No. 23-

IN THE

Supreme Court of the United States

SHIRLEY T. SHERROD AND LEROY JOHNSON,

Petitioners,

v.

JULIE A. SU, ACTING SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the underlying rulings contradict the plain text of the applicable ERISA provisions in finding a breach of Petitioners' fiduciary duties and disavow Rule 15 of the Federal Rules of Civil Procedure in depriving the Petitioners of the statutory right to amend their affirmative defenses?

RELATED CASES

Hugler v. Sherrod, No. 16 C 4825, U. S. District Court for the Northern District of Illinois. Judgment entered March 17, 2017. (Denial of motion to amend pleadings).

Walsh v. Sherrod, No. 16 C 4825, U. S. District Court for the Northern District of Illinois. Judgment entered March 31, 2022. (Grant of summary judgment).

Walsh v. Sherrod, No. 16 C 4825, U. S. District Court for the Northern District of Illinois. Judgment entered June 2, 2022. (Grant of injunctive relief).

Su v. Johnson, Nos. 22-2204 & 22-2205, U. S. Court of Appeals for the Seventh Circuit. Judgment entered May 10, 2023.

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PETITION FOR A WRIT OF CERTIORARI

Shirley Sherrod and Leroy Johnson respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

ORDERS BELOW

The Seventh Circuit Court of Appeals' affirmance of the District Court's orders is reported at *Su v. Johnson*, 68 F.4th 345 (7th Cir. 2023), and also reproduced at Appendix 1a. The Seventh Circuit's refusal to stay the mandate is unreported, but reproduced at Appendix 20a. The order of the District Court for the Northern District of Illinois denying leave to amend the affirmative defenses is unreported, but reproduced at Appendix 22a. The order of the District Court for the Northern District of Illinois granting summary judgment is unreported, but reproduced at Appendix 33a. The District Court's order granting injunctive relief is unreported, but reproduced at Appendix 53a.

JURISDICTION

This case arises under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001, et seq. On April 29, 2016, Plaintiff, Thomas E. Ruiz, then Secretary of Labor, United States Department of Labor (the "Secretary"), filed a Complaint against Shirley T. Sherrod, Leroy Johnson, and the Shirley T. Sherrod M.D. P.C. Target Pension Plan. District Court ("D. Ct.") Dkt. No. 1. The suit was brought to enjoin acts and practices which allegedly violated the

provisions of Title I of ERISA to obtain appropriate relief for the breaches of fiduciary duties under ERISA § 409, 29 U.S.C. §1109, and to obtain injunctive and equitable relief to redress violations and to enforce the provisions of Title I of ERISA. Id. The district court had jurisdiction under ERISA §502(e)(1), 29 U.S.C. § 1132(e)(1), because the Secretary raised a federal question. The district court granted the Secretary summary judgment on March 31, 2022, and the Secretary's Motion for Injunctive Relief on June 2, 2022. D. Ct. Dkt. 264, 278. Sherrod and Johnson timely appealed, and the Seventh Circuit affirmed on May 10, 2023. Appellate Court ("App. Ct.") Dkt. 54. The Appellants moved for a rehearing on June 23, 2023. App. Ct. Dkt. 57. The Seventh Circuit denied the Appellants' petition for rehearing on July 10, 2023. App. Ct. Dkt. 59. The statute under which the Supreme Court has jurisdiction here is 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. 1109 (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

29 U.S.C. 1109 (b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

INTRODUCTION

Pension abuse is rife. Stories abound of plan administrators and trustees exploiting their access to retirement funds and subsidizing lavish lifestyles with ill-gotten gains. That is not this case. Indeed, what transpired at bar could not be more different. Instead of a malevolent, or even ambivalent administrator, the Petitioners—Dr. Shirley Sherrod and Leroy Johnson—were fastidious in abiding by their fiduciary duties to a retirement plan Sherrod created. In fact, recognizing her inability to navigate the nuances of ERISA provisions, Dr. Sherrod reached out to the Respondent, the Department of Labor, for guidance on plan issues. Hardly the work of a schemer. The Department of Labor, in turn, recommended Sherrod retain counsel, and provided her with referrals.

Dr. Sherrod was a licensed, board-certified ophthalmologist who founded Sherrod PC and ran a successful ophthalmology practice in Detroit for over 20 years. The underlying retirement plan for her employees was the fruits of her labor. Entering her 60s, Dr. Sherrod began winding down the practice with the aim of enjoying retirement. She took the innocuous step of selling her practice in 2008. But disaster followed. The purchaser sued Sherrod in Michigan state court and won a judgment of $181,000. A bond used to subsidize an appeal of that award entangled plan assets. Further complicating matters, the purchaser garnished Sherrod's assets held at Merrill

Lynch, including her personal and retirement accounts, her company's account, and the plan's account. Seeking to untangle things, Dr. Sherrod sued Merrill Lynch in 2012. After that, the Secretary of Labor brought the underlying action against Dr. Sherrod in 2016, alleging her conduct breached fiduciary duties to the plan. Instead of a peaceful retirement, a cloud of litigation has accompanied Sherrod like a shadow. She has been further sullied with the unfair and inaccurate findings that she was disloyal and plundered plan proceeds for personal consumption.

Tarring plan administrator Leroy Johnson as an accomplice to Sherrod's supposed machinations is equally inscrutable. In May 2012, Dr. Sherrod appointed Johnson as plan administrator. By definition then, Johnson was not the plan administrator when two critical developments occurred in 2011: (1) the 2011 appeal bond in Michigan state court was posted, and (2) he did not sign the plan's 2011 "Form 5500" filed with the Department of Labor. Thus, Johnson by law was not responsible for anything that occurred in 2011, nor did he have any oversight with respect to the 2011 Form 5500. Yet he was held accountable for these events. Finally, Johnson was not and could not be liable for the accuracy or completeness of records created before he became administrator. The District Court's finding to the contrary necessitated reversing summary judgment. Johnson had nothing to do with the posting of the bond in the Michigan state court case, and pinning him with that responsibility *post hoc* is troubling.

This backstory is necessary to illustrate why Supreme Court intervention is warranted. This case is admittedly devoid of a circuit split or an issue of constitutional significance. But what this case lacks in

the conventional certiorari sense, it compensates for in the need to restore the fundamental concept of a fair and rules-based litigation process. And with due respect to the Northern District of Illinois and Seventh Circuit, such lodestars were not followed. Namely, Federal Rule of Civil Procedure 15(a)(2), which provides that leave to amend an affirmative defense is freely granted when justice so requires. FED R. CIV. P. 15(a)(2). The Petitioners moved to amend one of their affirmative defenses to allege that the Respondent knew in 2012 of the allegations underlying certain claims, which would thus be time-barred under ERISA's three-year statute of limitations. The basis for this affirmative defense did not become apparent until after the Answer was filed, when the Petitioners discovered documents evincing the Secretary's actual knowledge. The Petitioners' search for documents was further stymied by the fact the plan service providers from 2012 were deceased when the Complaint was filed. Justice thus required the Petitioners be permitted to raise this legitimate defense. A mere four-month delay in seeking to amend an answer is insufficient to deny leave to amend. Yet that is what the District Court held. Denying the motion for leave to add the affirmative defense (and the Seventh Circuit's affirmance) thwarted the Petitioners' ability to defend themselves. The Petitioners thus seek redress from this Court to vindicate their rights to a full and fair litigation defense, and ultimately, a trial on the merits because they presented material issues of fact precluding summary judgment on the ERISA claims. Supreme Court review is thus warranted.

STATEMENT OF THE CASE

A. Dr. Sherrod Creates A Pension Plan

Dr. Sherrod was a licensed, board-certified ophthalmologist who founded Sherrod PC, which offered ophthalmology services in Detroit, Michigan. D. Ct. Dkt. No. 214, ¶¶ 4, 17, 18. In 1987, Sherrod PC created a plan to provide retirement benefits to the participants (including Sherrod herself), who were Sherrod PC employees. D. Ct. Dkt. 1, PageID#:1, ¶ 2. Sherrod was the trustee of the plan. *Id.* ¶ 19. The plan required Sherrod to: (1) invest and manage plan assets subject to the direction of the employer or investment manager; (2) pay benefits to participants or their beneficiaries per the administrator; and (3) maintain records of receipts and disbursements for the administrator. D. Ct. Dkt. No. 168-6; Ex. E, Plan. All plan participants apart from Sherrod were terminated from their employment with the company on December 31, 2008. *Id.* ¶ 6. The plan was funded by company contributions, but the company stopped them in 2011, through at least 2017. *Id.* ¶ 7. Sherrod reached retirement age (65) under the plan in May 2011. *Id.* ¶ 20.

B. Leroy Johnson Becomes Plan Administrator

Sherrod was the plan administrator until May 30, 2012, when she appointed Leroy Johnson. *Id.* ¶ 14. Johnson was the plan administrator from May 30, 2012, to August 4, 2014. D. Ct. Dkt. 18 PageID #:36, ¶ 8. Johnson administered the plan for the exclusive benefit of the participants and beneficiaries. *Id.* § 2.4. He was required to determine the payment of benefits and to authorize the trustee concerning disbursements. *Id.* The plan instructed

that the trustee "shall be reimbursed for any reasonable expenses, including reasonable counsel fees incurred by it as Trustee. Such compensation shall be paid from the Trust Fund unless paid or advanced by the Employer." D. Ct. Dkt. No. 221, ¶ 6. Johnson and Sherrod met frequently to discuss the plan's bills and to minimize expenses. D. Ct. Dkt. No. 216, ¶¶ 75 & 76. Johnson kept records of the plan. *Id*. ¶ 64. He also hired an actuary to prepare the annual Form 5500 filed with the Department of Labor. *Id*. ¶ 42. In 2012, the plan's two key service providers were its actuary, Jeffrey Sinclair, and its attorney, Edwin Conger. D. Ct. Dkt. No. 30-2, ¶ 7. Both men died before the Complaint was filed. D. Ct. Dkt. 31, at p. 5.

C. The Michigan State Court Litigation

Around 2008, Sherrod sold the company to Michael Sherman, which eventually spawned a lawsuit filed by Sherman in Michigan state court. D. Ct. Dkt. No. 214, ¶ 44. On June 25, 2010, Sherman received a judgment against Sherrod for $181,000. *Id*. That order instructed "third-party plaintiffs Shirley T. Sherrod, M.D., and Shirley T. Sherrod, M.D., P.C. . . . are prohibited from directly or indirectly selling, transferring" or otherwise disposing of any of their assets. D. Ct. Dkt. No. 168-6; Ex. Q at 9.

During the Michigan litigation, Merrill Lynch was the plan custodian. D. Ct. Dkt. No. 214, ¶ 36. Sherman garnished Sherrod's assets at Merrill Lynch on October 12, 2010. *Id*. ¶ 45. On February 4, 2011, the Michigan court froze Sherrod's Merrill Lynch assets. *Id*. The Michigan court permitted Sherrod to appeal if she posted a $250,000 cash or surety bond. *Id*. The court allowed her to use her frozen assets. *Id*. Notably, when Sherrod posted the

$250,000 bond, Johnson was not the plan administrator. D. Ct. Dkt. No. 216, ¶ 22. Sherrod signed an affidavit swearing that she was directing Merrill Lynch to make two distributions from the plan: a $250,000 distribution to secure a bond, and a $3,000 distribution to cover the costs associated with filing the bond. *Id.* Sherrod also confirmed that the requested distributions did not exceed her individual interest in the plan. D. Ct. Dkt. No. 216, ¶ 19. In 2011, the Petitioners reported a $246,291 plan loss and no benefit distributions paid, and in 2012 the bond was repaid from the Sherrod valuation. D. Ct. Dkt. No. 216, ¶ 78. On February 28, 2012, Merrill Lynch moved to release the freeze on Sherrod's accounts. *Id.* ¶ 54. In April, the Michigan trial court stated that it would lift the freeze on the plan's assets. *Id.* ¶ 55. Sherrod contended the court lacked jurisdiction to lift the freeze because of her pending appeal. *Id.* Ultimately, the Michigan state court lifted the freeze on Sherrod's Merrill Lynch assets in May 2013. *Id.* ¶ 60. A flashpoint of the underlying litigation was the impact of the Michigan court's order on the plan assets and the propriety of the $250,000 distribution by Sherrod from the plan to post the appeal bond. The Secretary contended the freeze of Sherrod's assets included only "the amount of her retirement benefit in the Plan account." D. Ct. Dkt. No. 216, ¶ 45. Sherrod countered that the freeze applied to all plan funds held at Merrill Lynch. *Id.* Merrill Lynch later secured an order releasing the freeze on the account. *Sherrod v. Merrill Lynch*, No. 1:12-cv-02545, 2012 WL 5989345, at *4 (N.D. Ill. Nov. 28, 2012). Dr. Sherrod appealed the judgment and posted a $250,000 bond, plus a $3,000 bond fee. D. Ct. Dkt. 264, PageID #: 3825. Although the payment from the plan was characterized as a distribution, the money went directly to Wells Fargo Bank and Bologna Surety Agency. D. Ct. Dkt. 168-18 PageID #:1491-1492.

