieu of going through an expensive discovery and trial process.

In fact, in this case, despite their initial pleadings regarding "per se" fiduciary violations, Plaintiffs-Appellants are now saying they have no idea whether a breach has in fact occurred, over a year after their suit was filed. Notably, in their own brief before this Court, Plaintiffs-Appellants state:

> [T]he focus of a fiduciary breach claim is on the process employed by fiduciaries to select investments. That process was and remains unknown to Plaintiffs.

Br. of Pls.-Appellants at 11. This admission by Plaintiffs-Appellants could be read to suggest that this suit is also nothing more than a fishing expedition. Plaintiffs-Appellants had knowledge of all of the needed facts years ago, but despite years of opportunity, they still have no evidence of wrongdoing.

This suit, and those referred to above, reflect a very disturbing trend for employers who sponsor defined contribution plans. The private retirement system is a voluntary system; accordingly, no company is required to maintain a plan. *See Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833 (2003) (stating that "nothing in ERISA requires employers to establish employee benefit plans" and when they do "employers have large leeway to design ERISA plans as they see fit"); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983) (stating that "ERISA does not mandate that employers provide any particular benefits"). Because of the

overly complex set of rules applicable to defined benefit plans (pursuant to ERISA and other applicable laws), however, and the potential liabilities for plans and the employers that maintain such plans, the defined benefit plan system has been in a long and disturbing decline, as fewer and fewer employers choose to maintain such plans. *See* U.S. Dep't. of Labor Employee Benefits Sec. Admin., *Private Pension Plan Bulletin Historical Tables* 1 tbl.1 (Feb. 2008) (indicating that the number of defined benefit plans has decreased from 170,172 in 1985 to 47,614 in 2005).

Recently, the Council and the Chamber have begun to hear concerns from member companies regarding the costs and potential liabilities associated with defined contribution plans. It is possible that because of the recent wave of lawsuits, we are at a crossroads with respect to the future of the defined contribution plan system. If that is so, the greatest victims will be the millions of Americans who rely on the private retirement plan system for their retirement security.

The above description of the current state of the defined contribution plan system is not presented here to try to persuade this Court to change the law. On the contrary, we present the above as evidence of the critical need to enforce the law as it is. This is not the time to expand the statute of limitations to make all plans vulnerable to lawsuits in search of a settlement.

We say this because the defined contribution plan system envisioned by Plaintiffs-Appellants and the Secretary of Labor (the "Secretary") is a very disturbing one that was never contemplated by Congress when it created ERISA. As discussed below, the Plaintiffs-Appellants and the Secretary would effectively repeal the three-year statute of limitations with respect to claims regarding the prudence of an investment option.

2. Plaintiffs-Appellants and the Secretary of Labor Would Clearly Repeal ERISA's Three-Year Statute of Limitations with Respect to Claims Regarding the Prudence of an Investment Option.

Both Plaintiffs-Appellants and the Secretary state that in order to have "actual knowledge" of a fiduciary breach, a plaintiff must have "knowledge of *all* facts necessary to constitute a claim." Br. of Pls.-Appellants at 13-14 (*quoting Caputo v. Pfizer, Inc.*, 267 F.3d 181, 193 (2d Cir. 2001) (internal quotations omitted)); *see also* Br. for Secretary of Labor as *Amicus Curiae* Supporting Petitioners at 7. This "could include necessary opinions of experts, knowledge of a transactional harm consequence, or even actual harm." *See* Br. of Pls.-Appellants at 11-12.

Although Plaintiffs-Appellants and the Secretary accurately quote from the Second Circuit's decisions in *Caputo* and *Frommert v. Conkright*, 433 F.3d 254, 272-73 (2d Cir. 2006), they dramatically misapply the holdings in those two cases. Specifically, under the rule supported by Plaintiffs-Appellants, in order to have

actual knowledge, a claimant must not only know all the facts sufficient to constitute a claim, but must also have fully analyzed such facts and be prepared to go to court.

