UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AGI CONSULTING L.L.C., an Oklahoma limited liability company, by Assaf Al-Assaf as Trustee/Owner/Plan Administrator of an Alleged Non-Integrated Defined Benefit Plan, Plaintiff - Appellant, v. AMERICAN NATIONAL INSURANCE COMPANY, a Texas insurance company, Defendant - Appellee.	No. 19-6060 (D.C. No. 5:18-CV-00252-G) (W.D. Okla.)

ORDER AND JUDGMENT*

(Filed Jan. 9, 2020)

Before **MATHESON**, **McKAY**, and **BACHARACH**, Circuit Judges.**

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

** After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument.

Appellant AGI Consulting L.L.C. appeals the district court's denial of its post-judgment request to amend its complaint in order to include claims under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001–1461.

AGI commenced this action by filing a complaint on March 21, 2018. According to the complaint, in June 2011, AGI entered into a contract with Defendant American National Insurance Company ("ANICO") to purchase a defined benefit plan for AGI's employees that ANICO would administer in accordance with terms handwritten by AGI's representatives on a form furnished by ANICO. AGI alleged that, without AGI's knowledge, ANICO replaced the handwritten plan with a typewritten one and in the process altered the agreed-upon terms. AGI claims it did not discover the existence of the typewritten plan, with its altered terms, until August 10, 2016. Based on these allegations, AGI asserted a claim for common-law fraud.

ANICO moved to dismiss the complaint. Pointing to a summary plan description AGI filed as an exhibit in a related action, ANICO argued that AGI, exercising reasonable diligence, should have discovered the basis for the alleged fraud by September 12, 2013, and that the claim was thus time-barred under Oklahoma's statute of limitations. In response, AGI conceded its fraud claim was time-barred. AGI explained that it had discovered in its archived digital files a copy of the typewritten plan that one of its employees had received from ANICO on March 14, 2012. However, AGI requested leave to amend its complaint to include

common-law claims for breach of contract, rescission, and reformation.

The district court denied AGI's request to amend its complaint. The court concluded the proposed amendment would be futile because all the claims AGI sought to include would also be time-barred under Oklahoma's statute of limitations. And, as the parties agreed the fraud claim was time-barred, the court granted ANICO's motion to dismiss and entered judgment for ANICO.

AGI then filed a timely Fed. R. Civ. P. 59(e) motion to alter or amend the judgment.[1] In its motion, AGI again requested leave to amend its complaint, this time to include claims that ANICO breached its fiduciary duties to AGI in violation of ERISA.[2] In response, ANICO argued that AGI's request to amend should again be denied as futile because the claims AGI proposed would be time-barred under the applicable ERISA statute of repose. *See* 29 U.S.C. § 1113.

The district court agreed with ANICO. The court perceived two breaches of a fiduciary duty that AGI proposed to assert in its amended complaint and

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[1] AGI sought relief under section (a) of Rule 59, which relates to requests for a new trial. *See* Fed. R. Civ. P 59(a). Noting there had been no trial in the proceeding, the district court characterized AGI's motion as brought under section (e), and AGI accepts this characterization on appeal.

[2] The district court understood AGI to be arguing that the court should have construed AGI's first request to amend the complaint to include a request to bring an ERISA breach-of-fiduciary-duty claim.

concluded both would be time-barred. First, AGI claimed ANICO breached its fiduciary duty by replacing the agreed-upon terms from the handwritten plan with different terms in the typewritten plan, which ANICO then used to administer the plan. The court determined AGI had notice of the typewritten plan and its different terms—and thus of the basis for its breach claim—no later than March 14, 2012, when its employee received a copy of the typewritten plan from ANICO, rendering AGI's proposed claim on this basis time-barred under the periods outlined in § 1113. Second, AGI claimed ANICO breached its fiduciary duty by failing to resolve its disputes with AGI regarding ANICO's calculation of the census (the list of eligible employees). AGI asserted that ANICO included ineligible employees in the census, increasing AGI's costs, and that ANICO could have resolved the census disputes but failed to do so. The court determined AGI's own filings showed it had actual knowledge of the basis for this claim no later than September 12, 2013, rendering it time-barred under § 1113(2). Accordingly, the court denied AGI's Rule 59(e) motion.

On appeal, AGI challenges the district court's denial of the request raised in its Rule 59(e) motion to amend its complaint in order to include ERISA breach-of-fiduciary-duty claims. "Rule 59(e) relief is available in limited circumstances, including (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *Hayes Family Tr. v. State Farm Fire & Cas. Co.*, 845 F.3d 997, 1004 (10th

Cir. 2017) (alterations and internal quotation marks omitted). "Generally, leave to amend should be freely granted when justice requires, but amendment may be denied when it would be futile." *Moya v. Garcia*, 895 F.3d 1229, 1239 (10th Cir. 2018). We typically review for abuse of discretion the court's denial of both Rule 59(e) motions and requests to amend a complaint. *See id.* (request to amend); *Hayes Family Tr.*, 845 F.3d at 1004 (Rule 59(e) motion). However, we review the legal basis for a finding of futility, as well as questions involving the applicability of statutes of limitations and repose, de novo. *See Moya*, 895 F.3d at 1239; *Fulghum v. Embarq Corp.*, 785 F.3d 395, 413 (10th Cir. 2015).

"[Section] 1113 governs the time for filing a breach of fiduciary duty claim arising from an alleged violation of the duties imposed on ERISA plan fiduciaries." *Fulghum*, 785 F.3d at 413. Section 1113 states in its entirety:

> 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—
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> (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;
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> 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.

As for its first claim for breach—based on allegations that ANICO replaced the handwritten plan with a materially different typewritten plan causing it to administer the plan under the latter's terms—AGI argues that it would not be time-barred under § 1113(2)'s three-year limitations period because AGI lacked actual knowledge of the typewritten plan's existence until August 2016. However, AGI does not challenge the district court's conclusion that the claim would be time-barred by the six-year repose period in § 1113(1), which begins to run at the time the breach occurred regardless of when a plaintiff discovers or should have discovered it. *See Fulghum*, 785 F.3d at 413. Here, the record is clear that the alleged breach occurred no later than March 14, 2012, as there is no dispute that, by then, ANICO had begun administering the plan under the typewritten plan's terms. The six-year repose period had begun running at least by that date, and, because the period expired earlier than the three-year limitations period proposed by AGI and before AGI commenced the action, § 1113(1) would bar this claim in the absence of an applicable exception. *See Kurz v. Phila. Elec. Co.*, 96 F.3d 1544, 1551 (3d Cir. 1996)

("[S]ection [1113] creates a general six[-]year statute of [repose], shortened to three years in cases where the plaintiff has actual knowledge, and potentially extended to six years from the date of discovery in cases involving fraud or concealment.").

AGI argues that § 1113's "fraud or concealment" exception applies because it did not have actual knowledge of the typewritten plan until much later. We are not persuaded. Even assuming the exception might otherwise apply, its six-year period begins to run when a plaintiff "discover[s]" the breach. 29 U.S.C. § 1113. Unlike the three-year limitations period in § 1113(2), the fraud-or-concealment exception does not require a plaintiff to have "actual knowledge" of the breach; instead, constructive knowledge will suffice, and the period will begin to run when the plaintiff, by exercising diligence, should have discovered the breach.[3] Here, AGI concedes it had constructive knowledge of the

[3] Every circuit to consider the issue has ruled that the fraud-or-concealment exception does not require a plaintiff to have actual knowledge of the alleged breach; instead, constructive knowledge will suffice, and the period begins to run when the plaintiff should have discovered the alleged breach by exercising diligence. *See J. Geils Band Emp. Benefit Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1252–55 (1st Cir. 1996); *Janese v. Fay*, 692 F.3d 221, 228 (2d Cir. 2012); *Montrose Med. Grp. Participating Sav. Plan v. Bulger*, 243 F.3d 773, 788 (3d Cir. 2001); *Browning v. Tiger's Eye Benefits Consulting*, 313 F. App'x 656, 663 (4th Cir. 2009); *Brown v. Owens Corning Inv. Review Comm.*, 622 F.3d 564, 573 (6th Cir. 2010); *Martin v. Consultants & Adm'rs, Inc.*, 966 F.2d 1078, 1093–96 (7th Cir. 1992); *Schaefer v. Ark. Med. Soc'y*, 853 F.2d 1487, 1491–92 (8th Cir. 1988); *Larson v. Northrop Corp.*, 21 F.3d 1164, 1172 (D.C. Cir. 1994). We find their analyses persuasive.

typewritten plan by March 14, 2012, more than six years before it commenced this action. The exception would not apply.

With respect to its second breach claim—based on allegations that ANICO failed to resolve disputes with AGI regarding ANICO's incorrect inclusion of ineligible employees in the census in violation of the handwritten plan's terms—AGI argues again the claim would not be time-barred under § 1113(2) because AGI lacked actual knowledge that ANICO was operating under the terms of the typewritten plan.[4] The district court, however, after defining the nature of the alleged breach, did not view the existence of the typewritten plan as a material fact underlying this claim.[5] *See Sulyma v. Intel Corp. Inv. Policy Comm.*, 909 F.3d 1069, 1072–73 (9th Cir. 2018) (explaining that the first step of the § 1113(2) analysis is to "isolate and define the underlying violation upon which the plaintiff's claim is founded" (internal quotation marks and brackets omitted));[6] *Russell v. Chase Inv. Servs.,*

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[4] It appears § 1113(1)'s six-year repose period would not apply to this claim, as the alleged breach—failure to resolve the census dispute after AGI raised the issue on September 12, 2013—occurred less than six years before the action commenced.