D. The Merrill Lynch Litigation

On April 13, 2012, Dr. Sherrod sued Merrill Lynch in federal court related to the freeze. *Sherrod v. Merrill Lynch*, Dkt. 1, No. 1:12-cv-02545 (N.D. Ill. Apr. 13, 2012). On November 28, 2012, the Northern District of Illinois ruled for Merrill Lynch, granted its motion to dismiss, and found no controversy between the parties. *Sherrod v. Merrill Lynch*, 2012 WL 5989345, No. 1:12-cv-02545 (N.D. Ill. Nov. 28, 2012). The freeze was lifted in May 2013, and Merrill Lynch acknowledged the termination of the freeze on June 6, 2013. D. Ct. Dkt. 168-20 PageID#:1528. As for the bond funds, Sherrod produced a letter from counsel to the bond agency requesting that the $250,000 bond be returned to the plan. D. Ct. Dkt. 218 PageID#:2860.After the freeze was lifted, Sherrod started directing payments to herself from the plan's funds. In July 2013, the plan distributed two payments to Sherrod totaling $50,000. D. Ct. Dkt. No. 216, ¶ 63. The following year, Sherrod directed the plan to issue her 37 checks totaling $286,905. *Id*. ¶ 64. Sherrod used some payments to reimburse herself for the plan's legal expenses, which she had covered out of pocket. *Id*. Also in 2014, Sherrod instructed the plan to issue two checks totaling $4,000 payable to plan attorneys. *Id*. ¶ 70. For 2014, the Petitioners reported that the plan paid $57,000 in benefit distributions and $142,000 in expenses. *Id*. ¶ 81.

E. The Secretary of Labor Litigation

The underlying lawsuit began when the Secretary alleged (and the lower courts found) that the Petitioners violated three fiduciary duties: (1) loyalty to the plan under § 404(a)(1)(A); (2) due care under §404(a)(1)(B);

and (3) acting in accordance with plan documents under §404(a)(1)(D). To prevail, the Secretary had to establish: (1) the defendant is a plan fiduciary; (2) the defendant breached its fiduciary duty; and (3) the breach harmed the plaintiff. *Bator v. Dist. Council 4,* 972 F.3d 924, 929 (7th Cir. 2020). The second and third elements were contested. Relevant for certiorari purposes, the District Court denied Dr. Sherrod's motion to amend her pleading on March 27, 2017. D. Ct. Dkt. 43. On February 27, 2020, the Secretary sought summary judgment, (D. Ct. Dkt. 167 PageID #:1161), arguing that Sherrod breached her fiduciary responsibilities to the plan under ERISA. D. Ct. Dkt 169 PageID #:1545-1569. The court granted summary judgment, finding Sherrod violated her fiduciary duty with respect to section 404(a)(1)(D) (3822) of ERISA by not following the terms of the plan, section 404(a)(1)(A) 3823 and (B) 3827 of ERISA by allowing Sherrod to use $253,000 of plan funds to pay the appeal bond, and withdrawals that the court found were not reimbursements for necessary and reasonable plan expenses. D. Ct. Dkt. 264. The court later granted the Secretary's request to remove Dr. Sherrod as trustee, appointment of an independent fiduciary to review and allocate all previous distributions and transactions for the plan. D. Ct. Dkt. 278. The Seventh Circuit affirmed. *Su v. Johnson*, 68 F.4th 345 (7th Cir. 2023). The appellate court agreed with the trial court's finding that Dr. Sherrod had been dilatory in seeking leave to amend her answer. Slip Op. 13. It also found no evidence that the Secretary knew of a purported violation. Slip Op. 18. In so concluding, the Court cited the Supreme Court's decision in *Intel Corp. Investment Policy Comm. v. Sulyma*, 140 S. Ct. 768 (2020).

REASONS FOR GRANTING A PETITION

This case presents a recurring question on the applicability of ERISA provisions and the Federal Rules of Civil Procedure. These issues are tremendously important, arising in countless cases across the country each year.

I. The Plain Language of ERISA Was Not Adhered To By The Lower Courts.

A. The Statutory Framework.

In any statutory construction case, the Court begins with the statutory text. *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013). "[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). Under ERISA, and derived from the common law of trusts, a fiduciary must "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries" and "for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan." ERISA §404(a)(1)(A), 29 U.S.C. §1104(a)(1)(A). A fiduciary must discharge these duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of a like character and with like aims." ERISA §404(a)(1)(B); 29 U.S.C. §1104(a)(1)(B); *Fifth Third Bancorp v. Dudenhoeffer*, 73 U.S. 409 (2014). Further, every ERISA fiduciary, regardless of the parameters of

its duties, is subject to the co-fiduciary liability provision of Section 405(a), 29 U.S.C. § 1105(a). *In Re WorldCom, Inc. ERISA Litig.*, 354 F. Supp. 2d 423 (S.D.N.Y. Feb. 1, 2005). That Section provides:

> In addition to any liability which he may have under any other provisions of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:
>
> > (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
> >
> > (2) if, by his failure to comply with section 1104(a)(1) of this title [the prudent man standard of care] in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach; or
> >
> > (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

29 U.S.C. §1105(a).

The issue at bar is whether Sherrod acted prudently and in the best interests of plan participants when she

authorized the posting of a bond in Michigan in 2011, and whether Sherrod and Johnson acted prudently when, between 2013 and 2017, the plan paid for legal fees and expenses involving the administration of the plan.

B. Johnson Committed No Fiduciary Breaches.

Johnson's diligence in performing his duties as plan administrator are embodied by his frequent meetings with Sherrod to discuss the plan's bills and to try to minimize expenses. D. Ct. Dkt. No. 216, ¶¶ 75 & 76. Johnson maintained records of the plan. *Id.* ¶ 64. He hired an actuary to prepare the annual Form 5500s. *Id.* ¶ 42. As a matter of law, retaining an actuary is the prudent course when the fiduciary lacks the requisite knowledge, experience, and expertise to make the necessary disclosures. *United States v. Mason Tenders Dist. Council of Greater New York*, 909 F. Supp. 882, 886 (S.D.N.Y. 1995). Finally, Johnson testified that he had many documents related to the plan and they were turned over to the Secretary during discovery. D. Ct. Dkt. No. 216, ¶ 25.

Further, Johnson reasonably relied upon the information Sherrod provided, a woman Johnson believed to be both honest and motivated to minimize plan expenses. Concerning expenses paid by the plan to Sherrod for reimbursement of legal fees and expenses between 2013 and 2017, Johnson had a viable basis to believe that they were reasonably incurred by Sherrod. In that regard, context is critical. The plan assets were frozen in connection with the retention of attorneys and the posting of the bond in Michigan. Sherrod had to take action to combat the litigation and protect the plan funds.

And most critically for Johnson, all of this occurred seven months before he became the plan administrator, and the subsequent, ongoing litigation over the freeze of the plan assets.

Johnson was decidedly not the plan administrator when the bond was posted and he did not sign the 2011 Form 5500. Johnson was not responsible for anything that occurred in 2011, nor did he have any responsibility for oversight with respect to the 2011 Form 5500. Finally, Johnson was not responsible for the accuracy or the completeness of plan records created before he became plan Administrator. In short, Johnson had nothing to do with the Michigan bond.

And yet, the District Court and Seventh Circuit found Johnson breached his fiduciary duties. What is more, these courts required Johnson to prove his case at summary judgment. Indeed, unpersuaded by the legibility and foundation of plan records, the district court described them as "postal money orders, invoices, and communications with counsel regarding attorneys' fees," and found the Defendants offered no accounting. D. Ct. Dkt. 264, p. 17. The problem with this finding is that Johnson did not have a duty to prove anything. His burden was only to show more than a "scintilla" of evidence supporting his defenses. *See Anderson v. Liberty,* 477 U.S. 242, 251 (1985). Johnson's obligation was only to establish that a reasonable jury could find that the expenses, or at least one or more of the expenses, were plan-related. *Id.* In sum, Johnson performed his duties as plan Administrator with due care and diligence as a matter of law under 29 U.S.C. § 1104(a)(1)(B).

C. Sherrod Committed No Fiduciary Breaches.

ERISA does not require a sole recordkeeper or mandate any specific recordkeeping arrangement whatsoever. *Divane v. Nw. Univ.*, 953 F.3d 980, 990 (7th Cir. 2020). And when a plan provides that the fiduciary will interpret the plan, plan fiduciaries are entitled to deference. *Tompkins v. Cent. Laborers' Pension Fund*, 712 F.3d 995, 1002 (7th Cir. 2013). As for a trustee's obligations, the plan does reflect they are to work with the administrator, but it does not indicate how often, only that it be "at the direction of the administrator." D. Ct. Dkt. 264 PageID #1292. This only requires that a trustee follow any order the administrator gives them. Presuming this interpretation is correct, the record does not indicate which orders, if any, Dr. Sherrod failed to follow. And acting in absence of orders is not the same as disobeying one.Further, Dr. Sherrod provided an accounting. In fact, the record reflects she provided notations of sums spent, including tax returns, D. Ct. Dkt. 216 PageID #:2779-2780, and attorney invoices. D.Ct. Dkt. 216 PageID #:2781-2783. She also provided copies of payments to participants, to include C. Riggleman (D. Ct. Dkt. 168-12 PageID #:1407), along with attorneys, such as Mr. Conger. D. Ct. Dkt. 168-4 PageID #:1209, Dkt. 168 PageID #:1217, Dkt. 168-4 PageID #:1218, Dkt. 168-22 PageID #:1533. This is notwithstanding the pages of other records she has produced reflecting how the plan proceeds were spent. D. Ct. Dkt. 234-2 PageID #:3306-3362. Dr. Sherrod acknowledged that all the checks from 2013, 2014, 2015 and 2016 were directed by her to herself. D. Ct. Dkt. 168-4 PageID #:1210, Dkt. 168-4 PageID #:1216-1217, Dkt. 168-4 PageID #:1221, Dkt. 168-4 PageID #:1223-1224. In July 2013, she directed two payments totaling

$50,000.00 paid to "Shirley T. Sherrod MD." D. Ct. Dkt. 168-4 PageID #:1211, Dkt. 168-12 PageID #:1404. In 2014, consistent with the advice of the plan's counsel, the plan paid $193,905.00 to Dr. Sherrod to reimburse her for the attorneys' fees and expenses she personally assumed in connection with unfreezing the plan, and for the fees and expenses she assumed in paying plan service providers. D. Ct. Dkt. 168-15 PageID #:1430.