For example, Plaintiffs-Appellants' brief contains a long discussion of the need for a claimant to have applied Modern Portfolio Theory, to have understood compensated and uncompensated risk, and to have estimated "means, variances, and covariances of stocks by a combination of statistical analysis and security analyst judgment." Br. of Pls.-Appellants at 22 (*quoting* W. Scott Simon, *The Prudent Investor Act: A Guide to Understanding* 38 (2002) (*quoting* Harry M. Markowitz, *The Early History of Portfolio Theory: 1600-1960*, 55 No. 4 Fin. Analysts J. 5 (July/Aug. 1999))).

Neither *Caputo* nor *Frommert* can be read to support such an extreme position. In addition, the Seventh Circuit has clearly rejected the patently unrealistic theory proposed by Plaintiffs-Appellants and the Secretary. In *Martin v. Consultants & Adm'rs, Inc.*, the Seventh Circuit stated that "the relevant knowledge for triggering the statute of limitations is knowledge of the *facts* or *transaction* that constituted the alleged violation." 966 F.2d 1078, 1086 (7th Cir. 1992). Thus, the court concluded, "it is <u>not</u> necessary for a potential plaintiff to have knowledge of every last detail of a transaction, or knowledge of its illegality." *Id.* (emphasis added) (*citing Ziegler v. Connecticut Gen. Life Ins. Co.*, 916 F.2d

548, 552 (9th Cir. 1990)). *See Blanton v. Anzalone*, 760 F.2d 989, 992 (9th Cir. 1985). The Seventh Circuit went on to explain that:

> The line between actual and constructive knowledge of a violation is thus not as bright as the DOL suggests, and in cases near the border the distinction may well be merely semantic. Suffice it to say that to have actual knowledge of a violation to trigger ERISA's three-year statute of limitations, a plaintiff must know of the essential facts of the transaction or conduct constituting the violation.

Martin, 966 F.2d at 1086 (internal citations omitted).

Obviously, if Plaintiffs-Appellants are correct with respect to what is necessary for a plaintiff to have actual knowledge of an alleged breach regarding the offering of any investment option under a defined contribution plan, virtually no potential plaintiff in the country would have actual knowledge until experts are consulted in connection with a lawsuit and complex analyses are performed. Thus, effectively, there would be no three-year statute of limitations with respect to claims of fiduciary breach regarding plan investment options.

Significantly, Plaintiffs-Appellants and the Secretary do not seem to be satisfied with repealing the three-year statute of limitations once. They want to repeal it twice, by requiring that defendants demonstrate that each specific plaintiff in a case – which can often number in the tens of thousands (if not more) – actually physically sat down and read the plan documents and disclosures at issue. For example, the Secretary makes the following statement:

> [I]t cannot be assumed that a plaintiff read [the plan documents] upon receipt (or indeed that the documents were received) . . . The court [in *Bona v. Barasch*] reasoned that . . . the defendants had "demonstrated only that plaintiffs could have examined [the] tax forms" and "absent a showing that plaintiff actually did examine those forms and learned of the transactions, the court cannot impute actual knowledge to them." *Bona v. Barasch*, No. 01-CV-2289-MBM, 2003 WL 1395932, at *16 (S.D.N.Y. Mar. 20, 2003).

Br. for Secretary of Labor as *Amicus Curiae* Supporting Appellants at 14.

Proving that any of tens of thousands of participants actually read distributed plan documents would be extremely difficult; proving that any significant number of them did would be impossible.[6] How exactly would a defendant prove this fact? The Secretary apparently does not believe in the three-year statute of limitations, which she refers to as the "exception" and as "exceptional." *Id.* at 8, 9. Fortunately, it is not within her power to repeal that which Congress has so clearly provided.

[6] The introduction of this plaintiff-specific issue, which depends on whether each participant actually read the applicable documents and engaged in various complicated analyses, would preclude the possibility of class proceedings. That would be another clearly unintended effect of Plaintiffs-Appellants' extreme position.

3. Plaintiffs-Appellants and the Secretary of Labor Cannot Use an Ongoing Violation Theory to Further Obliterate the Three-Year Statute of Limitations.