[5] In a footnote, the district court concluded that AGI had actual knowledge that ANICO was administering the plan under different terms no later than September 12, 2013, when an AGI employee received a summary plan description of the typewritten plan's terms. However, this conclusion did not factor into the court's separate determination that AGI had actual knowledge of the material facts underlying the census-dispute claim.

[6] In addition to the Ninth Circuit, at least two other circuit courts have expressly stated that the § 1113(2) analysis begins

Corp., 384 F. App'x 753, 754 (10th Cir. 2010) (affirming dismissal under § 1113(2) where plaintiff filed ERISA claim "more than three years after she had actual knowledge of the facts on which she based her complaint").[7] Instead, based on AGI's pleadings, the court determined it was clear that, by September 12, 2013, AGI had actual knowledge that ANICO had included employees in the census who were allegedly ineligible under the handwritten plan's terms and that this had resulted in increased costs for AGI. In the court's view, AGI's actual knowledge of these facts was sufficient to trigger § 1113(2)'s three-year limitations period.

On appeal, AGI does not dispute that it had actual knowledge of the facts the district court determined are material to the census-dispute claim. Instead,

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with defining the nature of the alleged breach. *See Gluck v. Unisys Corp.*, 960 F.2d 1168, 1178 (3d Cir. 1992); *Rogers v. Millan*, 902 F.2d 34 (table), 1990 WL 61120, at *3 (6th Cir. 1990).

[7] "We have yet to define the phrase 'actual knowledge,' " and we have noted a split among other circuits, with several courts "requir[ing] [plaintiffs to have] some understanding that the conduct is unlawful under ERISA and [others] . . . merely requir[ing] knowledge of the conduct itself." *Mid-South Iron Workers Welfare Plan v. Harmon*, 645 F. App'x 661, 665 (10th Cir. 2016). The district court adopted what it considered the "more prevalent view," concluding that AGI's actual "knowledge of the essential facts constituting the alleged violation or breach . . . trigger[ed] § 1113(2)'s three-year limitations period." (Appellant's App. at P308.) AGI does not clearly challenge this construction of § 1113(2) on appeal, and, to the extent AGI does challenge it, its briefing on the issue is inadequate. *See Malouf v. SEC*, 933 F.3d 1248, 1256 n.6 (10th Cir. 2019). So, we once again have no need to consider whether to adopt the district court's construction. *See Mid-South*, 645 F. App'x at 665.

AGI's arguments focus on when it had actual knowledge of the typewritten plan. We, however, agree with the district court that the typewritten plan's existence is immaterial to this breach claim.[8] It is clear from AGI's filings that by September 12, 2013, it had actual knowledge of an unresolved census dispute after ANICO included allegedly ineligible employees in the census in violation of the handwritten plan's terms, substantially increasing AGI's costs. ANICO's reason for not following the handwritten plan's terms—*i.e.*, the existence of a typewritten plan with different terms under which ANICO chose to administer the plan—is immaterial to a claim that ANICO breached its fiduciary duty to resolve a census dispute according to the handwritten plan's terms. Because AGI had actual knowledge of the material facts underlying its proposed breach claim more than three years before it commenced the action, this claim would be time-barred under § 1113(2).

We are not persuaded by AGI's arguments that the fraud-or-concealment exception applies to its census-dispute claim. AGI argues the exception applies because AGI did not have actual knowledge of the typewritten plan until less than six years prior to

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[8] We therefore need not address the thorny issue of whether a corporate plaintiff's employee's receipt of a summary plan description or other document that neither the plaintiff's officers nor the employee reads demonstrates actual knowledge of the document's terms for purposes of § 1113(2). *Compare Sulyma*, 909 F.3d at 1076, *with Brown*, 622 F.3d at 571, *and Enneking v. Schmidt Builders Supply, Inc.*, 875 F. Supp. 2d 1274, 1284 & nn.33–34 (D. Kan. 2012).

commencing suit. This argument is misguided. We have already determined that the existence of the typewritten plan is immaterial for purposes of this claim. Moreover, as previously discussed, AGI's constructive knowledge of the typewritten plan more than six years before AGI commenced the action renders this exception inapplicable.

The district court correctly concluded that AGI's proposed ERISA breach-of-fiduciary-duty claims would be time-barred under § 1113 and that an amendment to include these claims would be futile. We thus **AFFIRM** the district court's denial of AGI's Rule 59(e) motion aimed at amending the complaint to assert these claims.[9]

Entered for the Court

Monroe G. McKay
Circuit Judge

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[9] On appeal, AGI asserts that its contract with ANICO required ANICO to provide documents, such as defined benefit plans and summary plan descriptions, by mail in hardcopy format and that ANICO's reliance on documents emailed to AGI constitutes another breach of a fiduciary duty. However, AGI raised this issue in the district court only in passing and not as a basis for a breach-of-fiduciary-duty claim. AGI admits it has had multiple "bites at the apple" (Appellant's Opening Br. at 13), and we will not give it another based on an argument it failed to raise in the district court. *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130–31 (10th Cir. 2011).

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

AGI CONSULTING L.L.C., BY Assaf AL-ASSAF as Trustee/Owner/Plan Administrator of an Alleged Non-Integrated Defined Benefit Plan,	)	
Plaintiff,	)	**Case No. CIV-18-252-G**
v.	)	
AMERICAN NATIONAL INSURANCE COMPANY,	)	
Defendant.	)	

ORDER

(Filed Mar. 28, 2019)

Now before the Court is the Motion for a New Trial filed by Plaintiff AGI Consulting L.L.C., by Assaf Al-Assaf as Trustee/Owner/Plan Administrator of an Alleged Non-Integrated Defined Benefit Plan, pursuant to Federal Rules of Civil Procedure 59(a)(1)(B) and 59(a)(2). *See* Pl.'s Mot. (Doc. No. 18). Defendant American National Insurance Company has responded in opposition (Doc. No. 19), and Plaintiff has replied (Doc. No. 20).

BACKGROUND

On July 30, 2018, the Court granted Defendant's Motion to Dismiss after Plaintiff confessed that its

cause of action for fraud against Defendant was time-barred. *See* Order of July 30, 2018 (Doc. No. 16) (West, J.). The Court further denied Plaintiff's request, set forth in its response to Defendant's Motion to Dismiss, to amend its complaint, after finding that amendment would be futile because Plaintiff's proposed claims for rescission, reformation, and breach of contract would likewise be untimely under Okla. Stat. tit. 12, § 95. *See id.* at 12.

Plaintiff has now moved the Court to vacate its Order and Judgment (Doc. Nos. 16, 17) entered on July 30, 2018, and permit Plaintiff to file an amended complaint alleging claims for breach of fiduciary duty against Defendant under the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*, as amended ("ERISA"). *See* Pl.'s Reply ¶ 23 (Plaintiff's "sole purpose [in filing the Motion for a New Trial is] to amend its Complaint to [set forth] an ERISA cause of action for breach of a fiduciary duty").[1]

STANDARD OF REVIEW

In support of its motion, Plaintiff has relied on Federal Rules of Civil Procedure 59(a)(1)(B) and (a)(2).

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[1] Plaintiff has cited Federal Rule of Civil Procedure 15 and its mandate that leave to amend "should [be] freely give[n] . . . when justice so requires." Fed. R. Civ. P. 15(a)(2). In light of the Court's disposition of Plaintiff's motion, the Court has not considered whether amendment is allowed under Federal Rule of Civil Procedure 15(c), which permits "[a]n amendment to a pleading [to] relate[ ] back to the date of the original pleading. . . ." Fed. R. Civ. P. 15(c)(1).

These rules provide, respectively, that the Court "may . . . grant a new trial . . . after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court" and "may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment." Fed. R. Civ. P. 59(a)(1)(B), (a)(2).

There has been no trial, nonjury or otherwise, in this matter, however. Neither Rule 59(a)(1)(B) nor Rule 59(a)(2), therefore, applies as a method for challenging the Court's Order and Judgment. *See Soto v. Bd. of Cty. Comm'rs of Caddo Cty.*, No. CIV-16-416-F, 2017 WL 6551295, at *1 (W.D. Okla. Oct. 4, 2017).

The instant motion is more properly characterized as a motion to alter or amend the Court's Order and Judgment under Federal Rule of Civil Procedure 59(e), which permits relief in certain "limited circumstances." *Hayes Family Tr. v. State Farm Fire & Cas. Co.*, 845 F.3d 997, 1004 (10th Cir. 2017). *See Soto*, 2017 WL 6551295, at *1 (Fed. R. Civ. P. 59(e) is "appropriate vehicle to review the court's order and judgment" after court has granted a motion to dismiss under Fed. R. Civ. P. 12(b)(6)). Those circumstances include

> "(1) an intervening change in the controlling law, (2) [when] new evidence previously [was] unavailable, and (3) the need to correct clear error or prevent manifest injustice."

Hayes Family Tr., 845 F.3d at 1004 (alterations in original) (quoting *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000)). *See Monge v. RG Petro-Mach. (Grp.) Co.*, 701 F.3d 598, 611 (10th Cir. 2012) (quoting *Webber v. Mefford*, 43 F.3d 1340, 1345 (10th Cir. 1994) ("'purpose of [Fed. R. Civ. P. 59(e)] motion is to correct manifest errors of law'")). While a Rule 59(e) motion "is not appropriate to revisit issues already addressed or [to] advance arguments that could have been raised in prior briefing," relief under this rule may be available if a "court has misapprehended the facts, a party's position, or the controlling law." *Servants of the Paraclete*, 204 F.3d at 1012 (citation omitted).