Perhaps most compelling, Sherrod contacted the Department of Labor for guidance, apprising it that the plan was in trouble. D. Ct. Dkt. 25-6. She even stated, in correspondence to the Department, that the plan was "still illegally frozen and if the laws written on ERISA are to be believed and respected this cannot occur." D. Ct. Dkt. 25-6 PageID #:208. Further, records demonstrate Sherrod made repeated requests for assistance from the Department, going so far as to ask what the Department would do about the plan's freeze. D. Ct. Dkt. 216 PageID #:2153. Finally, the plan authorized Sherrod to use funds to cover litigation costs. Section 7.7 of the plan states that "the Trustee shall be reimbursed for any reasonable expenses, including reasonable counsel fees[.]" D. Ct. Dkt. 168-6 PageID #:1295. *See also FirsTier Bank, N.A. v. Zeller*, 16 F.3d 907, 913 (8th Cir. 1994) (noting that ERISA "expressly authorizes a plan to permit reimbursement of expenses properly and actually incurred, in the performance of a fiduciary's duties with the plan") (citing 29 U.S.C. § 1108(c)(2)). To support many of her expenditures, Dr. Sherrod produced various copies of receipts, itemized attorney bills, and other invoices. D. Ct. Dkt. 234-2 PageID #:3306-3362. Some of the money order receipts were placed with invoices from Jeffrey L. Sinclair for preparation of various plan documents. D. Ct.

Dkt. 234-2 PageID #:3307. While others were attributed to court costs. D. Ct. Dkt. 234-2 PageID #:3322. Dr. Sherrod directed her attorney to draft a letter to the bond agency requesting that the $250,000 bond be returned to the plan. D. Ct. Dkt. 218 PageID #:2860.

Sherrod was in a bind. Plan assets were enveloped in the state lawsuit. Dr. Sherrod sought guidance from the Secretary. After the appeal concluded, Dr. Sherrod sought the return of the bond funds. D. Ct. Dkt. 218 PageID#:2860. She even used the services of experts, two of whom died. These developments should have precluded a finding of an ERISA violation, along with summary judgment. The Court should grant certiorari to resolve these issues.

II. The Leave To Amend Affirmative Defenses Was Wrongly Denied.

On April 29, 2016, the Secretary of Labor sued Sherrod. D. Ct. Dkt. 1 PageID #:1, ¶ 30. Sherrod answered on August 1, 2016, denying the allegations against her. D. Ct. Dkt. 18 PageID #:34. Four months later, on December 1, 2016, Sherrod sought leave to amend her third affirmative defense to assert that any claims arising out of the allegations in paragraphs 16 through 18 of the Complaint were further barred by the statute of limitations. D. Ct. Dkt. 25 PageID #:149-150. Specifically, Sherrod alleged that "the Department had actual knowledge as early as 2012 that the bond was posted using assets of the Plan" and had actual knowledge and said knowledge triggered ERISA's three-year statute of limitations. D. Ct. Dkt. 26 PageID #:214. A similar statement was plead in her proposed amended answer.

D. Ct. Dkt. 25-2 PageID #:174, ¶ 16. In support, Sherrod attached a fax from the plan's lawyer Edwin Conger to the Department dated December 20, 2012, notifying the Department that Johnson had succeeded Sherrod as plan administrator. D. Ct. Dkt. 25-4 PageID #:199- 200. Additionally, an email from Sherrod to the Department (dated August 10, 2012) inquired about alienation of plan assets by the state court. D. Ct. Dkt. 25-6 PageID #:208. The email provides: "I have done everything asked of me yet the employee retirement ERISA is still illegally frozen and if the laws written on ERISA are to be believed and respected this cannot occur." D. Ct. Dkt. 25-6 PageID #:208. Attached to that email was a demand letter dated February 14 of that year from Dr. Sherrod's lawyers to Merrill Lynch to unfreeze the plan. D. Ct. Dkt. 25-6 PageID #:210. After Sherrod further explained the delay in raising the defense was in part due to the passing of two service providers to the plan, actuary Jeffrey Sinclair and attorney Conger, (D. Ct. Dkt. 31 PageID #:326), the trial court denied Sherrod's motion to amend because it was untimely and lacked evidentiary support. D. Ct. Dkt. 43.

Leave to amend to add an affirmative defense should be freely granted when justice so requires. Fed R. Civ. P. 15(a)(2). Here, justice required that Johnson be permitted to raise any legitimate defense, including those under 29 U.S.C. § 1113(2), to the claims asserted by the Secretary. There was plainly no showing of "undue delay, bad faith, dilatory motive, prejudice, or futility" by the Secretary. A mere four-month delay in seeking to amend an answer is hardly a justifiable basis to deny leave to amend. The District Court's denial of the motion for leave to amend to add the affirmative defense severely undermined the Petitioners' defense. The Petitioners never exhibited

either bad faith or undue delay in requesting leave to amend. They faced significant challenges in their search for information: the plan's key service providers were deceased, and thus unavailable to provide the Petitioners with ready access to plan records and point them to documents and information that support viable defenses.

There is no Federal Appellate decision upholding the denial of a motion to amend an answer on the basis on untimeliness four months after the initial answer was filed. That is because the application and spirit of Rule 15 encourages parties to amend when appropriate. Especially here, where discovery was still ongoing. D. Ct. Dkt. 26 PageID #:216. The spirit of Rule 15(a) is for amendment to be given freely, to include application of affirmative defenses. An examination of the record as a whole reflects that allowing Dr. Sherrod leave to amend would not have prejudiced the Secretary or otherwise unfairly altered the course of these proceedings.

The mainstay of Dr. Sherrod's argument during the appeal was the denial of her motion to amend under Rule 15(a)(2). The Seventh Circuit found no evidence the Secretary had actual knowledge of a purported violation. Slip Op. 18. In reaching this, the Court invoked the Supreme Court's decision in *Intel Corp. Investment Policy Comm. v. Sulyma*, 140 S. Ct. 768 (2020). However, when Dr. Sherrod sought to amend her answer, the Supreme Court had not ruled on this issue. Nevertheless, the Supreme Court's holding in *Sulyma* was predicated on the extensive discovery that occurred in the case, to include at least one deposition – more specifically, the decision was not reached on a defective or otherwise insufficient pleading. *Id*. at 775. It is the Petitioners who would suffer

harm if the motion was denied, as such a denial prevented them from raising a defense fatal to the Department's key claims. The liberal amendment standard was specifically designed to protect litigants like the Petitioners–who comply with applicable pleading standards, and seek leave to amend promptly and in good faith–from such a harsh result.

In sum, Dr. Sherrod asserted that the proposed answer put the possibility of actual knowledge at issue. Indeed, as the Seventh Circuit noted, her proposed answer referenced two communications between herself and the Secretary referencing her concerns, including the Michigan lawsuit. Had she been allowed to amend the answer, she would have able to undertake the essential discovery to develop her affirmative defense. As in *Sulyma*. From there, she would have developed facts that would confirm whether the Department had in fact read her communications. Thus, the question for the Supreme Court is whether a court can reach the issue of actual notice before discovery concludes when deciding on whether to grant a motion to amend. This is an important issue worthy of the Court's attention.

CONCLUSION

For the foregoing reasons, the Court should grant a petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED MAY 10, 2023

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 22-2204 & 22-2205

JULIE A. SU, ACTING SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,*

Plaintiff-Appellee,

v.

LEROY JOHNSON and SHIRLEY T. SHERROD,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:16-cv-04825 — **Andrea R. Wood**, *Judge.*

Argued April 19, 2023 – Decided May 10, 2023

Before HAMILTON, BRENNAN, and KIRSCH, *Circuit Judges.*

HAMILTON, *Circuit Judge.* These appeals present questions about enforcement of fiduciary duties of loyalty and prudence under the Employee Retirement Income

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* We have substituted the current Acting Secretary of Labor, United States Department of Labor, for her predecessor, sued in an official capacity. Fed. R. App. P. 43(c)(2)

Security Act of 1974, better known as ERISA, 29 U.S.C. § 1001 et seq., as well as fiduciaries' duties to comply with plan documents. Defendants Shirley T. Sherrod and Leroy Johnson were fiduciaries of a retirement plan that Sherrod had set up for herself and other employees of her medical practice. The Secretary of Labor brought this civil enforcement action alleging that both defendants had breached their fiduciary duties under ERISA. The district court granted summary judgment in favor of the Secretary and entered a permanent injunction against defendants removing them as fiduciaries. *Walsh v. Sherrod*, No. 16-cv-04825, 2022 U.S. Dist. LEXIS 59927, 2022 WL 971857 (N.D. Ill. Mar. 31, 2022). Both defendants have appealed.

We affirm. The undisputed facts show that both defendants breached their fiduciary duties of loyalty and prudence under ERISA. Hundreds of thousands of dollars of plan assets were used for defendant Sherrod's personal benefit but were accounted for as plan expenses or losses rather than as distributions of retirement benefits to her. The permanent injunction was well within the scope of reasonable responses to the breaches.

I. Facts for Summary Judgment & Procedural History

Defendant Sherrod owned and ran an ophthalmology practice (Shirley T. Sherrod, M.D., P.C.) in Detroit, Michigan. In 1987, she established a defined-benefit retirement plan for the practice's employees, including herself. She named herself as trustee of the retirement

plan, which is governed by ERISA. In 2008, the employment of all employees other than Dr. Sherrod herself was terminated, and sometime around then, she sold the practice to another physician. In April 2010, the plan was amended to make Sherrod responsible for: (1) investing, managing, and controlling plan assets subject to the direction of the employer (herself) or an investment manager; (2) paying benefits to participants at the direction of the administrator; and (3) maintaining records of receipts and disbursements to furnish to the employer or administrator.

The buyer of Dr. Sherrod's practice later sued her in Michigan state court for breach of contract and obtained a judgment against her for $181,000.[1] *Michael S. Sherman D.O., P.C. v. Shirley T. Sherrod M.D., P.C.*, Nos. 299045, 299775, 308263, 2013 Mich. App. LEXIS 948, 2013 WL 2360189 (Mich. Ct. App. May 30, 2013). When that judgment went unpaid, the Michigan court prohibited "Shirley T. Sherrod, M.D., and Shirley T. Sherrod, M.D., P.C.," or anyone acting on their behalf "from directly or indirectly selling, transferring, ... or otherwise disposing of" any assets "held or hereafter acquired by or becoming due to them."

Around the same time, the buyer garnished Sherrod's assets at Merrill Lynch, where her personal and retirement accounts, her company's account, and the plan's account were kept. See *Johnson v. Merrill Lynch, Pierce,*

1. For simplicity's sake, all dollar figures in this opinion are rounded to the nearest hundred.

Fenner & Smith, Inc., 719 F.3d 601, 602 (7th Cir. 2013). Acting as a custodian of plan assets, Merrill Lynch read the Michigan court's order to require it to freeze all assets due to Sherrod, including distributions from the plan account. *Id.* at 603. But Merrill Lynch said it was prepared to follow any instructions from the plan administrator to make distributions to other plan participants. *Id.*

Sherrod appealed the money judgment against her. The Michigan Court of Appeals allowed the appeal and a stay of the judgment on the condition that Sherrod either appear for a creditor's examination or post a $250,000 cash or surety bond. Sherrod chose to post the bond. *Walsh*, 2022 U.S. Dist. LEXIS 59927, 2022 WL 971857, at *2. In November 2011, she signed an affidavit directing Merrill Lynch to make two distributions from the Plan: one for $250,000 to secure the bond and another for $3,000 to cover costs associated with filing the bond. Her affidavit also "confirmed that the requested distributions did not exceed her individual interest" in the Plan. *Id.* Merrill Lynch made those requested payments from plan assets to cover the bond, apparently with the blessing of the Michigan court.