Plaintiffs-Appellants and the Secretary have very creatively developed a third means of repealing the three-year statute of limitations with respect to the Plans' single equity funds ("Single Equity Funds").

More than three years before this suit was filed, the Plans offered the Single Equity Funds and disclosed the nature of those funds to participants. The decision to do so had been made by the Plan fiduciaries. There is no suggestion anywhere in the briefs that anything happened after that decision that would have caused the fiduciaries to revisit that decision.

Notwithstanding the above facts, Plaintiffs-Appellants and the Secretary argue that the failure to remove the Single Equity Funds from the Plans' investment menu is a continuing violation, always permitting a claim with respect to the three-year period prior to the filing of the suit. Br. of Pls.-Appellants at 25-26; Br. for Secretary of Labor as *Amicus Curiae* Supporting Appellants at 26-29. Under their proffered theory, the statute of limitations can never run on a fiduciary breach claim based on investment options currently offered. In other words, a fiduciary could have made a decision 20 years ago to offer a single equity fund and could have fully disclosed this decision to plan participants. Moreover, for illustrative purposes, assume that every participant in the plan was fully aware of

the single equity funds and of every aspect of Modern Portfolio Theory and that the nature of the plan's funds remained constant for the following 20-year period. It is abundantly clear in this example that under ERISA, any claim based on the offering of the single equity fund should have been brought within three years of the participants' knowledge of the facts, *i.e.*, 17 years ago. But Plaintiffs-Appellants and the Secretary would argue that the participants' knowledge of every aspect of the alleged breach from 20 years ago is irrelevant; because the alleged breach has not yet been cured, the statute of limitations effectively remains open forever.

This is not the law and has never been the law. As aptly noted by Defendants-Appellees in their briefs to this Court, the express, unambiguous statutory text of ERISA states that no action may be filed 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) (emphasis added). Moreover, as noted by the Ninth Circuit in *Phillips v. Alaska Hotel & Rest. Employees Pension Fund*, ERISA "requires plaintiff's knowledge to be measured from the 'earliest date' on which he or she knew of the breach." 944 F.2d 509, 520 (9th Cir. 1991) (*quoting* 29 U.S.C. § 1113(2)). Thus, "[i]f the 'continuing violation' rationale . . . were as broad as the plaintiffs . . . suggest, the 'actual knowledge' provision in the statute would be

superfluous and virtually no breach would ever grow stale so long as it remain unremedied." *Id.* at 522-23 (O'Scannlain, J., concurring).

Accordingly, the plain language of ERISA precludes any argument that the failure to cure an alleged breach can keep the three-year statute of limitations running where plaintiff had prior knowledge of such alleged breach. We urge this Court not to read into ERISA a rule that was never intended by Congress and that could needlessly subject employers nationwide to expensive and time-consuming litigation.

Significantly, numerous cases from this Circuit indicate the courts' general refusal to extend ERISA's statutes of limitations based on a "continuing violation" theory. For example, in *Carey v. IBEW Local 363 Pension Plan*, 201 F.3d 44, 46 (2d Cir. 1999), the plaintiff was denied benefits under an ERISA retirement plan and then sought benefits again five years after the fact. In rejecting plaintiff's argument that each claim was a separate cause of action for purposes of applying ERISA's six-year statute-of-limitations, the Court noted that "such an interpretation would render the limitation period meaningless." *Id.* at 49.

Similarly, in *Miele v. Pension Plan of New York Teamsters Conference Pension & Ret. Fund*, 72 F. Supp. 2d 88, 102 (E.D.N.Y. 1999), a court from the Eastern District of New York rejected the plaintiff's assertion that each allegedly improper benefit payment constitutes a new claim for ERISA purposes. In so

holding, the court noted that it is "well-settled that the continuing claims doctrine does not apply to a claim based on a single distinct event which has ill effects that continue to accumulate over time." *Id.* (emphasis added). The court went on to state that in order for the continuing claims doctrine to apply to keep open ERISA's six-year statute of limitations, "the plaintiff's claims must be inherently susceptible to being broken down into a series of independent and distinct events or wrongs, each having its own associated damages." *Id.* (internal citations omitted).