Plaintiff has stated, "[b]y way of explanation and not as an excuse," that "when Plaintiff [first] sought to amend its [c]omplaint, Plaintiff was not clear about the fact that [r]escission, [r]eformation, and [b]reach of [c]ontract all presuppose the existence of a contract and therefore ERISA would apply." Pl.'s Mot. ¶ 9. Plaintiff has argued that the Court nevertheless should have understood that Plaintiff was seeking relief under ERISA in its proposed amended complaint and not under state law for rescission, reformation, and breach of contract (as Plaintiff had argued), and more particularly should have recognized that, because Defendant was a fiduciary, it was charged with the duties imposed by 29 U.S.C. § 1104(a) and that

Plaintiff was seeking relief under 29 U.S.C. § 1109 for breach of fiduciary duty.[2]

Plaintiff has contended that if the Court had done so, it would have applied 29 U.S.C. § 1113, the statute applicable "to actions brought to redress a fiduciary's breach of its obligations to enforce the provisions of ERISA," *Trs. of Wyo. Laborers Health & Welfare Plan v. Morgen & Oswood Constr. Co.*, 850 F.2d 613, 618 n.8 (10th Cir. 1988) (citation omitted), as opposed to Okla. Stat. tit. 12, § 95, and Plaintiff's proposed claims would have been deemed timely. *See* Pl.'s Mot. ¶¶ 6, 8-9, 13.

Plaintiff has conceded, however, that it did not "raise[] the application of ERISA" in response to Defendant's argument that amendment would be futile, (b) acknowledge in its submissions that it was seeking relief under ERISA, or (c) cite § 1113. *Id.* ¶ 8. Plaintiff has argued that despite "this lack of clarity" in its pleadings and papers, the Court should now vacate its Order and Judgment and permit Plaintiff to file an amended complaint, this time "clearly stat[ing] an ERISA [claim and] statute of limitations. . . ." *Id.* ¶¶ 9, 32.

Because the Court's and the parties' reliance on a state statute of limitations (and failure to address

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[2] *See* 29 U.S.C. § 1109(a) (providing that a "fiduciary . . . who breaches any of the responsibilities, obligations, or duties imposed upon" it by 29 U.S.C. § 1104(a) "shall be personally liable to make good . . . any losses to the plan resulting from each such breach, and . . . shall be subject to such . . . equitable or remedial relief as the court may deem appropriate").

whether ERISA had pre-empted Defendant's proposed state law claims[3]) may be deemed a manifest error of law or a misapprehension of the controlling law that warrants revisitation, the Court reconsiders the matter to determine whether amendment as proposed by Plaintiff would be futile.[4]

29 U.S.C. § 1113

Section 1113 provides that "[n]o action may be commenced . . . with respect to a fiduciary's breach of any responsibility, duty, or obligation,"

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

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[3] In what is known as conflict preemption, ERISA provides that in certain circumstances it "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in [29 U.S.C. §] 1003(a) . . . and not exempt under [29 U.S.C. §] 1003(b). . . ." 29 U.S.C. § 1144(a). The Tenth Circuit has identified four categories of state law "causes of action that 'relate to' a benefit plan for purposes of ERISA preemption," one of which pertains to "laws and common-law rules providing remedies for misconduct growing out of the administration of such plans." *Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 990 (10th Cir. 1999) (citation omitted). Plaintiff has now contended that Defendant breached certain fiduciary duties and that Defendant's alleged "misconduct grow[s] out of [its] . . . administration of [an ERISA] . . . plan." *Id.* Therefore, Plaintiff's state law claims seeking relief for reformation, rescission, and breach of contract would be preempted.

[4] In doing so, the Court may consider not only the proposed complaint itself, but also exhibits attached thereto and documents incorporated by reference therein.

> 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.

By its express terms, then, § 1113 creates two periods for filing suit for breach of the duties imposed on ERISA fiduciaries by 29 U.S.C. § 1104(a): three years and six years. If plaintiff knew of defendant's nonfraudulent breach, § 1113(2)'s three-year limitations period applies, measured from "the earliest date on which the plaintiff had actual knowledge of the breach or violation." *Id.* § 1113(2).

The Tenth Circuit has characterized § 1113(1)'s six-year period as a "statute of repose." *Fulghum v. Embarq Corp.*, 785 F.3d 395, 413 (10th Cir. 2015) (citations omitted). "[S]tatutes of repose operate to 'extinguish a plaintiff's cause of action whether or not the plaintiff should have discovered within that period that there was a violation or an injury.'" *Id.* (quoting *Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc.*, 764 F.3d 1199, 1224 (10th Cir. 2014)). Under § 1113(1), a plaintiff has six years to file its lawsuit, with this six-year period beginning to run either on the date defendant last acted, if defendant's breach involves an

affirmative act, *see* 29 U.S.C. § 1113(1)(A), or on "the latest date on which [defendant] . . . could have cured the . . . violation," *id.* § 1113(1)(B), if defendant's breach is the result of an omission.

In addition to the six-year statute of repose, "§ 1113 contains language providing that 'in the case of fraud or concealment,' a civil enforcement action 'may be commenced not later than six years after the date of discovery of [the] breach or violation.'" *Fulghum*, 785 F.3d at 413 (quoting 29 U.S.C. § 1113). The Tenth Circuit views "the 'fraud or concealment' provision" not as "a separate statute of limitations," but rather as "a legislatively created exception to the six-year statute of repose." *Id.* at 414 (citation omitted). The circuit reads "[t]he fraud or concealment exception . . . in the disjunctive[,]" *id.* at 415, and "'[c]anons of construction indicate that terms connected in the disjunctive . . . be given separate meanings.'" *Id.* (quotation and further citations omitted). "[T]he exception to the general six-year statute," therefore

> applies when the alleged breach of fiduciary duty involves a claim the defendant made "a false representation of a matter of fact, whether by words or conduct, by false or misleading allegations or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury" or when the defendant conceals the alleged breach of fiduciary duty.

Id. (quotation and footnote omitted).

DISCUSSION

Defendant has argued that whether the Court applies § 1113's three-year limitations period, the six-year statute of repose, or § 1113's six-year "fraud or concealment" provision, Plaintiff's proposed breach of fiduciary claims are time-barred and amendment as Plaintiff has now suggested would be futile. The Court agrees.

Plaintiff's original complaint was filed on March 21, 2018. *See* Compl. (Doc. No. 1). In that pleading, Plaintiff alleged that in June 2011 it negotiated and entered into a contract with Defendant to purchase a Defined Benefit Plan ("DBP" or "Plan"), *see id.* ¶ 2, that was to be administered according to the handwritten terms on a form titled "Adoption Agreement for American National Insurance Company Standardized Non-Integrated Defined Benefit Prototype Plan" ("Adoption Agreement"). *See id.* Ex. 1 (Doc. No. 1-2). Plaintiff contended that Defendant, without Plaintiff's knowledge, replaced that form with a typewritten form prepared by Defendant and, in doing so, changed certain material terms in the Plan. *See id.* Ex. 3 (Doc. No. 1-4).

In the proposed amended pleading which Plaintiff had attached to its response to Defendant's Motion to Dismiss, *see* Pl.'s Resp. Ex. 2 (Doc. No. 12-3), and which Plaintiff has now contended should have been evaluated under § 1113 (and not Okla. Stat. tit. 12, § 95), Plaintiff has alleged:

(1) prior to the date Plaintiff executed the Adoption Agreement to purchase the

DBP, Robyn Assaf on behalf of Plaintiff had numerous telephone conversations with Andre Fleener, Defendant's sales agent, concerning the DBP, *see* Pl.'s Resp. Ex. 2 ¶ 9;

(2) on the date the Adoption Agreement was executed, June 22, 2011, Assaf and Fleener together with Defendant representative Greg Valley "discussed [the form] line by line," *id.* ¶ 10;

(3) the Adoption Agreement "modifie[d] . . . [Defendant's] Prototype Plan to [Plaintiff's] . . . specification[s]," *id.* ¶ 8, and once the Adoption Agreement had been executed, Defendant was to administer the DBP according to the Adoption Agreement's terms;

(4) "the preprinted [Adoption Agreement] form . . . had been partially filled out by [Defendant] . . . in typewritten form and then was partially filled out by handwritten entries either by . . . Assaf, or by . . . Valley to complete the agreement," *id.* ¶ 10, although "[s]ome items on the form . . . remained blank," *id.*;

(5) "[i]n addition to the Adoption Agreement[,] . . . Valley prepared a 'New Plan Installation Transmittal' . . . to send . . . to . . . Defendant," *id.* ¶ 12; *see* Compl. Ex. 2 (Doc. No. 1-3);

(6) "to implement the Plan, a list or 'census' of all eligible employees[ ] . . . [had to] be furnished to . . . [Defendant] . . . to

calculate . . . the [Plan's] funding requirements," Pl.'s Resp. Ex. 2 (Doc. No. 12-3) ¶ 16; *e.g.*, *id.* ¶ 22 ("The census affects the amount of funding necessary to operate the DBP[.] The more employees who qualify for participation, the greater the funding.");

(7) Defendant first requested the 2011 census on December 29, 2011, and Plaintiff furnished the same on February 8, 2012, *see id.* ¶ 18; censuses were thereafter provided for years 2012 and 2013, *see id.*;

(8) "[f]rom the very beginning of the contract term the parties disagreed on [which employees were] . . . to be included in the census," *id.* ¶ 19, "as well as [on] other substantial matters," *id.* ¶ 20;

(9) on August 27, 2013, Defendant notified Plaintiff "of a substantial increase in the funding requirements," *id.* ¶ 23, and after Plaintiff "complain[ed] about the dramatic increase," *id.*, "the DBP was [f]rozen [on September 12, 2013]," *id.* ¶ 24, at Fleener's instruction, *id.* ¶ 23; and

(10) the Plan started on January 1, 2011, *id.* ¶ 21, and from that time until September 12, 2013, "Defendant was managing a DBP that was materially different than the Adoption Agreement . . . Plaintiff had executed on June 22, 2011." *Id.* ¶ 20.