In May 2012, Sherrod appointed Johnson as plan administrator. In that role, Johnson's "primary responsibility" was "to administer the Plan for the exclusive benefit" of plan participants and "in accordance with [plan] terms." Toward that end, Johnson was "to maintain all necessary records for the administration of the Plan," as well as "a record of all actions taken ... and other data that may be necessary for proper

administration of the Plan." He was also "responsible for supplying all information and reports to the Internal Revenue Service, Department of Labor, Participants, Beneficiaries and others as required by law" and for authorizing and directing the trustee "with respect to all discretionary or otherwise directed disbursements from the Trust." After Johnson became plan administrator, Sherrod filed a required form with the Department of Labor reporting no benefit distributions and no expenses in 2011, but reporting a $246,300 "loss" to the plan.

The Michigan court eventually lifted the freeze on Sherrod's assets. She then started directing payments to herself out of plan funds. Sherrod had reached retirement age under the plan in 2011, but many of the payments to her were treated as plan expenses rather than as distributions of her retirement benefits. In addition to the $250,000 bond payment that she had directed in 2011, Sherrod pulled at least $50,000 from the plan in 2013, $286,900 in 2014, $120,000 in 2015, $196,400 in 2016, and $173,800 in 2017. In 2014, Sherrod and Johnson reported $57,000 in benefit distributions and $142,000 in expenses. In 2015, $59,000 in distributions and $40,000 in expenses. In 2016, $62,500 in distributions and $133,900 in expenses. In 2017, about $69,700 in distributions and $104,100 in expenses. The plan account had been closed to deposits since 2008, and no deposits were made into the plan from 2014 to 2017.

Under ERISA section 502(a)(2), codified as 29 U.S.C. § 1132(a)(2), the Secretary of Labor brought this civil enforcement action against Sherrod and Johnson in April

2016, while Sherrod was still making payments to herself and Johnson was plan administrator. The Secretary's complaint alleged both past and ongoing violations of defendants' fiduciary duties. The complaint asked the court to remove Sherrod and Johnson from their positions of trust, to enjoin them permanently from serving as fiduciaries for ERISA-covered plans, and to appoint an independent fiduciary to administer and terminate the plan.

Defendants filed their answer raising three affirmative defenses, including ERISA's statute of limitations, alleging that any failure to administer benefits for terminated employees according to the plan occurred no later than the sale of Sherrod's practice in 2008. About four months later, in December 2016, defendants sought leave to amend their answer to elaborate on the statute of limitations defense with respect to claims concerning the use of plan assets to post a bond in the Michigan lawsuit against Sherrod. The proposed amendment would have alleged that the Secretary had actual knowledge in 2012 that plan assets had been used for that purpose. The district court (the late Judge Milton I. Shadur) denied the motion. Although the district court said it rejected the Secretary's argument that the amendment would be futile, the court noted that defendants had been dilatory and that the amendment lacked evidentiary support.

The case was later assigned to Judge Wood, and the Secretary moved for summary judgment. The district court found no genuine dispute of fact material to whether Johnson and Sherrod had repeatedly violated their duties

of care and loyalty and their duty to administer according to plan documents. *Walsh*, 2022 U.S. Dist. LEXIS 59927, 2022 WL 971857, at *4-9. Because these violations had harmed the plan, the court granted summary judgment for the Secretary, 2022 U.S. Dist. LEXIS 59927, [WL] at *7, *9, as well as all requested injunctive relief.

The court removed defendants as plan fiduciaries and permanently enjoined them from serving or acting as fiduciaries or service providers with respect to any employee benefit plans subject to ERISA. The court also appointed an independent fiduciary to terminate the plan and to issue distributions to eligible participants and beneficiaries. The fiduciary was given the power to review and allocate appropriately all previous distributions and transactions for the plan, including the 2011 bond payment and all payments to Sherrod and her attorneys, and all other payments or withdrawals from the plan that were not paid directly to a participant other than Sherrod from 2013 to present. Both defendants have appealed.[2]

2. We asked at oral argument why the Secretary has not yet pursued any restitutionary relief against defendants under 29 U.S.C. § 1109. The answer may be that, in reviewing and allocating previous distributions and transactions, the independent fiduciary may be able to take further action affecting Sherrod's personal benefits. Regardless, the district court's permanent injunction is appealable under 28 U.S.C. § 1292(a).

II. Analysis

A. Legal Standard

We review de novo a district court's grant of summary judgment, giving defendants, as the non-moving parties in this case, the benefit of conflicting evidence and drawing reasonable inferences in defendants' favor. *Kenseth v. Dean Health Plan, Inc.*, 610 F.3d 452, 462 (7th Cir. 2010). To prevail on a claim for breach of fiduciary duty under ERISA, the plaintiff must prove: (1) that the defendant is a plan fiduciary; (2) that the defendant breached his or her fiduciary duty; and (3) that the breach resulted in harm to the plaintiff. *Id.* at 464. Defendants agree that they were plan fiduciaries, and the undisputed facts show both breach and harm.

B. Breaches of the Duty to Follow Plan Documents

To a degree unusual in the law, ERISA focuses on following written plan documents, regardless of other evidence. ERISA requires fiduciaries to "discharge [their] duties ... in accordance with the documents and instruments governing the plan." 29 U.S.C. § 1104(a)(1)(D). As relevant here, the plan required Sherrod to pay benefits "at the direction of the Administrator," and to "maintain records of receipts and disbursements." Johnson was required "to authorize and direct" Sherrod "with respect to all discretionary or otherwise directed disbursements" and to maintain records "of all actions taken."

Defendants do not dispute that Sherrod often acted at her own direction and not "at the direction of the

Administrator," unilaterally withdrawing funds from the plan without consulting Johnson. Accordingly, there is also no dispute that Johnson did not "authorize and direct" those payments as required by the plan. In effect, Sherrod gave herself the keys to the bank vault, and Johnson let her use them. On these undisputed facts, defendants violated their duty to act "in accordance with the documents and instruments governing" the plan. 29 U.S.C. § 1104(a)(1)(D).[3]

Johnson's attempts to avoid this conclusion are not persuasive. He says that he prudently hired an actuary to prepare annual reports, that he and Sherrod "met frequently to discuss the Plan's bills and to try to minimize expenses," that he never "attempted to conceal" Sherrod's conduct, and that he "found her to be an honest person" who could be taken "at her word." None of these points creates a genuine dispute on the core issue—whether Johnson failed to "authorize and direct" Sherrod's withdrawals.

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3. The Secretary also alleged that defendants failed to maintain records properly as required by the plan. Sherrod argues that she could not have violated ERISA on this basis because "ERISA does not ... mandate any specific recordkeeping arrangement at all." See *Divane v. Northwestern Univ.*, 953 F.3d 980, 990 (7th Cir. 2020), vacated on other grounds by *Hughes v. Northwestern Univ.*, 142 S. Ct. 737, 740, 211 L. Ed. 2d 558 (2022). That is true, but the plan still required *some* kind of recordkeeping. We need not reach the recordkeeping question, however. Sherrod's failure to seek Johnson's authorization and direction and Johnson's concomitant failure to fulfil his responsibilities are sufficient to demonstrate breaches of § 1104(a)(1)(D).

For her part, Sherrod argues that she was required to follow Johnson's direction only when he gave it, so she could not have violated plan documents by acting on her own. But such an understanding is contrary to the plan's language (the "Trustee will" make distributions "as directed by the Administrator") and would render all but meaningless the administrator's fiduciary role.

C. Breaches of the Duties of Care & Loyalty

"ERISA's duty of loyalty is the 'highest known to the law.'" *Davis v. Richards*, 7 F.4th 534, 546 (7th Cir. 2021), quoting *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982). The duty "protects beneficiaries by barring any conflict of interest that might put the fiduciary in a position to engage in self-serving behavior at the expense of beneficiaries." *Id.* ERISA's primary command to fiduciaries, in section 404, is therefore to "discharge [their] duties ... solely in the interest of the participants and beneficiaries and ... for the exclusive purpose of ... providing benefits to participants and their beneficiaries." 29 U.S.C. § 1104(a)(1)(A)(i). Fiduciary self-dealing is therefore prohibited "[e]xcept as provided in section 1108 of this title." 29 U.S.C. § 1106(a)(1)(D) (fiduciary "shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect ... transfer to, or use by or for the benefit of a party in interest," including the fiduciary, 29 U.S.C. § 1002(14)(A), "of any assets of the plan"); *Leigh v. Engle*, 727 F.2d 113, 123 (7th Cir. 1984) (§ 1106 "prohibits transactions where those dealing with the plan may have conflicting interests which could lead to self-dealing").

Appendix A

1. The Bond Payment

In the district court, Sherrod did not dispute that she used plan funds to make the bond payment in her state-court appeal. She argued there that the payment was a reasonable expense authorized by the plan. *Walsh*, 2022 U.S. Dist. LEXIS 59927, 2022 WL 971857, at *5. On appeal, Sherrod did not make this "reasonable litigation expense" argument until her reply brief, so that argument is waived. See *Foster v. PNC Bank, N.A.*, 52 F.4th 315, 319 n.2 (7th Cir. 2022) (arguments not addressed in opening brief on appeal are waived).

Instead, Sherrod argues on appeal that she paid the plan back for the bond payment. But the only evidence of payment she offers is a 2014 letter from Johnson's attorneys to a bond agency asking that the bond payment be returned to the plan. The suggestion that a *request* for payment should be sufficient proof that the requested payment was *actually made* seems to invite the court to enter unknown legal territory. If a quarter of a million dollars had actually been paid back into the plan, we would expect that the plan fiduciaries would have at least some record of the payment.

More fundamental, though, even if Sherrod had actually later reimbursed the plan for that quarter of a million dollars she had taken for her personal purposes and charged as a plan expense, that would not be a defense on the merits of the breach of fiduciary duty. Drawing on plan funds to obtain a bond in litigation that had little or nothing to do with the plan was itself a violation of

Sherrod's fiduciary duties. An embezzler does not avoid criminal liability by returning the stolen money, whether the theft has been discovered yet or not. Similarly here, Sherrod could not absolve herself of her fiduciary breach by returning the funds three years after they were wrongfully taken from the plan.

Johnson raises a separate point regarding the bond payment. The district court wrote that Johnson, who was supposed to be overseeing the plan's funds, breached his fiduciary duties "by allowing Dr. Sherrod to make such a withdrawal on her own initiative." *Walsh*, 2022 U.S. Dist. LEXIS 59927, 2022 WL 971857, at *6. That statement was not accurate. The record shows that Sherrod directed Merrill Lynch to make the bond payment in November 2011, but Johnson did not become plan administrator until May 2012. Johnson makes much of this factual error, but it was harmless.

Although Johnson was not plan administrator at the time of the bond payment, once he did become administrator, he became "responsible for supplying all information and reports" to the Department of Labor. While Johnson was plan administrator, defendants reported no benefit distributions and no expenses for 2011—the year of the bond payment. They did report a $246,300 "loss" to the Plan. It is therefore not decisive that Johnson was not plan administrator at the time of the improper bond payment.

Nor does it matter that Johnson hired an actuary to prepare the forms filed with the Department of Labor and

did not, himself, sign the 2011 form reporting the bond payment as a "loss." As plan administrator, Johnson was responsible for the reporting, both under plan documents and under ERISA. See 29 U.S.C. § 1021(b) ("Duty of disclosure and reporting").

Sherrod and Johnson therefore both violated their fiduciary duties with respect to the bond payment—Sherrod in directing the payment and Johnson in falsely reporting it as a loss. And even if we thought that Johnson had a potentially viable defense based on his limited role in the payment for the bond, the rest of his breaches of fiduciary duty would still, as discussed below, call for the remedies the district court ordered.

2. Distributions After the Freeze Was Lifted

Once the Michigan court in May 2013 lifted the freeze on Sherrod's assets, including plan distributions to her, Sherrod began directing payments to herself out of plan assets. From 2013 to 2017, Sherrod withdrew close to $825,000 from the Plan in 123 transactions.