In short, the ongoing violation theory proposed by the Secretary and Plaintiffs-Appellants is yet another attempt to repeal the three-year statute of limitations without any basis in the law. Moreover, the theory would make every plan in the country vulnerable to lawsuits based on their current investment menu regardless of when the decisions regarding that menu were made and communicated. For the reasons discussed above, the defined contribution plan system – a system relied upon by millions of American families – would be irreparably harmed were the Court to adopt such a rule.

We urge this Court not to obliterate the statute of limitations at this critical time for the defined contribution plan system.

4. Plaintiffs-Appellants Cannot Survive A Motion to Dismiss by Incomplete Pleadings.

As discussed above, recent lawsuits, including the one giving rise to this case, could be perceived as aimed at forcing expensive discovery in the hope of encouraging the defendants in these cases to reach a settlement. Plaintiffs in these cases, however, cannot be allowed to circumvent ERISA's three-year statute of limitations through incomplete pleadings. Otherwise, plan sponsors would be confronted with the prospect of either (i) settling claims they believe would be later dismissed by a trial court as time-barred by ERISA's statute of limitations, or (ii) pursuing a course of required discovery and litigation that is likely to result in the expenditure of great amounts of time and money for the sponsor and fiduciaries of the plan involved.

In a recent case from the Sixth Circuit, *Bishop v. Lucent Techs., Inc.*, 520 F.3d 516, 518 (6th Cir. 2008), the Sixth Circuit addressed very similar facts. Specifically, the court addressed whether the plaintiffs' ERISA breach of fiduciary duty claims were time-barred where the plaintiffs had remained silent in their complaint as to when they first obtained actual knowledge of the alleged breach of fiduciary duty. *Bishop*, 520 F.3d at 518-519. In *Bishop*, the plan fiduciaries had disclosed the material facts to the plaintiffs well in excess of three years ago. *See id.* at 519. However, the plaintiffs in that case argued that because they had not affirmatively pled when they obtained actual knowledge of the material facts at

issue, the court could not read such knowledge into their complaint. *Id.* at 520. In rejecting this argument, the Sixth Circuit ruled that the ERISA-mandated disclosures triggered the running of the three-year statute of limitations. *Id.* at 522. The court went on to specifically state:

> [I]t is not enough for plaintiffs to argue that the complaint, because it is silent as to when they first acquired actual knowledge, must be read in the light most favorable to them and construed as not precluding the possibility that they will be able to prove facts establishing their entitlement to relief.

Id. at 520. The Sixth Circuit concluded "the incomplete allegations of the complaint do not justify any reasonable inference that their complaint was timely filed." *Id.* at 522.

We urge the Court here to follow the sound analysis of the Sixth Circuit and ensure that plaintiffs, such as Plaintiffs-Appellants, are not given latitude to circumvent ERISA's statute of limitations through incomplete pleadings. If plaintiffs are otherwise permitted to avoid dismissal by simply omitting all facts regarding the timing and origin of the alleged breach, we would be doing the legal system and the defined contribution plan system a great injustice. Again, we ask this Court not to expand the law to let this happen.

5. The Statute of Limitations Should Commence When the Relevant Facts Are Disclosed.

Contrary to Plaintiffs-Appellants' assertions, and those of the Secretary, ERISA's three-year statute of limitations does not begin to run only after a

claimant has engaged experts or otherwise engaged in complicated analyses utilizing various statistical calculations. Rather, as intended by Congress, and as evidenced by the plain language of ERISA, the statute is tolled only until the earliest date upon which a claimant has knowledge of the material facts that constitute the alleged breach of fiduciary duty.

Unless participants are to be permitted to turn their back on information provided to them, plan communications mandated by applicable law that adequately disclose material facts with respect to a plan's current investment menu must be treated as providing plan participants with actual knowledge of such material facts, and thus trigger a running of ERISA's three-year statute of limitations. *See Young v. General Motors Inv. Mgmt. Corp.*, 550 F. Supp. 2d 416, 419 (S.D.N.Y. 2008) (stating that the plan disclosures "on which the Plaintiffs relied in their complaint . . . plainly disclose that the Single Equity Funds were undiversified investments primarily holding the stock of a single company," and that "[a]ccordingly, Plaintiffs had actual knowledge of all of the facts that they now allege establish a breach of fiduciary duty by Defendants more than three years prior to filing this lawsuit. . .") (internal citations omitted).