Plaintiff has alleged in its proposed pleading that on August 10, 2016, three years after "the DBP was

[f]rozen," *id.* ¶ 24, Plaintiff "discovered the existence of the two different . . . [P]lans," *id.* ¶ 25, learned that "[t]he DBP that Defendant operated was materially different than the DBP Plaintiff had purchased," *id.* ¶ 26, and further learned that "[t]he signature page from . . . Plaintiff's [handwritten] Adoption Agreement [had been] . . . attached to . . . Defendant's [typewritten] Adoption Agreement." *Id.* ¶ 27. *But see* Pl.'s Resp. (Doc. No. 12) ¶ 9 ("Plaintiff believed the first date of discovery of the switched signature pages was March 24, 2016").

Papers filed in this matter revealed, however, that Plaintiff had in its possession as early as March 14, 2012, a copy of the typewritten Adoption Agreement that contained the materially different terms. *See id.* at 3, n.1.[5] As Plaintiff has conceded, that copy "would have put Plaintiff on notice of the two different plans, which in turn would have started the statute of

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[5] Plaintiff advised the Court and Defendant that "[o]n June 12, 2018, while looking for a lease form for a new tenant, on an old staff computer that had been archived for four (4) years, [Plaintiff] . . . found a computer file labeled 'Pension' containing a downloaded copy of the typewritten plan from March 14, 2012. [Plaintiff was] . . . surprised to find the electronic document as the past employee did not make [Plaintiff] . . . aware of the downloaded material or print out a copy of the documents and forward them to . . . [Plaintiff]." Pl.'s Resp. (Doc. No. 12) at 3, n.1. The Court finds, under these circumstances and absent any contrary authority cited by Plaintiff, that the employee's knowledge of the typewritten Adoption Agreement is imputed to Plaintiff and Plaintiff is charged with the knowledge of its employee. *See W. Diversified Servs., Inc. v. Hyundai Motor Am., Inc.*, 427 F.3d 1269, 1276 (10th Cir. 2005) (as a "general principle" "an employee's knowledge gained in the course and scope of the employment is imputed to the corporation, and, therefore, to all of its departments").

limitations running at a date much earlier than Plaintiff[ ] . . . reasonably believed." *Id.* ¶ 9.

The Court finds, upon review of Plaintiff's proposed pleading and other documents properly considered, that Plaintiff had notice by March 14, 2012, that: (1) Defendant had "not provide[d] the same Adoption Agreement . . . Plaintiff [had] purchased," *id.* Ex. 3 (Doc. No. 12-3) ¶ 31; (2) the DBP that Defendant was managing required only six months of employment to be eligible as a Plan participant, as opposed to one year of employment as stated in the handwritten Adoption Agreement, *compare* Compl. Ex. 3 (Doc. No. 1-4) at 4, *with id.* Ex. 1 (Doc. No. 1-2) at 4;[6] (3) the DBP indicated for purposes of calculating accrued benefits "200%" of an employee's average compensation, while the handwritten form had no percentage assigned, *compare id.* Ex. 3 (Doc. No. 1-4) at 8, *with id.* Ex. 1 (Doc. No. 1-2) at 8; and (4) the DBP stated that participation and average compensation would be measured from January 1, 2010, in contrast to Plaintiff's form that stated that participation and average compensation would be measured from January 1, 2011, *compare id.* Ex. 3 (Doc. No. 1-4) at 7, *with id.* Ex. 1 (Doc. No. 1-2) at 7.

Plaintiff has alleged in its proposed pleading that Defendant fraudulently "manag[ed] a DBP that was

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[6] Although Plaintiff has claimed that it intended that employees would be eligible to participate after one year of service, the New Plan Installation Transmittal which was prepared by Valley and signed by Robyn Assaf on behalf of Plaintiff and which was attached to Plaintiff's complaint, indicates the contrary: that Plaintiff intended employees would be eligible after six months of service. *See* Compl. Ex. 3 (Doc. No. 1-3) at 3, ¶ 1.

materially different than the Adoption Agreement . . . Plaintiff had executed on June 22, 2011." Pl.'s Resp. Ex. 3 (Doc. No. 12-3) ¶ 20; *e.g.*, *id.* ¶ 38 (the freezing of the DBP and the increase in funding requirements "are a direct result of . . . Defendant's fraud in using its DBP terms rather than the Adoption Agreement . . . Plaintiff signed on June 22, 2011"). Further, Plaintiff has alleged that Defendant concealed the fact that two plans existed by attaching "[t]he signature page from . . . Plaintiff's Adoption Agreement . . . to . . . Defendant's Adoption Agreement." Pl.'s Resp. Ex. 3 (Doc. No. 12-3) ¶ 27.

Under § 1113's "fraud or concealment" provision, an "action 'may be commenced not later than six years after the date of discovery of [the] breach or violation.' " *Fulghum*, 785 F.3d at 413 (quoting 29 U.S.C. § 1113). It is undisputed that Plaintiff had in its possession as early as March 14, 2012, a copy of the typewritten Adoption Agreement. That copy not only revealed the materially different terms, *see* Pl.'s Resp. (Doc. No. 12) at 3, n.1, but also had attached to it the Plaintiff's signature page. As Plaintiff has acknowledged, the document "would have put Plaintiff on notice of the two different plans." *Id.* ¶ 9.

Plaintiff therefore had six years after the date of discovery of Defendant's alleged fraudulent conduct and its alleged concealment, or until March 14, 2018, to assert causes of action under § 1109 for breach of fiduciary duty. Because Plaintiff did not seek relief until March 21, 2018 (assuming Plaintiff's claims relate back under Fed. R. Civ. P. 15(c)), amendment of Plaintiff's complaint at this stage of the litigation to more clearly articulate its ERISA claims would be futile.

Plaintiff also has alleged in its proposed pleading that Defendant also breached its fiduciary duty by failing to resolve the census issue on September 12, 2013, after Plaintiff complained that date about the increase in funding. Plaintiff has contended that Defendant "made its first request for a 2011 census [on December 29, 2011]," Pl.'s Resp. Ex. 2 (Doc. 12-3) ¶ 18, and that Plaintiff responded to that request on February 8, 2012, *see id.* Plaintiff has argued that "[w]ith each census, [Plaintiff] questioned and challenged incorrect inclusions by Defendant." Pl.'s Mot. ¶ 21. Plaintiff has alleged in its proposed pleading that "from the first year's census and every census thereafter, disagreements on the census . . . arose." Pl.'s Resp. Ex. 2 (Doc. 12-3) ¶ 20. Plaintiff has alleged that Defendant notified Plaintiff on August 27, 2013, "of a substantial increase in funding," *id.* ¶ 23, and the DBP was thereafter frozen on September 12, 2013, *see id.* ¶ 24.

Section 1113(2) provides that "[n]o action may be commenced . . . with respect to a fiduciary's breach of any responsibility, duty, or obligation . . . after . . . three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation." 29 U.S.C. § 1113(2).[7] The Tenth Circuit has "yet to define the

[7] The Court may take judicial notice of case filings in determining when Plaintiff had knowledge of the facts underlying its causes of action. *See Wei v. Univ. of Wyo. Coll. of Health Sch. Pharmacy*, 2019 WL 117081, at *3 (10th Cir. Jan. 7, 2019) (district court entitled to glean relevant date for limitations calculation by taking judicial notice of its own case files). Here, the Court has reviewed the pleadings and papers filed in *AGI Consulting LLC v. Am. Nat'l Ins. Co.*, Case No. CIV-18-245-W (W.D. Okla.),

phrase 'actual knowledge,'" *Mid-S. Iron Workers Welfare Plan v. Harmon*, 645 F. App'x 661, 665 (10th Cir. 2016), used in § 1113(2), and has instead looked to "sister circuits" whose definitions "fall[] for the most part into two schools of thought: those that require some understanding that the conduct is unlawful under ERISA and those that merely require knowledge of the conduct itself." *Id.*; *see Fish v. GreatBanc Tr. Co.*, 749 F.3d 671, 679 (7th Cir. 2014) ("strictest test applies the three-year bar only when the plaintiff knows not only the facts underlying the alleged violation but also that those facts constitute a violation under ERISA"). *Compare Maher v. Strachan Shipping Co.*, 68 F.3d 951,

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wherein Plaintiff sought a declaration that no DBP existed between Plaintiff and Defendant. *See id.* Compl. (Doc. No. 1) ¶ 8. Attached to the complaint in that matter is a partial copy of the "AGI Consulting Pension Plan and Trust Summary Plan Description" ("SPD"), *see id.* Compl. Ex. 15 (Doc. No. 1-9), that Plaintiff states was "first provided" by Defendant on September 12, 2013. *See id.* at 1. A complete copy of the SPD is attached to Defendant's Motion to Dismiss, *see* Def.'s Mot. Ex. 1 (Doc. No. 12-1), and the Court has considered the SPD, the authenticity of which has not been challenged, as "part of the Plan." *Eugene S. v. Horizon Blue Cross Blue Shield*, 663 F.3d 1124, 1131 (10th Cir. 2011).