In the district court, Sherrod argued that many of those payments were reimbursements for necessary and reasonable plan expenses, that she was entitled to any benefits she did receive as a plan participant, and that the Secretary bore the burden of establishing any violations. *Walsh*, 2022 U.S. Dist. LEXIS 59927, 2022 WL 971857, at *7. The district court agreed that the burden was on the Secretary but found that the undisputed evidence showed that Sherrod had directed hundreds of

thousands of dollars to be paid to herself out of plan funds. That was sufficient, said the district court, to prove that Sherrod had "put her own interests above those of Plan participants and beneficiaries in violation of § 404(a)(1)(A)" and had violated § 406(a)(1)(D)'s prohibition on self-dealing. *Id.*, citing ERISA sections codified as 29 U.S.C. §§ 1104 & 1106. In the district court's view, by establishing such self-dealing, the Secretary had shifted the burden back to the defendants to show that the transactions were "actually permissible under ERISA." *Id.*, citing *Allen v. GreatBanc Trust Co.*, 835 F.3d 670, 676 (7th Cir. 2016).

On appeal, Sherrod has abandoned several arguments she made in the district court. She no longer argues that some of the payments were made to reimburse her for plan legal expenses she had covered out of her own funds. Nor does she argue that some of the payments went to plan expenses and to other plan beneficiaries.

Instead, Sherrod argues that any allegations of violations after plan year 2014 should be disregarded on the theory that "the particularized allegations" of the Secretary's complaint were limited to plan years 2012 to 2014. But the Secretary's 2016 complaint alleged continuing violations from "January 1, 2015 to the present." That was sufficient to put defendants on notice that ongoing violations were part of the case. Even if we were to accept this argument, it would not help Sherrod. She has not argued, let alone raised a dispute of fact, in this appeal that the payments from 2012 to 2014 were proper. Those payments alone are enough to establish violations of ERISA sections 404(a)(1)(A) and 406(a)(1)(D), codified in 29 U.S.C. §§ 1104 & 1106.

Still, both Sherrod and Johnson argue that the burden is on the Secretary to prove violations and not on them to show that payments were permissible. We disagree. Section 406(a) applies broad prohibitions on payments to fiduciaries subject to section 408. In the most relevant portion, section 406(a) provides: "Except as provided in section [408]: (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect ... (D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan ...." In turn, section 408(b) enumerates categories and conditions for transactions exempted from the prohibitions of section 406. Further, section 408(c) provides that section 406 shall not be construed to prohibit a fiduciary from receiving benefits she may be entitled to as a plan participant or beneficiary or reasonable compensation for services rendered to the plan. 29 U.S.C. § 1108(c). As we said in *Allen*, though, "an ERISA plaintiff need not plead the absence of exemptions to prohibited transactions. It is the defendant who bears the burden of proving" that a section 408 exemption applies. 835 F.3d at 676. A fiduciary seeking the protection of section 408 has the burden of pleading and ultimately proving that an exception applies to a transaction otherwise prohibited by section 406. The district court correctly shifted the burden to defendants.

Defendants did not carry that burden. They produced 70 pages of "postal money orders, invoices, and communications with counsel regarding attorneys' fees," but they failed to offer "an accounting of these documents" or to match them up with Sherrod's withdrawals from the plan. *Walsh*, 2022 U.S. Dist. LEXIS 59927, 2022 WL

971857, at *8. It is neither the district court's nor this Court's job to piece together an argument for Sherrod and Johnson. *Id.*, citing *Estate of Moreland v. Dieter*, 395 F.3d 747, 759 (7th Cir. 2005) ("We will not scour a record to locate evidence supporting a party's legal argument.").

D. Harm to the Plan

Once it is established that fiduciaries have breached their duties, the plaintiff must show harm to the plan. See *Kenseth*, 610 F.3d at 464. Defendants argue that the district court erred when—in spite of the 2014 letter from Johnson's attorney asking that the payment be returned to the plan—the court inferred that there was "no indication in the record ... that the Plan ever received" those funds and concluded that the bond payment was therefore a loss to the plan. *Walsh*, 2022 U.S. Dist. LEXIS 59927, 2022 WL 971857, at *7 & n.6. The district court's treatment of that issue was exactly right. Also, undisputed evidence shows that the plan suffered harm from at least a significant portion of the more than 100 subsequent payments Sherrod made to herself from plan assets from 2012 to 2017.

E. Denial of Motions to Amend

Both defendants argue on appeal that the district court abused its discretion by denying defendants leave to amend their original answer to add a statute of limitations defense. Federal Rule of Civil Procedure 15(a)(2) provides that courts "should freely give leave" to amend "when justice so requires," but "a district court may deny leave to amend for undue delay, bad faith, dilatory motive,

prejudice, or futility." *General Electric Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1085 (7th Cir. 1997).

The presumptive limitation period for violations of ERISA is six years from the date of the last action constituting part of the breach or violation. *Fish v. GreatBanc Trust Co.*, 749 F.3d 671, 674 (7th Cir. 2014); 29 U.S.C. § 1113(1). The period is shortened to just three years from the time the plaintiff gained "*actual knowledge* of the breach or violation." *Fish*, 749 F.3d at 674, quoting 29 U.S.C. § 1113(2) (emphasis added).

Four months after they filed their answer, defendants sought leave to amend to add an affirmative defense regarding the bond transaction in 2011 based on ERISA's three-year limitations period. They claimed that two documents they had discovered in their own files suggested that the Secretary's claims with respect to the bond payment were time-barred. The documents showed nothing of the sort. One was a fax from the plan's lawyer to the Department of Labor, dated December 20, 2012, notifying the Department that Johnson had succeeded Sherrod as plan administrator and that a notice of appeal had been filed in a federal case brought by Sherrod and Johnson against Merrill Lynch. See *Johnson v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, No. 12-cv-2545, 2012 U.S. Dist. LEXIS 169149, 2012 WL 5989345 (N.D. Ill. Nov. 28, 2012). The second document was an email from Sherrod to the Department of Labor, dated August 10, 2012, asking about the alienation of plan assets by the Michigan state court.

In March 2017, District Judge Shadur denied the motion, finding that defendants had been dilatory in pursuing the amendment and had, regardless, put forth no evidence that could meet the statute's "actual knowledge" requirement. Aside from questions of law, which we review de novo, our review of a district court's denial of leave to amend is for an abuse of discretion. *Gandhi v. Sitara Capital Mgmt., LLC*, 721 F.3d 865, 868 (7th Cir. 2013). We find no abuse of discretion in the district court's decision.

First, the district court did not err by finding that defendants had been dilatory in pursuing this affirmative defense. The supposedly new documents had been in defendants' possession from the start, so an affirmative defense based on them "could have been pled at any time after the filing of the initial complaint." See *Continental Bank, N.A. v. Meyer*, 10 F.3d 1293, 1298 (7th Cir. 1993) (affirming denial of amendment where facts "must have been known to defendants").

More important, though, the documents defendants relied upon fell far short of hinting, let alone proving, that the Secretary actually learned of the defendants' violations. The three-year statute of limitations applies only when the plaintiff has actual knowledge of a violation, not when the plaintiff arguably should have known of a violation.

Defendants' theory seems to be that the Secretary should have realized that Sherrod had breached her fiduciary duties by posting the bond with plan assets because (a) the fax referred to the federal lawsuit between

defendants and Merrill Lynch, and (b) if the Secretary had investigated and obtained documents filed in that suit, then the Secretary would or could or should have known of her breach. The August 2012 email, defendants argued, likewise should have put the Secretary on notice because a letter attached to that email described how Sherrod had signed an affidavit stating that plan assets would be used to post the bond.

We agree with the district court that defendants' effort to "cobble together" from these two documents a showing of actual knowledge that would trigger the three-year statute of limitations did not warrant a late amendment of the answer, or at least the district court did not abuse its discretion in denying the amendment. The passing references in these documents to the lawsuits did not give the Secretary actual notice of defendants' self-dealing and neglect. At best, those documents *might* have prompted the Secretary "to engage in active outside research" that *might* have revealed Sherrod's breach of her fiduciary duties. That theory would have been a stretch to establish constructive ("should have known") knowledge. It certainly falls far short of actual knowledge.

The district court accurately explained that defendants were trying to apply the concept of inquiry notice to "the far more demanding 'actual knowledge' test under ERISA." The court's analysis was prescient. Three years after the district court denied defendants' motion to amend, the Supreme Court heard a case where the plaintiff had received far more explicit disclosures of the ERISA breaches, not just indications that might warrant

an investigation. The Court held that, to meet ERISA's actual knowledge requirement, there must be "more than evidence of disclosure alone." *Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 774-75, 777, 206 L. Ed. 2d 103 (2020). Rather, "the plaintiff must in fact have become aware" of the disclosed information showing the violation. *Id.* In reaching this holding, the Court addressed some of the same circuit decisions that the district court did here.[4]

In sum, even if defendants' supposedly newly discovered documents had actually disclosed a violation, which they did not, there is no evidence or reason to think that the Secretary was "in fact ... aware" of that disclosure. In the wake of *Intel*, establishing actual knowledge on such paltry evidence would be impossible, and it is now clear that any amendment would have been futile. The denial of leave to amend was not a reversible error.

F. Injunctive Relief

Finally, both defendants argue that even if we agree with the district court on the merits, the court granted excessive equitable relief. We review a district court's grant of injunctive relief for an abuse of discretion. *Harrell ex rel. NLRB v. American Red Cross*, 714 F.3d 553, 556 (7th Cir. 2013).

While Johnson asks that we reverse the judgment of the district court and remand for a trial, he makes

4. See *Intel*, 140 S. Ct. at 775 n.3, citing, e.g., *Caputo v. Pfizer, Inc.*, 267 F.3d 181 (2d Cir. 2001), and *Gluck v. Unisys Corp.*, 960 F.2d 1168 (3d Cir. 1992).

no specific argument that the district court abused its discretion in granting the relief that it did. For her part, Sherrod argues that she should not have been removed as plan trustee. She says that she faced extraordinary circumstances, that the plan's assets were enmeshed in a state lawsuit, that she "reached out to the Secretary for help," that she used the services of experts and even "made efforts to secure the return of the bond funds." In other words, Sherrod argues that, at the time she made the bond payment, she thought she was doing "everything reasonable to protect" the plan from the Michigan litigation.

Even if we give Sherrod the benefit of her assertions of good faith, since the district court imposed the injunction based on a summary judgment decision, good faith is not a defense for one breach of a fiduciary duty, let alone the repeated breaches shown here. See *Davis*, 7 F.4th at 546, citing *Leigh*, 727 F.2d at 124. In any event, the undisputed facts show that a significant portion of Sherrod's many later payments to Sherrod herself from plan assets from 2012 to 2017 were prohibited self-dealing. As with harm to the plan, those payments, taken alone, amply support the district court's decision to remove defendants as fiduciaries and to prohibit them from again serving in such positions of trust. Given the gravity and frequency of defendants' breaches of their fiduciary duties, they are fortunate that the relief against them has thus far been relatively modest. The district court's grant of summary judgment and its permanent injunction are

AFFIRMED.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED JULY 19, 2023

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

July 19, 2023

Before

DAVID F. HAMILTON, *Circuit Judge*

No. 22-2205

JULIE A. SU, ACTING SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Plaintiff-Appellee,

v.

SHIRLEY T. SHERROD,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:16-cv-04825

Andrea R. Wood,
Judge.

Appendix B

ORDER

On consideration of defendant Shirley T. Sherrod's Motion for a Stay of Issuance of the Mandate, the motion is denied.

To obtain a stay of the mandate pending her planned effort to seek Supreme Court review, Sherrod "must show that the petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(1). This requires her to demonstrate three elements: (1) the Supreme Court is likely to grant certiorari, (2) there is a reasonable possibility that the Supreme Court will reverse, and (3) the moving party will suffer irreparable harm absent a stay. See, e.g., *Books v. City of Elkhart*, 239 F.3d 826, 828 (7th Cir. 2001) (Ripple, J., in chambers).