As noted by the Secretary in her *amicus curiae* brief for this Court, section 413 of ERISA requires "actual knowledge" versus "constructive knowledge" of the material facts giving rise to the alleged breach of fiduciary duty. Br. for Secretary

of Labor as *Amicus Curiae* Supporting Petitioners at 9-12. However, as noted by the district court, "establishing 'actual knowledge' for the purposes of ERISA . . . does not . . . require proof that the individual Plaintiffs actually saw or read the documents that disclosed that the Single Equity Funds were undiversified instruments." *Young*, 550 F. Supp. 2d at 419 n.3 (*citing Frommert*, 433 F.3d at 272 *and Caputo*, 267 F.3d at 181). "Rather, when determining whether plaintiffs had actual knowledge of a breach for the purposes of ERISA § 413, this Circuit has focused on whether the documents provided to plan participants adequately disclosed the alleged breach." *Young*, 550 F. Supp. 2d at 419 n.3. Otherwise, as reasoned by the district court, "[a]ny interpretation of the term 'actual knowledge' that would allow a participant to disregard information clearly provided to him/her would effectively provide an end run around ERISA's limitations requirement." *Id.* (*citing Edes v. Verizon Commc'ns, Inc.*, 417 F.3d 133, 142 (1st Cir. 2005)).[7]

[7] The district court's interpretation is reinforced by this Court's summary order in *Hirt v. The Equitable Retirement Plan for Employees, Managers and Agents*, 06-4757-cv (L) (Summary Order) (July 9, 2008). In that case, plaintiffs filed suit in the Southern District of New York challenging various aspects of a defined benefit plan, including that the plan failed to provide sufficient notice of certain plan amendments. The district court held, in part, that all of the plaintiffs' notice-based claims were time-barred under ERISA's six-year statute of limitations, which the district court found had been triggered by the distribution by the plan administrator of the ERISA-required summary plan description ("SPD"). *See id.* (Summary Order) at 3-4. In affirming the district court's decision, this Court "emphasized" the "'central role that the SPD plays in communicating the terms of a plan to its members.'" *Id.* (Summary Order) at 5.

Where a plan sponsor makes a clear disclosure regarding plan investment options in accordance with all applicable laws – and in doing so, discloses the "essential facts of the transaction or conduct constituting the [alleged] violation" – the statute of limitations with respect to those options must commence at that time.[8] *Martin*, 966 F.2d at 1086. Otherwise, we venture into a world where defined contribution plans are vulnerable every day with respect to decisions made 10 or even 20 years ago. That would be a sad state of affairs for all involved, including the millions of participants and beneficiaries who rely on the defined contribution plan system for their retirement security.

For the same reasons stated by the Court in *Hirt* (Summary Order) – including, most notably, the important role that the SPD and similar disclosures provide in "communicating the terms of a plan to its members" – ERISA's three-year statute of limitations should be triggered when a plan sponsor makes a clear disclosure regarding plan investment options in accordance with all applicable laws.

[8] Obviously, if the facts change in a material way that would cause any reasonable fiduciary to revisit the original decision, such factual development may well trigger a new running of the statute of limitations.

CONCLUSION

Based on the foregoing, the Council and the Chamber as *Amici* respectfully urge the Court to affirm the judgment of the district court.

Respectfully submitted,

Dated: July 24, 2008

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and 2nd Cir. R. 32(a) because this brief contains 5,747 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Office Word 2003 in 14 Point type, Times New Roman in the text and footnotes.

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ANTI-VIRUS CERTIFICATION

I hereby certify that a virus check, using Symantec AntiVirus version 10.0.2.2000, was performed on the PDF file of this brief, and no viruses were found.

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