These documents reflect that, as of September 12, 2013, Plaintiff would have had actual knowledge of the terms of the DBP that Defendant was managing, absent any allegations of fraud or concealment, including the following provisions: (1) Article I, titled "Participation in the Plan," *see id.* at 4 (capitalization modified to initial capitals only), which advises employees that they will be eligible to participate after "completion of six (6) months of service," *id.*; and (2) Article II, titled "Determination of Benefits," *see id.* at 5 (capitalization modified to initial capitals only), which advises employees that "[a]ccrued [b]enefit[s] will be determined based upon a retirement benefit formula . . . equal to 200% of Your Average Compensation," *id.*

954-56 (5th Cir. 1995) ("'[actual knowledge] requires a showing that plaintiffs actually knew not only of the events that occurred which constitute the breach or violation but also that those events supported a claim for breach of fiduciary duty or violation under ERISA'" (alteration in original)), *and Int'l Union of Elec., Elec., Salaried, Mach. & Furniture Workers v. Murata Erie N.A., Inc.*, 980 F.2d 889, 900 (3d Cir. 1992) ("actual knowledge" "requires a showing that plaintiffs actually knew not only of the events that occurred which constitute the breach or violation but also that those events supported a claim of breach of fiduciary duty or violation under ERISA"), *with Wright v. Heyne*, 349 F.3d 321, 330 (6th Cir. 2003) ("relevant knowledge required to trigger the statute of limitations under 29 U.S.C. § 1113(2) is knowledge of the facts or transaction that constituted the alleged violation; it is not necessary that the plaintiff also have actual knowledge that the facts establish a cognizable legal claim under ERISA in order to trigger the running of the statute"), *Martin v. Consultants & Adm'rs, Inc.*, 966 F.2d 1078, 1086 (7th Cir. 1992) ("it is not necessary for a potential plaintiff to have knowledge of every last detail of a transaction, or knowledge of its illegality," but "plaintiff must know of the essential facts of the transaction or conduct constituting the violation"), *and Brock v. Nellis*, 809 F.2d 753, 755 (11th Cir. 1987) ("[t]o 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"). *See also Caputo v. Pfizer, Inc.*, 267 F.3d 181, 193 (2d Cir.

2001) (quoting *Gluck v. Unisys Corp.*, 960 F.2d 1168, 1177 (3d Cir. 1992)) ("[P]laintiff has 'actual knowledge of the breach or violation' within the meaning of ERISA . . . , when he has knowledge of all material facts necessary to understand that an ERISA fiduciary has breached his or her duty or otherwise violated the Act. While a plaintiff need not have knowledge of the relevant law, he must have knowledge of all facts necessary to constitute a claim. Such material facts 'could include necessary opinions of experts, knowledge of a transaction's harmful consequences, or even actual harm.'" (citations omitted)).

Following the more prevalent view[8] that only knowledge of the essential facts constituting the alleged violation or breach is required to trigger § 1113(2)'s three-year limitations period[9] (as opposed to the Third and Fifth Circuit's narrower interpretation of § 1113(2)), the Court finds that Plaintiff's proposed cause of action would be time-barred. Plaintiff

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[8] *See Wright*, 349 F.3d at 330 (broader view of actual knowledge "furthers the policies underlying statutes of limitations. Among the basic policies served by statutes of limitations is preventing plaintiffs from sleeping on their rights and prohibiting the prosecution of stale claims.").

[9] Though the Tenth Circuit has not expressly adopted this view, *see Mid-S. Iron Workers Welfare Plan*, 645 F. App'x at 665, it appears to be the view taken by the Tenth Circuit in *Russell v. Chase Inv. Servs. Corp.*, 384 F. App'x 753 (10th Cir. 2010). In that case, the Tenth Circuit held that the plaintiff's breach of fiduciary duty claim was barred by 29 U.S.C. § 1113(2) because the lawsuit was filed "more than three years after [the plaintiff] had actual knowledge of the facts on which [the plaintiff] based her complaint." *Id.* at 754.

had actual knowledge of the increased funding and about Defendant's alleged "incorrect inclusions"—which form the basis of this breach of fiduciary claim—as early as August 22, 2013, and no later than September 12, 2013. *See* Pl.'s Mot. (Doc. No. 18) ¶ 14.e ("8-22-13 Date Plaintiff was notified of a substantial increase in funding, and the inclusion of ineligible persons on the census."); *id.* ¶ 24 ("On 8-27-13, Plaintiff was notified of a substantial increase in the funding requirements."); *id.* ¶ 14.f ("9-12-13 Date the DBP was frozen at the direction of [Defendant] . . . and resolution of Plaintiff due to dispute over the census."). Plaintiff therefore knew more than three years before this lawsuit was filed on March 21, 2018, of the facts constituting the alleged violation. It was "not necessary that . . . [P]laintiff also have actual knowledge that th[ose] facts establish[ed] a cognizable legal claim under ERISA . . . to trigger the running of the statute." *Wright*, 349 F.3d at 330. Accordingly, any claim for breach of fiduciary duty based on these allegations would be untimely.

CONCLUSION

In its Motion for a New Trial, Plaintiff has prayed that this Court vacate its Order and Judgment entered on July 30, 2018, reconsider the timeliness of Plaintiff's proposed claims under § 1113, and allow Plaintiff to file another amended complaint "to clearly state an ERISA statute of limitations among other things." Pl.'s Mot. (Doc. No. 18) ¶ 32.

As stated, the Court's and the parties' reliance on a state-law statute of limitations may be deemed a manifest error of law or a misapprehension of the controlling law that required revisitation. Having now reexamined Plaintiff's proposed claims under § 1113 and having determined that amendment would be futile because those claims would be time-barred, the Court again FINDS that dismissal of this lawsuit is warranted. Accordingly, the Court DENIES Plaintiff's Motion for a New Trial (Doc. No. 18).

IT IS SO ORDERED this 28th day of March, 2019.

/s/ Charles B. Goodwin
CHARLES B. GOODWIN
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

AGI CONSULTING L.L.C., by Assaf Al-Assaf as Trustee/ Owner/Plan Administrator of an Alleged Non-Integrated Defined Benefit Plan,	)	
Plaintiff,	)	No. CIV-18-252-W
vs.	)	
AMERICAN NATIONAL INSURANCE COMPANY,	)	
Defendant.	)	

ORDER

(Filed Jul. 30, 2018)

Plaintiff AGI Consulting L.L.C., by Assaf Al-Assaf as Trustee/Owner/Plan Administrator of an Alleged Non-Integrated Defined Benefit Plan ("AGI"), filed this action on March 21, 2018, against defendant American National Insurance Company ("ANICO"). See Doc. 1. AGI alleged in its complaint that in June 2011, it negotiated and entered into a contract with ANICO to purchase a Defined Benefit Plan ("DBP" or "Plan") and that the Plan was to be administered according to terms handwritten on a form titled "Adoption Agreement for American National Insurance Company Standardized Non-Integrated Defined Benefit Prototype Plan." AGI contended that ANICO replaced that form with a typewritten form and in doing so, changed

certain terms in the Plan. See Doc. 1-5 at 3. AGI complained that ANICO's conduct was fraudulent "and "calculated to deceive [AGI] . . . and take financial advantage of [it]. . . ." Doc. 1 at 7, ¶ 32. AGI sought both actual and punitive damages.

The matter then came before the Court on ANICO's Motion to Dismiss filed pursuant to Rule 12(b)(6), F.R.Civ.P. ANICO argued that AGI's claim was time-barred, and in its response, AGI agreed.[1] AGI also requested in its response that the Court grant AGI leave to amend its complaint and assert a cause of action for rescission[2] and in the alternative, causes of action for reformation and breach of contract. In its reply, ANICO opposed AGI's request, and the Court directed AGI to file a sur-reply.

Rule 15(a)(2), F.R.Civ.P., requires that leave to amend be "freely give[n] . . . when justice so requires." Confronted with this liberal standard, the Court has examined the record to determine whether the Rule's

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[1] See Doc. 12 at 1, ¶ 2 ("Plaintiff admits the [s]tatute of [l]imitations . . . has expired and [d]efendant's Motion to Dismiss [p]laintiff's cause of action for fraud should be sustained.").

[2] In Oklahoma, rescission of a contract seeks to avoid the contract ab initio; "the rights of the parties . . . are the same as if no contract had ever been made." Hooper v. Commercial Lumber Co. 341 P.2d 596, 598 (Okla. 1959). Thus, "there can be no partial rescission of a contract[,]" Berland's Inc. of Tulsa v. Northside Village Shopping Center, Inc., 447 P.2d 768, 772 (Okla. 1968) (citation omitted); the contract "must either be valid or void in toto[.]" Id. (citation omitted).

"mandate is to be heeded," Foman v. Davis, 371 U.S. 178, 182 (1962) (citation omitted), in this instance.

In determining whether "justice . . . requires," Rule 15(a)(2), supra, that AGI be granted leave to amend its pleading, the Court must consider such reasons "as undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice to the opposing party . . . [and] futility of amendment[.]" Foman, 371 U.S. at 182. ANICO has not argued that AGI has acted in bad faith or with a dilatory motive; it likewise has not argued that the proposed amendment would result in undue delay or undue prejudice. ANICO's sole challenge focuses on "futility of amendment."

In this circuit, "'"[a] proposed amendment is futile if the complaint, as amended, would be subject to dismissal."'" Anderson v. Suiters, 499 F.3d 1228, 1238 (10th Cir. 2007) (quoting Lind v. Aetna Health, Inc., 466 F.3d 1195, 1199 (10th Cir. 2006) (further quotation omitted)). Accordingly, the Court must decide, based on the allegations in the proposed amended complaint and after consideration of those documents of which the Court may take judicial notice,[3] whether, as

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[3] See Aldrich v. McCulloch Properties, Inc., 627 F.2d 1036, 1041 n.4 (10th Cir. 1980) (statute of limitations issues may be resolved on motion to dismiss but only where dates given in complaint make clear that right sued upon has been extinguished). See also Guttman v. Khalsa, 669 F.3d 1101, 1127 n.5 (10th Cir. 2012) (court may take judicial notice of public records, including court filings); Jacobsen v. Deseret Book Co., 287 F.3d 936, 941 (10th Cir. 2002) (court may consider documents referred to in complaint if documents are central to plaintiff's claim and parties do not dispute documents' authenticity).