Defendant Sherrod cannot show any of these elements. On the merits, a motion to stay the mandate asks this court to consider objectively the possibility that it may have erred. At the same time, this court can bring to the motion a sense of realism. This court should consider the issues to be raised in the planned petition, the Supreme Court's treatment of similar cases, and the more general considerations that apply to petitions for writs of certiorari. See *Williams v. Chrans*, 50 F.3d 1358, 1360–61 (7th Cir. 1995) (denying stay of execution pending possible Supreme Court review). The question Sherrod plans to present—whether the district court erred in denying her leave to amend her answer to add a statute of limitations defense based on an assertion that the plaintiff Secretary of Labor had actual knowledge of the ERISA violations more than three years before bringing suit—concerns a

case management matter that is highly case-specific and subject to deferential appellate review. Such a question is not a likely candidate for one of the few score grants of certiorari each year.

Second, even if certiorari were to be granted, reversal seems unlikely, keeping in mind again the deferential standard of review that this court applied to the district court's decision and that the Supreme Court would also apply.

Finally, Sherrod has not shown that issuance of the mandate will cause irreparable harm to her. On this score, she points only to motions pending against her in the district court that she fears might result in financial sanctions. The timing of our mandate from this interlocutory appeal will not affect the district court's jurisdiction to consider those matters. See, e.g., *Wisconsin Mutual Insurance Co. v. United States*, 441 F.3d 502, 504 (7th Cir. 2006) (interlocutory appeal does not deprive district court of jurisdiction to enter final judgment); *Union Oil Co. v. Leavell*, 220 F.3d 562, 565–66 (7th Cir. 2000) (during appeal of unstayed injunction, district court retains jurisdiction to enforce injunction, through contempt proceedings, if necessary). Moreover, having to go through those proceedings in the district court will not impose irreparable harm on defendant. If and when financial sanctions are imposed, the district court's decisions on those motions also would not inflict irreparable harm on Sherrod. The possible sanctions are also too speculative at this point to call for a further delay in this court's mandate.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, FILED JUNE 2, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARTIN J. WALSH, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

SHIRLEY T. SHERROD, *et al.*,

Defendants.

Judge Andrea R. Wood

No. 16-cv-04825

FINAL JUDGEMENT AND ORDER GRANTING INJUNCTIVE AND EQUITABLE RELIEF

Plaintiff Martin J. Walsh, Secretary of Labor, United States Department of Labor ("Secretary"), moved this Court for Summary Judgment and the Court granted the motion. (Dkt. No. 264.) The Court permitted Defendants to file a supplemental memorandum for the limited purpose of responding to the Secretary's request for injunctive and

other equitable relief. Having reviewed and considered those supplemental briefs, as well as the entirety of the summary judgment record, the Court grants the Secretary's request for injunctive and other equitable, and so IT IS HEREBY ORDERED:

1) The Court enters Final Judgment in favor of Plaintiff Secretary and against Defendants Shirley T. Sherrod and Leroy Johnson .

2) Defendants Shirley T. Sherrod and Leroy Johnson are removed as fiduciaries of the Shirley T. Sherrod M.D., P.C. Target Pension Plan ("Plan"), including from their positions as Plan Administrator and Trustee, and are permanently enjoined from serving or acting as fiduciaries or service providers with respect to any employee benefit plans subject to Employment Retirement Income Security Act of 1974.

3) AMI Benefit Plan Administrators, Inc.,100 Terra Bella Dr., Youngstown, OH 44505), ("Independent Fiduciary") is immediately appointed as the Plan's independent fiduciary for purposes of terminating the Plan and issuing distributions; and all fees and reasonable expenses of the Independent Fiduciary shall be paid by the Defendants. If the Defendants fail to pay in advance the fees of the Independent Fiduciary, the Independent Fiduciary may deduct its fees and reasonable expenses from Defendant Sherrod's Plan account before distribution. The

Appendix C

Independent Fiduciary shall have the following powers, duties, and responsibilities:

a. The Independent Fiduciary shall have responsibility and authority to collect, liquidate, and manage such assets of the Plan for the benefit of the eligible participants and beneficiaries for the Plan who are entitled to receive such assets, until such time that the assets of the Plan are distributed to the eligible participants and beneficiaries of the Plan;

b. The Independent Fiduciary shall exercise reasonable care and diligence to identify and locate all participants and beneficiaries of the Plan, including any who left the Plan, and who are eligible to receive a payment under the terms of the Summary Judgment and this Order and to disburse to each such eligible participant or beneficiary the payment to which he or she is entitled;

c. The Independent Fiduciary shall have full access to all data, information and calculations in the Plan's possession or under its control, including that information contained in the records of the Plan's custodial trustees and other service providers, bearing on the distribution of benefit payments, participant account balances and current plan assets;

d. The Independent Fiduciary may retain such persons and firms including, but not limited to, accountants and attorneys, as may be reasonably required to perform his duties hereunder;

e. For the services performed pursuant to this Order, the Independent Fiduciary shall receive compensation not to exceed $12,000 for fees and expenses reasonably and necessarily incurred to:

   i. Provide custodial and participant tax reporting;

   ii. Conduct communications with participants;

   iii. Terminate the Plan;

   iv. Review and allocate appropriately all previous distributions and transactions for the Plan consistent with the findings in this Court's Order at Docket No. 264; this expressly includes the bond payment in 2011 and all checks written to or transfers to Sherrod and Sherrod's attorneys, and all other payments or withdrawals from the Plan that were not paid directly to a participant (who was not Sherrod) in the Plan from 2013 to present, being considered payments to Sherrod;

v. File amended Form 5500s from 2011 to present as needed and to file a final Form 5500;

vi. Complete the distribution of assets to participants;

vii. Prepare a final report to the U.S. Department of Labor; and

viii. Create updated valuations for plan years 2011 to present as needed.

f. Within 30 days of any reallocation or distribution of the Plan's assets, the independent fiduciary shall provide the Regional Director of the U.S. Department of Labor, Employee Benefits Security Administration ("EBSA"), at 1885 Dixie Highway, Suite 210, Ft. Wright, KY 41011, with a report identifying the distributions made by the Plan since the independent fiduciary's appointment.

g. The independent fiduciary's appointment shall terminate upon the first to occur of: 1) removal by the Court; 2) its resignation after finding an acceptable replacement, agreed to by all parties or the Court, providing notice to all parties to this matter, and approval by the Court to have the replacement independent fiduciary appointed; or 3) the liquidation

and distribution of the Plan's assets and the completion of all related tasks.

Dated: June 2, 2022

/s/
Andrea R. Wood
United States District Judge

APPENDIX D — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, FILED MARCH 31, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 16-cv-04825

Judge Andrea R. Wood

MARTIN J. WALSH, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

SHIRLEY T. SHERROD, *et al.*,

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiff Martin J. Walsh, in his capacity as Secretary of the U.S. Department of Labor ("Secretary"), has brought this civil enforcement action under the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(2), to address alleged misconduct with respect to the Shirley T. Sherrod, M.D., P.C. Target Pension Plan ("Plan"). Specifically, the Secretary alleges that Defendants Shirley T. Sherrod, M.D., and Leroy Johnson breached their duty of loyalty, duty of due care,

and duty to follow the governing plan documents under 29 U.S.C. § 1104. Now before the Court is the Secretary's motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. (Dkt. No. 167.) For the reasons that follow, the motion is granted.

BACKGROUND

For purposes of summary judgment, the Court views the evidence in the light most favorable to Dr. Sherrod and Johnson as the nonmoving parties and draws all reasonable inferences from the facts in their favor. *Weber v. Univs. Rsch. Ass'n, Inc.*, 621 F.3d 589, 592 (7th Cir. 2010). Except where otherwise noted, the following facts are undisputed.

I. Factual Background

At all times relevant to the case, Dr. Sherrod owned Shirley T. Sherrod, M.D., P.C. ("Company") in Detroit, Michigan. (Def. Sherrod's Resp. to Pl.'s Statement of Material Facts ("Sherrod RPSOMF") ¶¶ 4, 17, Dkt. No. 214.) The Company offered ophthalmology services. (*Id.* ¶ 18.) Beginning January 1, 1987, the Company established the Plan to provide retirement benefits to its employees, including Dr. Sherrod herself. (*Id.* ¶¶ 5-6.) Dr. Sherrod reached retirement age under the Plan's language (65 years old) in May 2011. (*Id.* ¶ 20.) She has also been the trustee of the Plan since its establishment. (*Id.* ¶ 19.) Johnson was named as the Plan administrator on May 30, 2012. (Sherrod's RPSOMF ¶ 22; Def. Johnson's Resp. to Pl.'s Statement of Material Facts ("Johnson

RPSOMF") ¶ 22, Dkt. No. 216.) The Plan was funded by Company contributions, but the Company stopped making distributions in 2011 through at least 2017. (*Id.* ¶ 7.)

All Plan participants apart from Dr. Sherrod were terminated from their employment with the Company on December 31, 2008. (*Id.* ¶ 6.) In April 2010, the Plan language was amended. (*Id.* ¶ 8.) The 2010 Plan is the version that was effective during the time relevant to the Secretary's complaint. (*Id.*) Under the language of the Plan, the trustee, Dr. Sherrod, was responsible for (1) investing, managing, and controlling Plan assets subject to the direction of the employer or investment manager; (2) paying benefits to participants or their beneficiaries at the direction of the administrator; and (3) maintaining records of receipts and disbursements to furnish to the employer or administrator. (Pl.'s Statement of Material Facts ("PSOMF"), Ex. E, Plan ("2010 Plan") § 7.1(a), Dkt. No. 168-6.) The job of the administrator, Johnson, was to administer the Plan for the exclusive benefit of the participants and beneficiaries. (*Id.* § 2.4.) The administrator was required to determine the payment of benefits and to authorize and direct the trustee with respect to disbursements. (*Id.*) The 2010 Plan language states that the trustee "shall be reimbursed for any reasonable expenses, including reasonable counsel fees incurred by it as Trustee. Such compensation shall be paid from the Trust Fund unless paid or advanced by the Employer." (Pl.'s Resp. to Def. Sherrod's Statement of Additional Facts ("Pl.'s Resp. Sherrod Facts") ¶ 6, Dkt. No. 221 (internal quotation marks omitted).)

Dr. Sherrod eventually sold her company in Michigan[1] to an individual named Michael Sherman, and a dispute between the two led to litigation in Michigan state court. (Sherrod RPSOMF ¶ 44.) On June 25, 2010, Sherman received a judgment against Dr. Sherrod in the amount of $181,048. (*Id.*) The Secretary claims that the judgment was against Dr. Sherrod individually, while Dr. Sherrod insists that the judgment was also entered against the Company. (*Id.* (citing PSOMF, Ex. Q, State of Mich. Cir. Ct. Filings ("Mich. Filings") at 9, Dkt. No. 168-18).) The language of the court's order provides that "third-party plaintiffs Shirley T. Sherrod, M.D., and Shirley T. Sherrod, M.D., P.C. . . . are prohibited from directly or indirectly selling, transferring" or otherwise disposing of any of their assets. (Mich. Filings at 10.)

At the time of the Michigan litigation, Merrill Lynch, Pierce, Fenner, and Smith, Inc. ("Merrill Lynch") was the Plan custodian. (Sherrod RPSOMF ¶ 36.) After obtaining a judgment against Dr. Sherrod in Michigan, Sherman secured a garnishment of all Dr. Sherrod's assets at Merrill Lynch on October 12, 2010. (*Id.* ¶ 45.) On February 4, 2011, the Michigan court ordered all Dr.

1. The parties agree that at some point before June 2010, "Sherrod sold her company in Michigan." (Sherrod RPSOMF ¶ 44.) But the parties also agree that Dr. Sherrod was the owner of the Company, Shirley T. Sherrod, M.D., P.C., "[f]rom at least January 1, 2008 to present." (*Id.* ¶ 17.) It is not clear from the parties' materials whether the company Dr. Sherrod sold was the Company at issue in this case and, if so, whether the sale was actually effectuated. The Court assumes for purposes of the present ruling that Dr. Sherrod owned the Company at all times relevant to the Secretary's complaint.