ANICO has argued, amendment would be futile in this case.[4]

In the proposed pleading, AGI has alleged:

(1) on June 22, 2011, it "negotiated and adopted a contract [("Adoption Agreement")] to purchase a . . . [DBP] from . . . [ANICO,]" Doc. 12-3 at 3, ¶ 4;

(2) on the same date, AGI and ANICO "entered into an Agreement for Pension Services[,]" id. ¶ 5;

(3) prior to this time, Robyn Assaf on behalf of AGI had numerous telephone conversations with Andre Fleener, an ANICO sales agent, and on the date these documents were executed, Assaf and Fleener together with ANICO representative Greg Valley "discussed [the Adoption Agreement] line by line[,]" id. at 4, ¶ 10;

(4) the purpose of the Adoption Agreement was to "modif[y] . . . [ANICO's standardized] [p]rototype [p]lan to [AGI's] . . . specification[s,]" id. at 3, ¶ 8, and once the Adoption Agreement had been executed by the parties, ANICO was to administer the DBP according to the Adoption Agreement's terms;

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[4] In determining whether a proposed pleading would be subject to dismissal, the Court uses the same analysis that governs a motion to dismiss filed under Rule 12(b)(6), supra. See n.3, supra. Accordingly, the Court must accept the well-pleaded allegations of the proposed amended complaint as true and construe them in the light most favorable to AGI; if those allegations show, on their face, that the statute of limitations has run, the proposed claims would be subject to dismissal. E.g., Little v. Portfolio Recovery Associates, LLC, 548 Fed. Appx. 514, 515 (10th Cir. 2013) (cited pursuant to Tenth Cir. R. 32.1).

(5) "the preprinted [Adoption Agreement] form . . . had been partially filled out by ANIC[O] in typewritten form and then [to complete the agreement,] was partially filled out by handwritten entries either by . . . Assaf, or by . . . Valley[,]" id. at 4, ¶ 10, with "[s]ome items on the form remain[ing] blank[,]" id.;

(6) "a list or 'census' of all eligible [Plan] employees [had to] . . . be furnished [on an annual basis] to . . . ANIC[O] . . . to calculate . . . the [Plan's] funding requirements[,]" id. at 5, ¶ 16;

(7) although AGI furnished the 2011 census on February 8, 2012, see id. at 6, ¶ 18, and thereafter provided censuses for years 2012 and 2013, "[f]rom the very beginning of the contract term the parties disagreed on [which individuals were] . . . to be included in the census[,]" id. ¶ 19, as well as disagreed on "other substantial matters[,]" id. ¶ 20;

(8) on August 27, 2013, AGI "was notified by [ANICO] . . . of a substantial increase in the funding requirements[,]" id. ¶ 23, and after AGI complained, "the DBP was [f]rozen [on September 12, 2013,]" id. ¶ 24, by AGI based on Fleener's instruction to do so;

(9) "the Plan started [on January 1, 2011,]" id. ¶ 21, and from that time until September 12, 2013, ANICO "was managing a DBP that was materially different than the Adoption Agreement . . . [AGI] had executed on June 22, 2011[,]" id. ¶ 20; and

(10) three years after the Plan "was [f]rozen[,]" id. ¶ 24, AGI on August 10, 2016, "discovered the

existence of the] two . . . [P]lans," id. at 7, ¶ 25, and learned that "[t]he signature page from [AGI's handwritten] . . . Adoption Agreement [had been] . . . attached to . . . [ANICO's typewritten] Adoption Agreement." Id. ¶ 27.

> AGI has sought in its amended pleading
>
> > to rescind both the DBP and the Agreement for Pension Services for failure of consideration and[/]or fraud because . . . [ANICO] did not provide the same Adoption Agreement . . . [AGI] purchased and because . . . [ANICO] failed to provide the pension services . . . and a proper census[5] and for fraud by substitution of . . . [ANICO's] Adoption Agreement for . . . [AGI's] Adoption Agreement. . . .

Id. at 8, ¶ 31; e.g., id. ¶ 32 ("fraudulent activities of Defendant resulted in a failure of consideration"). AGI has prayed that the Agreement for Pension Services "and the [DBP] . . . be declared null and void and without force and effect." Id. at 8. AGI has further sought to

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[5] In the proposed pleading, AGI has quoted the Agreement for Pension Services in part:

> "[T]his Agreement may be renewed on an annual basis by . . . [AGI's] completion and execution of and returning to . . . [ANICO] an 'Annual Census' (hereinafter called the 'Census') on forms to be furnished to . . . [AGI] by . . . [ANICO]. If . . . [AGI] does not return a properly completed and executed Census . . . within the time limit established by . . . [ANICO], this Agreement shall expire as of its termination date and shall not be renewed without the express written consent of . . . [ANICO]."

Doc. 12-3 at 5, ¶ 17 (quoting Doc. 12-4 at 2, ¶ 5).

recover "all sums [it] . . . has paid to . . . [ANICO] for the . . . Agreement [for Pension Services] and . . . to fund any . . . annuities and . . . [to pay] outside actuaries and filing fees. . . ." Id.

ANICO has first contended that amendment would be futile since an action under these circumstances based on the theory of rescission[6] would be subject to dismissal[7]

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[6] See 15 O.S. § 233A (where action is timely brought for relief based on theory of rescission, whether action would have been formerly denominated rescission at law or rescission in equity, method of trial to be afforded depends on relief to which party who brought suit is entitled); id. § 233B (in action based on theory of rescission of contract, court shall adjust equities between parties even though action is tried to jury). See Commercial Communications, Inc. v. State ex rel. Oklahoma Board of Public Affairs, 613 P.2d 473, 476 (Okla. 1980) (equitable nature of rescission codified in 15 O.S. §§ 231-235).

[7] To the extent, if any, AGI is proceeding in equity, the Oklahoma Supreme Court has noted that "[a]lthough facts which necessitate resort to the equitable remedy of rescission usually provide grounds for a legal action . . . , rescission ordinarily is within the exclusive jurisdiction of equity and, because controlled by equitable principles[,] is a remedy which can be conferred by equity alone." Ionic Petroleum, Ltd. v. Third Finance Corp., 411 P.2d 492, 495 (Okla. 1966) (citation omitted). See Berland's Inc. of Tulsa, 447 P.2d at 772 (suit for rescission is action of equitable cognizance and governed by principles of equity). The state court has further recognized that "it is a fundamental principle that equity will not exercise jurisdiction to cancel a contract when the complainant has a plain, adequate and complete remedy at law. . . ." Ionic Petroleum, 411 P.2d at 495 (citation omitted).

ANICO has not argued that this cause of action is subject to dismissal because AGI has an adequate remedy at law or argued, based on the doctrine of laches, that AGI was obligated to " 'diligent[ly] . . . seek[ ] [t]his [equitable] remedy, and must not have slept upon [its] . . . rights; [or argued that] . . . with knowledge of the facts which gave [AGI] . . . a right to seek rescission, [AGI] . . .

as time-barred.[8] AGI has responded that this claim did not accrue until September 12, 2013, the date AGI unilaterally

> signed its corporate resolution to freeze the [P]lan based upon ANIC[O]'s recommendation due to uncertainty [about] . . . which employees should or should not be in the census and due to the tripling of the funding requirements based on ANIC[O]'s version of the Adoption Agreement.

Doc. 12-3 at 9, ¶ 38. AGI has contended that it had five (5) years from that date to seek relief.

In Baker v. Massey, 569 P.2d 987 (Okla. 1977), the Oklahoma Supreme Court held "that the limitation period to be applied in actions to rescind on the ground[ ]

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has been guilty of an unreasonable and unnecessary delay in availing [it]self of [t]his remedy[.]' " Nickel v. Janda, 115 Okla. 207, ___, 242 P. 264, 267 (1923) (quotation omitted). See International Supply Co. v. Bryan & Emery, 164 Okla. 142, ___, 23 P.2d 205, 209 (1933) (essential averments to equitable proceeding of rescission are that party, upon discovery of alleged fraud, promptly rescinded contract and offered to restore everything of value which had been agreed to be transferred as consideration for contract).

[8] Because the Court's subject matter jurisdiction is grounded on diversity of citizenship and requisite amount in controversy, see 28 U.S.C. § 1332, the Court must apply Oklahoma law in deciding whether AGI's proposed causes of action are time-barred and whether any tolling provisions apply to those claims. E.g., Burnham v. Humphrey Hospitality Reit Trust, Inc., 403 F.3d 709, 712 (10th Cir. 2005) (federal court sitting in diversity applies state law for statute of limitations purposes; state law also determines when action commenced).

of . . . failure of consideration[9] is five years."[10] Id. at 992 (footnote omitted); e.g., 12 O.S. § 95(A)(1)). Because AGI has sought rescission of "both the DBP and the Agreement for Pension Services for failure of consideration[,]" Doc. 12-3 at 8, ¶ 31, due to ANICO's failure to "provide the same Adoption Agreement . . . [AGI] purchased and . . . to provide the pension services . . . and a proper census[,]"[11] id. ¶ 31, consistent with the terms of AGI's Adoption Agreement, the Court finds the five-year period arguably applies in this case. E.g., Crumley v. Smith, 397 P.2d 119 (Okla. 1964); Taylor v. Clark, 380 P.2d 250 (Okla. 1963) (where plaintiffs' alleged cause

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[9] In Oklahoma, "[a] contract is extinguished by its rescission." 15 O.S. § 232. "A party to a contract may rescind the same . . . [i]f through the fault of the party as to whom he rescinds, the consideration for his obligation fails in whole or in part." Id. § 233(2).

[10] Oklahoma statutory law provides that

> [r]escission . . . can be accomplished only by the use, on the party rescinding, of reasonable diligence to comply with the following rules:
>
> 1. He must rescind promptly, upon discovering the facts which entitle him to rescind[ ] . . . and is aware of his right to rescind; and,
>
> 2. He must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same. . . .

Id. § 235.

[11] As stated, AGI has also sought rescission of "both the DBP and the Agreement for Pension Services for . . . fraud[,]" Doc. 12-3 at 8, ¶ 31, due to ANICO's "substitution of . . . [ANICO's] Adoption Agreement for . . . [AGI's] Adoption Agreement[.]" Id. ¶ 31. As AGI has admitted, any claim based on fraud is time-barred.

of action, if any, appears to have arisen, partly at least, out of alleged fact that no valid consideration was ever paid for deeds sought to be cancelled, five-year limitations period is applicable); id. (if any limitations period is used to defeat equitable action to cancel deeds for failure of consideration, it is five-year period). Even still, the Court finds amendment would be futile.

AGI's claim for rescission accrued, and the five-year limitations period began to run, when AGI had sufficient information to put it on notice of the basis of its claim. Despite AGI's assertion that the accrual date for this claim is September 12, 2013—the date AGI "froze" the Plan, AGI, as the record now establishes, had in its possession as early as March 24, 2012, a copy of ANICO's typewritten form that contained materially different terms and that, as AGI has conceded, "would have put [AGI] . . . on notice of the two different plans[.]" Doc. 12 at 4, ¶ 9. Accordingly, AGI had notice by that date that ANICO had "not provide[d] the same Adoption Agreement . . . [AGI had] purchased and . . . [that ANICO had] failed to provide the pension services [consistent with that agreement]. . . ." Doc. 12-3 at 8, ¶ 31. The applicable five-year period therefore began to run on March 24, 2012, and expired on March 24, 2017;[12] amendment of the complaint at this date to assert a claim for rescission would therefore be futile.

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[12] To the extent, if any, AGI's cause of action is governed by section 235, see n.10, supra, the Court further finds that AGI failed to use "reasonable diligence"[,] 15 O.S. § 235, and failed to "rescind promptly," id. § 235(1), after receiving information on March 24, 2012, that entitled AGI to seek rescission.

AGI has also sought leave to amend its complaint and assert an alternate theory of relief based on reformation. It has prayed that ANICO's Adoption Agreement be reformed "in every respect to[, and that the Plan be administered pursuant to the terms of,] the . . . Adoption Agreement . . . that [AGI] . . . signed[,]" Doc. 12-3 at 8-9, and contended that such relief is warranted based on ANICO's "acts of fraud." Id. at 9, ¶ 36.

In Oklahoma, "[r]eformation may be had [in those instances where there has been] . . . mistake on one side and fraud or inequitable conduct on the other." Maloy v. Smith, 341 P.2d 912, 917 (Okla. 1959) (citation omitted). Reformation is therefore warranted to revise a contract to make it express the parties' true intention where, as alleged in this case, fraudulent conduct has caused a party either to omit a provision to which the parties had agreed or to insert one to which the parties had not agreed.[13]

As case law teaches, "[i]f the right to recover is primarily based on fraud[, as in this case,] the two-year statute [of limitations found in title 12, section 95(A)(3) of the Oklahoma Statutes] is applicable." Maloy, 341

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[13] See also Home Stake Production Co. v. Trustees of Iowa College, 331 F.2d 919, 920-21 (10th Cir. 1964) (quoting Ohio Casualty Insurance Co. v. Callaway, 134 F.2d 788, 789 (10th Cir. 1943)) ("in Oklahoma, that 'where parties orally agree upon the terms of a written contract, but . . . through mistake on the part of one, and fraud or inequitable conduct on the part of the other, the written agreement drafted to evidence the oral contract fails to express the real agreement and intention of the parties, equity may grant reformation of the written contract to comply with the antecedent oral agreement.' ").

P.2d at 917 (citations omitted); e.g., id. (five-year period found in 12 O.S. § 95(A)(12) only applicable if right to recover based on inequitable conduct that falls short of fraud). That two-year period "does not commence to run until the fraud is discovered or should have been discovered[.]" Id. Cf. Scott v. Peters, 388 P.3d 699, 704 (Okla. 2016) (notice, constructive or actual, triggers accrual of statute of limitations).

AGI has conceded that its original claim for fraud is time-barred. See Doc. 12 at 1, ¶ 2. For that reason and because AGI has contended that its right to reformation is grounded on ANICO's "acts of fraud[,]" Doc. 12-3 at 9, ¶ 36, and because AGI knew no later than September 24, 2012, that ANICO's Adoption Agreement did not conform to AGI's handwritten version, the Court finds this proposed claim for relief is likewise time-barred. Amendment would therefore be futile as to this cause of action.

Finally, AGI has sought leave to amend its complaint and assert in the alternative that ANICO is liable for breach of contract.[14] In support of this

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[14] In the proposed pleading, AGI has referred to one "contract" (comprised of the Adoption Agreement and the Agreement for Pension Services) and has focused on September 12, 2013, as the date its causes of action for rescission, reformation and breach of contract each accrued. See Doc. 12-3 at 9, ¶ 37. Accordingly, the Court has not considered AGI's belated assertions in its sur-reply that "[e]very month . . . [ANICO] bills [AGI] . . . for services rendered under the Agreement for Pension Services[,]" Doc. 15 at 4, and that "[t]hese monthly installment payments . . . state a new accrual of the statute [of limitations] for rescission, revocation or breach of contract. . . ." Id. at 5.

proposed cause of action, AGI has relied on the following allegations:

(1) on June 22, 2011, it "negotiated and adopted a contract to purchase a . . . [DBP] from . . . [ANICO] and contemporaneous with that agreement, [AGI] . . . and [ANICO] . . . entered into a written contract where [AGI] . . . would pay [ANICO] . . . an annual fee to provide pension services to . . . [AGI,]" Doc. 12-3 at 10, ¶ 40;

(2) AGI "has performed all the stipulations, conditions and agreements required . . . under the terms of both . . . [AGI's version of the Adoption Agreement and the Agreement for Pension Services,]" id. ¶ 42;

(3) on September 12, 2013, and thereafter, ANICO "failed or refused to perform its part of [these two] . . . contracts[,]" id. at 11, ¶ 43; and

(4) ANICO's failure or refusal to perform has caused AGI damages in the amount of $251,108.00.

"A breach of contract is a material failure of performance of a duty arising under or imposed by agreement." Lewis v. Farmers Insurance Co., 681 P.2d 67, 69 (Okla. 1983). If a contract did exist between the parties—AGI's Adoption Agreement and the Agreement for Pension Services, as AGI has alleged,[15] the Court

[15] To recover on a breach of contract claim, a plaintiff must first prove the "formation of a contract[.]" Digital Design Group, Inc. v. Information Builders, Inc., 24 P.3d 834, 843 (Okla. 2001) (footnote omitted). That requires proof of, among other things, an agreement, that is—a "meeting of the minds"—on all material terms. See Queen Anne Candy Co. v. Eagle, 184 Okla. 519, ___,

must decide for purposes of AGI's request to amend when ANICO breached that contract. According to AGI, ANICO's breach occurred on September 12, 2013, because on that date AGI

> signed its corporate resolution to freeze the [P]lan based upon ANIC[O]'s recommendation due to uncertainty [about] . . . which employees should or should not be in the census and due to the tripling of the funding requirements based on ANIC[O]'s version of the Adoption Agreement.

Doc. 12-3 at 9, ¶ 38; e.g., id. ¶ 37.

However, as the proposed amended complaint alleges, the Plan started on January 1, 2011, see Doc. 12-3 at 6, ¶ 21,[16] and from that date until September

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88 P.2d 630, 632 (1939) (in determining existence of contract, court considers whether there was meeting of minds on all essential elements).

In this case, AGI has alleged in its proposed amended complaint that an annual census was necessary "to implement the Plan," Doc. 12-3 at 5, ¶ 16, and was an integral part of the Agreement for Pension Services, see Doc. 15 at 4 (" 'census' is not some de minimis factor"), but has further alleged that "[f]rom the very beginning of the contract term the parties disagreed on who was to be included in the census[,]" Doc. 12-3 at 6, ¶ 19; e.g., id. ¶ 20, and on "other substantial matters[.]" Id. The Court has nevertheless assumed for purposes of this cause of action that a contract existed between the parties.

[16] Both AGI's handwritten Adoption Agreement and ANICO's typewritten version provide that the effective date of the parties' contract was January 1, 2011, even though AGI did not sign its version until June 22, 2011. See Doc. 1-2 at 2, ¶ 6; Doc. 1-4 at 2, ¶ 6. Likewise, the Agreement for Pension Services signed on June

12, 2013, ANICO "was managing a DBP that was materially different than the Adoption Agreement . . . [AGI] had executed. . . ." Id. ¶ 20. Moreover, as AGI's response makes clear, on March 14, 2012, AGI received a copy of ANICO's typewritten Adoption Agreement, which contained the "materially different" terms pursuant to which ANICO had been managing the DBP since 2011 and which showed that ANICO had allegedly breached the terms of the parties' agreement from the Plan's start date.

In Oklahoma, actions upon a written contract must be brought within five (5) years from the accrual of the cause of action. See 12 O.S. § 95(A)(1). The limitations period in such cases "accrues when the party asserting [the claim] . . . first acquires the right to sue." Kinzy v. State ex rel. Oklahoma Firefighters Pension and Retirement System, 20 P.3d 818, 823 (Okla. 2001) (footnote omitted). In this case, AGI's right to sue accrued no later than March 2012 when AGI received the typewritten form from ANICO and knew then that ANICO had breached the terms of the parties' agreement. Accordingly, this claim is likewise time-barred.