Sherrod's assets at Merrill Lynch frozen. (*Id.*) Dr. Sherrod appealed the judgment against her. (Sherrod RPSOMF ¶ 46.) Michigan's court of appeals allowed Dr. Sherrod's appeal to proceed and to stay the enforcement of the judgment only if she did one of following: either (1) appear for a creditor's examination with certain documents or (2) post a $250,000 cash or surety bond. (*Id.*; Mich. Filings at 12.) According to Dr. Sherrod, she had willingly agreed to sit for the creditor's examination, but it "did not come to fruition." (Sherrod RPSOMF ¶ 46.) Instead, Dr. Sherrod decided to post the bond, for which the court allowed her to use her frozen assets. (*Id.*) Consequently, on November 10, 2011, Dr. Sherrod signed an affidavit swearing that she was directing Merrill Lynch to make two distributions from the Plan: first, a $250,000 distribution to secure a bond pursuant to the Michigan court's order, and second, a $3,000 distribution to cover the costs associated with filing the bond. (Mich. Filings at 18-20.) In the affidavit, Dr. Sherrod also confirmed that the requested distributions did not exceed her individual interest in the plan. (*Id.* at 19.) For the year 2011, Defendants reported a $246,291 Plan loss and no benefit distributions paid. (Sherrod RPSOMF ¶ 78.)

On February 28, 2012, Merrill Lynch filed a motion to have the freeze on Dr. Sherrod's accounts released. (*Id.* ¶ 54.) In April, the Michigan court stated that it would lift the freeze on the Plan's assets. (*Id.* ¶ 55.) But Dr. Sherrod's then-attorney objected on the grounds that the court lacked jurisdiction to lift the freeze because of her pending appeal. (*Id.*) For reasons that are unclear based on the record before this Court, the Michigan state court

lifted the freeze on Dr. Sherrod's assets at Merrill Lynch in May 2013. (*Id.* ¶ 60.)

The parties dispute the effect of the Michigan court's order on the Plan assets and, consequently, the propriety of $250,000 distribution from the Plan to post the bond in the underlying litigation. The Secretary claims that the freeze of Dr. Sherrod's assets included only "the amount of her retirement benefit in the Plan account." (Sherrod RPSOMF ¶ 45.) But Dr. Sherrod asserts that the freeze applied to all Plan funds held at Merrill Lynch. (*Id.*) In its filing to lift the freeze, Merrill Lynch indicated that the Plan account was frozen, although in parallel proceedings before the Seventh Circuit Merrill Lynch maintained that only Dr. Sherrod's interests were affected by the order.[2] (Mich. Filings at 3; *Johnson v. Merrill Lynch*, 719 F.3d 601, 602 (7th Cir. 2013).)

Shortly after the freeze on Dr. Sherrod's assets was lifted, she started directing payments to herself from the Plan's funds. In July 2013, the Plan distributed two payments to Dr. Sherrod totaling $50,000. (*Id.* ¶ 63.) The

2. On April 6, 2012, Dr. Sherrod also filed suit against Merrill Lynch in the United States District Court for the Northern District of Illinois related to the freeze on her accounts. (Sherrod RPSOMF ¶ 56.) That district court granted Merrill Lynch's motion to dismiss on jurisdictional grounds. (*Id.* ¶ 57.) The Seventh Circuit subsequently affirmed that ruling. (*Id.* ¶¶ 58-59); *see also Johnson*, 719 F.3d at 602. In so doing, the Seventh Circuit noted that "Merrill Lynch only froze the Plan account with respect to Sherrod," as Merrill Lynch represented in the briefing that it would not refuse instructions to distribute funds to any Plan participant other than Dr. Sherrod. *Id* at 603.

following year, Dr. Sherrod directed the Plan to issue her thirty-seven checks totaling $286,905. (*Id.* ¶ 64.) But according to Dr. Sherrod, she never cashed $40,000 worth of checks included in that amount from the year 2014. (*Id.*) And Dr. Sherrod also asserts that she used some amount of those payments to reimburse herself for the Plan's legal expenses, which she had covered using her own cash and credit cards. (*Id.*) Also in 2014, Dr. Sherrod instructed the Plan to issue two checks totaling $4,000.00 payable directly to her attorneys. (*Id.* ¶ 70.) For the year 2014, Defendants reported that the Plan paid $57,000 in benefit distributions and $142,000 in expenses. (*Id.* ¶ 81.)

The Secretary asserts that in 2015, the Plan made twenty-six distributions totaling $120,016 to Dr. Sherrod. (*Id.* ¶ 65.) Dr. Sherrod claims that she only received distributions totaling $59,000 in 2015 and that the remaining $61,764 were attributable to Plan expenses.[3] (*Id.*) For the year 2015, Defendants reported $59,000 in benefit distributions and $40,000 in expenses paid. (*Id.* ¶ 82.) In the year 2016, the Plan distributed funds to Dr. Sherrod thirty times, totaling $196,471.50. (*Id.* ¶ 66.) Again, Dr. Sherrod asserts that $133,922.00 of that total went to Plan expenses. (*Id.*) For the 2016 Plan year, Defendants reported $62,550.00 in benefit distributions and $133,922.00 in expenses paid (totaling $186,472.00). (*Id.* ¶ 83.) Finally, in 2017, the Plan made twenty-eight distributions to Dr. Sherrod totaling $173,809.99—$104,144.99 of which Dr. Sherrod asserts went to Plan

3. The Court notes that $61,764 added to $59,000 totals $120,764, not $120,016.

expenses and other Plan beneficiaries. (*Id.* ¶ 67.) In 2017, Dr. Sherrod also directed two checks to other Plan participants or their beneficiaries, but those checks were sent to Dr. Sherrod's address in South Carolina. (*Id.* ¶ 72.) Dr. Sherrod testified that the Plan mailed the checks to her and she sent the checks to the beneficiaries. (Def. Sherrod's Mem. in Opp'n, Corrected Ex. 1, Dep. of Dr. Sherrod 228:1-4, Dkt. No. 218.)

No deposits went into the Plan from 2014 through 2017. (Sherrod RPSOMF ¶ 71.) But Dr. Sherrod notes that the account was closed to deposits beginning in 2008. (*Id.*)

DISCUSSION

Summary judgment is appropriate if the admissible evidence considered as a whole shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law, even after all reasonable inferences are drawn in the non-movant's favor. *Dynegy Mktg. & Trade v. Multiut Corp.*, 648 F.3d 506, 517 (7th Cir. 2011). "A dispute is 'genuine' 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Zaya v. Sood*, 836 F.3d 800, 804 (7th Cir. 2016) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). "To overcome a motion for summary judgment, the non-moving party must come forward with specific facts demonstrating that there is a genuine issue for trial." *Wheeler v. Lawson*, 539 F.3d 629, 634 (7th Cir. 2008); *see also Balderston v. Fairbanks Morse Engine Div. of Coltec Indus.*, 328 F.3d 309, 320 (7th Cir. 2003) (explaining that

the non-moving party must present "more than mere conclusions and allegations"). The party opposing the motion must also "go beyond the pleadings (*e.g.*, produce affidavits, depositions, answers to interrogatories, or admissions on file), to demonstrate that there is evidence upon which a jury could properly proceed to find a verdict in her favor." *Modrowski v. Pigatto*, 712 F.3d 1166, 1168-69 (7th Cir. 2013) (internal quotation marks and citation omitted).

In ruling on a motion for summary judgment, the Court "must construe the facts in favor of the nonmovant, and may not make credibility determinations or weigh the evidence." *McCottrell v. White*, 933 F.3d 651, 655 (7th Cir. 2019). "[S]ummary judgment may be granted based on any ground that finds support in the record, so long as the non-moving party had an opportunity to submit affidavits or other evidence and contest the issue." *Hester v. Ind. State Dep't of Health*, 726 F.3d 942, 946 (7th Cir. 2013) (internal quotation marks omitted); *see also BBL, Inc. v. City of Angola*, 809 F.3d 317, 325 (7th Cir. 2015) ("At the summary-judgment stage, the court can properly narrow the individual ***factual*** issues for trial by identifying the material disputes of fact that continue to exist.").

The Secretary argues that it is entitled to summary judgment, including injunctive relief removing Defendants as fiduciaries, because the undisputed facts show that Defendants violated their duties to the Plan under § 404 of ERISA. *See* 29 U.S.C. § 1104. The Secretary alleges that Dr. Sherrod and Johnson breached three duties: (1) their duty of loyalty to the Plan under § 404(a)(1)(A); (2)

their duty of due care under § 404(a)(1)(B); and (3) their duty to act in accordance with Plan documents under § 404(a)(1)(D). To prevail, the Secretary must establish "(1) that the defendant is a plan fiduciary; (2) that the defendant breached its fiduciary duty; and (3) that the breach resulted in harm to the plaintiff." *Bator v. Dist. Council 4*, 972 F.3d 924, 929 (7th Cir. 2020) (internal quotation marks omitted).

Dr. Sherrod does not dispute that she was Plan fiduciary at all relevant times. (Sherrod RPSOMF ¶ 19.) And Johnson admits that, from May 30, 2012 through August 4, 2014, he also qualified as a Plan fiduciary. (Johnson RPSOMF ¶ 34.) For the period of time after August 2014, however, Johnson contends that he was no longer a Plan fiduciary. Instead, Johnson asserts, he had properly delegated the position of Plan Administrator to LJ Consulting Services LLC ("LJ Consulting"), an entity that Johnson formed in August 2014. (Johnson Decl. in Opp. to Mot. for Summary Judg. ¶ 3-4, Dkt. No. 216.) LJ Consulting has never had any employees, maintained any office space, or had any other client besides the Plan, and Johnson is the sole owner. (Johnson RPSOMF ¶ 24.) There is no apparent distinction between Johnson and LJ Consulting, and Johnson cannot evade his fiduciary duties by attempting to insulate himself behind a corporate form. Regardless, the Plan's governing documents did not permit Johnson to appoint a new Plan administrator.[4]

4. Johnson argues that there is no non-delegation clause in the Plan, relying on language in the 2009 Plan document that allows the Administrator to "appoint counsel, specialists, advisers, agents (including nonfiduciary agents) and other persons as the

Accordingly, both Dr. Sherrod and Johnson meet the first element, although they dispute the second and third elements of breach and harm.

The Secretary asserts that Defendants breached their fiduciary duties in three ways. First, the Secretary claims they failed to maintain proper records and distribute assets in accordance with Plan documents. Second, the Secretary asserts that Dr. Sherrod used Plan funds to pay for the bond in her Michigan action and Johnson failed to stop her. Finally, according to the Secretary, Dr. Sherrod made numerous distributions to herself from the years 2013 through 2017, which she falsely treated as "plan expenses," and Johnson failed to stop her. The Court considers each alleged breach in turn.[5]

Administrator [] deems necessary or desirable in connection with the administration of this Plan . . .." (Johnson RPSOMF ¶ 33.) But that the Plan permitted Johnson to appoint third parties to ***assist*** him in administering the Plan does not mean that he was entitled to unilaterally appoint another to replace him as Plan Administrator.

5. Dr. Sherrod contends that the Secretary has waived its right to rely on evidence concerning Plan years 2015 through 2017 because the complaint only includes allegations about the years 2012 through 2014. Dr. Sherrod points to *Holman v. Revere Electric Supply Co.*, in which another court in this District denied the plaintiff's motion for summary judgment as to a retaliatory discharge claim because it was not included in the relevant complaint. No. 02 C 6351, 2005 U.S. Dist. LEXIS 43402, 2005 WL 638085, at *26 (N.D. Ill. Mar. 15, 2005). The *Holman* court concluded that the defendant was never given notice of that claim as required under Federal Rule of Civil Procedure 8(a). *Id.* But in this case, the Secretary's complaint (filed in 2016) alleges that, "[f]rom January 1, 2015 to the present, Defendant Sherrod continues to withdraw funds from the Plan

Appendix D

I. Maintenance of Records in Accordance with Plan Documents

Section 404(a)(1)(D) of ERISA requires fiduciaries to discharge their duties with respect to a plan "in accordance with the documents and instruments governing the plan." 29 U.S.C. § 1104(a)(1)(D). The Secretary contends that the undisputed facts show Defendants violated § 404(a)(1)(D) by failing to follow the Plan documents.