Because AGI has confessed that its cause of action for fraud is time-barred, see Doc. 12 at 1, ¶ 2, and because the Court has determined that AGI's proposed claims for rescission, reformation and breach of contract would likewise be untimely, the Court

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22, 2011, was in effect from January 1, 2011, to December 31, 2011. See Doc. 12-4 at 2.

(1) GRANTS ANICO's Motion to Dismiss [Doc. 9] filed on May 24, 2018;

(2) in its discretion, DENIES AGI's request to amend its complaint [Doc. 12]; and

(3) DISMISSES this matter with prejudice.

ENTERED this 30th day of July, 2018.

/s/ Lee R. West
LEE R. WEST
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

AGI CONSULTING L.L.C., by Assaf Al-Assaf as Trustee/ Owner/Plan Administrator of an Alleged Non-Integrated Defined Benefit Plan,	)	
Plaintiff,	)	No. CIV-18-252-W
vs.	)	
AMERICAN NATIONAL INSURANCE COMPANY,	)	
Defendant.	)	

JUDGMENT

(Filed Jul. 30, 2018)

Pursuant to the Court's Order issued this date, the Court DISMISSES this matter with prejudice.

DATED and ENTERED this 30th day of July, 2018.

/s/ Lee R. West
LEE R. WEST
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

AGI CONSULTING L.L.C., by Assaf Al-Assaf as Trustee/ Owner/Plan Administrator of an Alleged Non-Integrated Defined Benefit Plan,	)	
Plaintiff,	)	No. CIV-18-252-W
vs.	)	
AMERICAN NATIONAL INSURANCE COMPANY,	)	
Defendant.	)	

ORDER

(Filed Jul. 17, 2018)

Plaintiff AGI Consulting L.L.C., by Assaf Al-Assaf as Trustee/Owner/Plan Administrator of an Alleged Non-Integrated Defined Benefit Plan ("AGI"), filed this action on March 21, 2018, against defendant American National Insurance Company ("ANICO"). See Doc. 1. AGI alleged in its complaint that on June 22, 2011, it negotiated and entered into a contract with ANICO to purchase a Defined Benefit Plan ("Plan"). See id. at 1, ¶ 2. "The Plan was drawn up on a form with handwritten blanks to be filled in[,]" id. at 2, ¶ 5, and relying on certain representations made by ANICO, R. Robyn Assaf and Assaf Fadil Al-Assaf, as owners, employers and sponsors of the Plan, signed the document. See id. ¶ 4.

AGI contended in its complaint not only that ANICO's representations on June 22, 2011, were misleading and designed "to induce . . . [AGI] to purchase a . . . [Plan,]" id. 6, ¶ 26, but also that ANICO subsequently replaced the handwritten form with a typewritten form and in doing so, made changes to certain material terms. AGI sought both actual and punitive damages based on ANICO's allegedly fraudulent conduct, which was "calculated to deceive [AGI] . . . and take financial advantage of [it]. . . ." Id. at 7, ¶ 32.

The matter came before the Court on ANICO's Motion to Dismiss filed pursuant to Rule 12(b)(6), F.R.Civ.P. ANICO argued that AGI's claim was time-barred, and in its response, AGI agreed. Accordingly, AGI's claim based on fraud should be and will be dismissed with prejudice.

AGI also requested in its response that the Court grant AGI leave to amend its complaint and assert a cause of action for rescission and in the alternative, causes of action for reformation and breach of contract. In its reply, ANICO has argued that amendment would be futile since AGI's proposed causes of action are also time-barred.

Upon review, the Court finds that AGI should be given the opportunity to address ANICO's arguments and authorities regarding the timeliness of each proposed claim for relief, particularly, since AGI has conceded that its claim for fraud is untimely. Accordingly, the Court DIRECTS AGI to file a sur-reply, the text of which shall not exceed ten (10) pages, within seven

(7) days of this date and address ANICO's argument that amendment of the complaint as AGI has proposed would be futile.

ENTERED this 17th day of July, 2018.

/s/ Lee R. West
LEE R. WEST
UNITED STATES
DISTRICT JUDGE

29 U.S.C. Sec. 1113 Limitation of actions
(United States Code (2020 Edition))

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.

(Pub. L. 93–406, title I, §413, Sept. 2, 1974, 88 Stat. 889; Pub. L. 100–203, title IX, §9342(b), Dec. 22, 1987, 101 Stat. 1330–371; Pub. L. 101–239, title VII, §§7881(j)(4), 7894(e)(5), Dec. 19, 1989, 103 Stat. 2443, 2450.)

Amendments

1989—Pub. L. 101–239, §7894(e)(5), struck out "(a)" before "No action". Par. (2). Pub. L. 101–239, §7881(j)(4), struck out comma after "violation".

1987—Subsec. (a)(2). Pub. L. 100–203 struck out "(A)" after "date" and struck out "or (B) on which a report from which he could reasonably be expected to have

obtained knowledge of such breach or violation was filed with the Secretary under this subchapter".

Effective Date of 1989 Amendment

Amendment by section 7881(j)(4) of Pub. L. 101–239 effective, except as otherwise provided, as if included in the provision of the Pension Protection Act, Pub. L. 100–203, §§9302–9346, to which such amendment relates, see section 7882 of Pub. L. 101–239, set out as a note under section 401 of Title 26, Internal Revenue Code.

Amendment by section 7894(e)(5) of Pub. L. 101–239 effective, except as otherwise provided, as if originally included in the provision of the Employee Retirement Income Security Act of 1974, Pub. L. 93–406, to which such amendment relates, see section 7894(i) of Pub. L. 101–239, set out as a note under section 1002 of this title.

Effective Date of 1987 Amendment

Amendment by Pub. L. 100–203 applicable with respect to reports required to be filed after Dec. 31, 1987, see section 9342(d)(1) of Pub. L. 100–203, set out as a note under section 1132 of this title.

APPENDIX
Critical Dates

06-22-11 Date Defined Benefit Plan was purchased.

12-29-11, Date Insurance Co. requested a census.

2-8-12, Date AGI responded to census request.

03-14-12, Date Employer's employee downloaded or dropped and dragged the insurance company's Defined Benefit Plan onto a clerical computer. Note: the Employer did not know this had occurred. No hard copy was printed, nor was Employer made aware of employee's actions or the email. It must be noted that the Plan Contract required that all correspondence be provided to Employer in hard copy, not electronically by email.

8-27-13, Employer was notified of a large increase in funding requirements. Note: This is due to the differences in the census, but AGI did not know why there were differences. The Insurance Company's census had more participants than the Employer's census.

9-12-13, A Plan Summary was mailed to Employer with instructions to distribute it to all participants. Note: Employer did not read The Plan Summary because it assumed it was a summary of the Employer's Plan.

09-12-13, Plan was frozen with the understanding that the census numbers would be resolved. Still AGI did not know their signature page had been attached to a

second plan ie. AGI did not know there were two different Plans.

03-17-16, AGI hired an Actuary to prepare the government required filings the Insurance Company ceased to prepare for filing.

3-24-16, Actuary requests DBP from Insurance Co.

3-24-16, Ins. Co. emails their DBP to the Plan Administrator who simply forwards it to the Actuary. The Plan Administrator had no reason to read it because it had and every reason to believe it was their Plan and not a different plan the Insurance Company had prepared.

08-10-16, Actuary forwards the DBP that they were forwarded from Insurance Company, to the Employer, AGI. This is the Date AGI discovered there were two different Defined Benefits Plans and that AGI's signature pages had been switched by the Insurance Co.

03-21-18, AGI filed its Complaint for common law fraud.

06-12-18, Plan Administrator discovers its clerical personal had downloaded the Insurance Co.'s DBP on 3-14-12.

6-29-18. Plan Administrator in its Response Brief to Insurance Co.'s Motion to Dismiss admits to discovery of the downloaded DBP of Insurance Co (See 3-14-12). AGI concedes its Complaint for common law fraud should be dismissed due to imputed knowledge from

the download. AGI asks for leave to amend to Rescission, Reformation or Breach of Contract.

7-6-18, Insurance Co. files a Reply and renews its Motion to Dismiss the Proposed Amended Complaint.

07-30-18, USDC-WD Okla. dismisses all of Plan Administrator's contract claims and enters Judgment for Insurance Company.

08-24-18, Plan Administrator files Motion for New Trial.

09-12-18, Insurance Co. argues Motion for New Trial is improper and Plan Administrator should have filed a Rule 59e Motion to correct clear error and to prevent manifest injustice. Insurance Co.'s response argues that even under ERISA law the case should be dismissed as it would be futile since Employer had constructive or imputed knowledge of any breach of fiduciary duty on 03-14-12.

03-28-19, USDC-WD Okla. Issues Order- Motion for New Trial should be Denied.

04-26-19, Notice of Appeal to Tenth Circuit.

08-29-19, Brief in Chief filed by AGI in Tenth Circuit.

10-16-19, Appellee/Insurance Co.'s Response Brief filed.

11-4-19, Reply Brief filed.

01-09-2020, Order and Judgment of the Tenth Circuit.

01-31-20, Mandate issued by Tenth Circuit.

02-26-2020, US Supreme Court rules on "actual knowledge" in Intel v. Sulyma, No. 18-1116, 589 U.S. ___ (2020).

04-08-20, Date Employer's Writ for Certiorari was due to be filed.

03-19-2020, ORDER LIST 589, US Supreme Court extends date to file any petition for a writ of certiorari to 150 days from date of the lower court judgment.

6/07/2020, Date Petitioner's Writ of Certiorari due to be filed based on Order List 589.