It is undisputed that the Plan language required Dr. Sherrod, as the trustee, to maintain records of receipts and disbursements to furnish to the employer and the administrator and to pay benefits due under the Plan only at the direction of the administrator. (Sherrod RPSOMF ¶ 10; Johnson RPSOMF ¶ 10.) Dr. Sherrod does not dispute that Johnson, acting as the administrator, did not direct, approve, oversee, or question her payments out of the Plan from 2012 through 2017 because she never provided information for his review. (Sherrod RPSOMF ¶ 40; *see also* PSOMF, Ex. D, Dep. of Leroy Johnson ("Johnson Dep.") 77:19-82:12, Dkt. No. 168-5.) For his part, Johnson admits

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and Defendants Sherrod and Johnson fail to account for these distributions properly." (Compl. ¶ 25, Dkt. No. 1.) Though brief, the complaint's allegation concerning ongoing withdrawals from the Plan is sufficient to put Defendants on notice that the Secretary is alleging ongoing violations. The Court will therefore consider the Secretary's evidence for the years after 2014. Dr. Sherrod also contends that the Secretary's complaint is barred by the statute of limitations. However, Dr. Sherrod recognizes that the Court has already rejected that argument in denying Defendants' motion for leave to amend and their motion for reconsideration. (*See* Dkt. Nos. 43, 128.) The Court sees no reason to revisit the prior rulings.

that, between 2011 and 2013, Dr. Sherrod never provided him copies of invoices, checks, or money orders related to purported Plan expenses. (*See* Johnson RPSOMF ¶ 40; Johnson Dep. 78:8-79:10 (Johnson's testimony responding to a question about whether he verified Dr. Sherrod's reimbursements by stating, "I knew what Dr. Sherrod did was justified and correct.").) Rather, Johnson simply "took her word" that those expenses were properly paid out of the Plan. (Johnson Dep. 81:4-10.)

Dr. Sherrod argues that the undisputed evidence does not show she violated § 404(a)(1)(D) because the Plan does not specify how records are to be kept and "[t]he fact that Dr. Sherrod did not administer the Plan exactly how the Secretary would have preferred in this case does not lead to liability." (Dr. Sherrod's Resp. in Opp'n at 14, Dkt. No. 210.) Indeed, "ERISA does not require a sole recordkeeper or mandate any specific recordkeeping arrangement at all." *Divane v. Nw. Univ.*, 953 F.3d 980, 990 (7th Cir. 2020). But under the language of the Plan, Dr. Sherrod and Johnson were required to follow a certain procedure, with Johnson as the administrator directing Dr. Sherrod as the trustee to make payments out of Plan funds only when appropriate. And Defendants do not dispute that Dr. Sherrod instead took actions with respect to the Plan without conferring with Johnson. Johnson, for his part, merely accepted Dr. Sherrod's actions as proper without reviewing any of the relevant documents. That conduct was inconsistent with the language of the Plan. Accordingly, the Court finds that the Secretary has established it is entitled to summary judgment with respect to Defendants' violations of ERISA § 404(a)(1)(D).

II. Dr. Sherrod's Use of Plan Funds for the Bond in Michigan

The Secretary next argues that the undisputed facts show Defendants breached their general duties of loyalty and prudence under §§ 404(a)(1)(A) and (B) of ERISA by allowing Dr. Sherrod to appropriate $253,000 of Plan funds to pay for a bond in connection with her personal litigation in Michigan.

Dr. Sherrod does not dispute that she used Plan funds to pay for the bond in Michigan, but she contends that it was a reasonable expense authorized by the Plan. The 2010 Plan language provides that the trustee "shall be reimbursed for any reasonable expenses, including reasonable counsel fees incurred by it as Trustee." (Pl.'s Resp. Sherrod Facts ¶ 6, Dkt. No. 221.) ERISA also explicitly exempts from its listed prohibited transactions any reasonable legal fees necessary for the establishment or operation of the benefit plan. *See* 29 U.S.C. § 1108(b)(2)(A). Accordingly, courts have allowed fiduciaries to use plan funds to pay for legal services when such services were necessary to protect the plan or were incurred by the trustee in performance with her plan duties. *See Jordan v. Mich. Conf. of Teamsters Welfare Fund*, 207 F.3d 854, 861 (6th Cir. 2000); *FirsTier Bank, N.A. v. Zeller*, 16 F.3d 907, 913-14 (8th Cir. 1994). Thus, the critical question is whether there is a genuine dispute as to whether Dr. Sherrod's payment of the bond in the Michigan case was necessary to protect the Plan or otherwise reasonably connected to her duties as a fiduciary.

The parties first dispute whether the Michigan state court in 2010 froze only Dr. Sherrod's personal assets or also the assets of her Company. (*See* Sherrod RPSOMF ¶¶ 44-45.) That court's order states "third-party plaintiffs Shirley T. Sherrod, M.D., and Shirley T. Sherrod, M.D., P.C. . . . are prohibited from directly or indirectly selling, transferring" or otherwise disposing of any of their assets. (Mich. Filings at 10.) Therefore, it appears from the language of the order that the court froze the assets of the Company, as well as Dr. Sherrod's personal assets. But even an ERISA fiduciary's use of plan funds for the benefit of the company sponsoring the plan, rather than for the sole benefit of plan participants, violates the duty of loyalty under § 404(a)(1)(A). *See Frahm v. Equitable Life Assurance Soc'y of the U.S.*, 137 F.3d 955, 959 (7th Cir. 1998) ("Deliberately favoring the corporate treasury when administering . . . a plan is inconsistent with the statute."); *Perez v. Wallis*, 77 F. Supp. 3d 730, 744 (N.D. Ill. 2014) (concluding that the defendants breached their duty of loyalty under ERISA when they failed to remit employee contributions to the plan and instead "retained those contributions in [the company's] operating budget and used them to pay general expenses"); *Solis v. Hartmann*, No. 10 C 123, 2012 U.S. Dist. LEXIS 124289, 2012 WL 3779050, at *6-7 (N.D. Ill. Aug. 31, 2012) (finding that fiduciaries breached their duty of loyalty by using plan assets to pay company expenses rather than for the exclusive benefit of plan participants and beneficiaries). The undisputed evidence shows that Dr. Sherrod directed the Plan to pay a $250,000 bond (and $3,000 in fees) in connection with litigation to which the Plan itself was not a party. That alone demonstrates that Dr. Sherrod breached her duty

of loyalty to the Plan. The evidence is also sufficient to show that Johnson, who was supposed to be overseeing the Plan's funds, breached his duty of due care and duty to follow Plan documents by allowing Dr. Sherrod to make such a withdrawal on her own initiative.

Dr. Sherrod nonetheless contends that that the payment of the bond was a necessary expense because, while the Michigan state court may have intended only to freeze Dr. Sherrod's assets (including her interest in Plan funds) Merrill Lynch had frozen all the Plan's assets and was not allowing distributions to be paid to any Plan participants and beneficiaries. (*See* Mich. Filings at 3..) Payment of the bond, therefore, was necessary to avert harm to Plan participants (other than Dr. Sherrod) as the freeze order could possibly bar any distributions to them. But the freeze applied only so long as judgment in the underlying action was unpaid—the appeal of the freeze was primarily an appeal of the merits of the judgment against Dr. Sherrod and the Company. (*See*, PSOMF, Ex. R, State Mot. Hearing on Dec. 2, 2011 and State Mot. Hearing on Apr. 13, 2011 at 8, Dkt. No. 168-19.) (denying, in December 2011, the motion to unfreeze Dr. Sherrod's assets on the basis that "[t]here is a judgment against her and the freeze will remain in effect until she pays that judgment . . . [a]ll she has to do is pay and all these problems go away") Indeed, in its motion to release the freeze on Dr. Sherrod's accounts, Merrill Lynch acknowledged that "not all of the assets [of the Plan] are available to secure the judgment since the plan filing shows 18 participants." (Mich. Filings at 4.) In other words, even if the freeze had affected the Plan, the primary purpose of the $250,000 bond was to appeal the underlying judgment against Dr.

Sherrod and the Company, with the unfreezing of the assets a secondary effect of any positive ruling for them both. This is, in fact, exactly what occurred—the freeze was terminated in May 2013 when the Michigan Appellate Court ruled on the freeze order. (Sherrod RPSOMF ¶ 60; PSOMF, Ex. S, Merrill Lynch Resignation Letter at 1, Dkt. No. 168-20.) In sum, the primary purpose of the bond remained to address concerns in the litigation against Dr. Sherrod and the Company, not to benefit the Plan.

Defendants argue that even if Dr. Sherrod's actions constituted a breach of the fiduciary duty of loyalty, the Secretary has not established the required element of harm or loss. Dr. Sherrod points to *Mira v. Nuclear Measurements Corp.*, 107 F.3d 466, 472 (7th Cir. 1997). There, the Seventh Circuit found that defendants were not liable for clear breaches of their fiduciary duties because the plaintiffs had failed to demonstrate a loss to the plan trust. *Id.* In *Mira*, the defendants "used the funds that should have been applied to pay the insurance premiums for the day-to-day expenses that were necessary to keep the business afloat and thus keep its entire workforce employed." *Id.* Although the Seventh Circuit found this to be a violation of their fiduciary duty, it held that the plaintiffs could not recover damages for those breaches because the "plan was reinstated and the [plaintiffs] were reimbursed for any and all claims filed during the period in question." *Id.* at 473. As the plaintiffs had already been made whole, they could not satisfy the third element of economic loss. *Id.* Awarding damages was therefore improper, as any monetary payout would give the plaintiffs a windfall in the form of double recovery. *Id.*

This case, however, can be distinguished from *Mira* on several grounds. Here, the undisputed facts show that the Company terminated all employees apart from Dr. Sherrod in 2008. (*See* Sherrod RPSOMF ¶ 6.) Thus, unlike in *Mira*, where employees would have lost their jobs and any future benefits had the company gone out of business due to the financial strain, the Plan participants were no longer dependent upon the continued existence of the Company. Moreover, while the plaintiffs in *Mira* were made whole when the defendant company retroactively reinstated the lapsed coverage and paid all the past premiums due, here, Dr. Sherrod does not dispute that the Plan was never reimbursed for the $250,000 used to post the bond. In other words, the Plan has indeed suffered economic loss.[6]

In short, Dr. Sherrod's use of Plan funds in connection with litigation that involved only herself and the Company was a clear violation of her duty of loyalty to Plan participants, and the Secretary has presented sufficient proof as to the element of loss or harm. The Secretary's motion for summary judgment is therefore granted with respect to Dr. Sherrod's use of Plan funds to pay her bond in Michigan.

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6. Dr. Sherrod does point to a letter from counsel to the bond agency requesting that the $250,000 bond be returned to the Plan (Sherrod RPSOMF, Ex. 3, Jan. 6, 2014 Letter, Dkt. No. 218.) There is no indication in the record, however, that the Plan ever received these funds.

Appendix D

III. Checks from Plan Funds Addressed to Dr. Sherrod for the Years 2013 Through 2017

After the Michigan state court lifted the freeze on Dr. Sherrod's assets, including the assets of the Plan, she began making frequent payments to herself out of Plan funds. The Secretary asserts that Defendants violated their duties of loyalty and due care, and their duty to follow Plan documents, by improperly allocating those distributions to "expenses" or "losses." Put more simply, the Secretary contends that Dr. Sherrod wrote herself checks out of the Plan accounts and falsely reported that those payments were reimbursements for reasonable expenses. The Secretary also argues that Johnson is liable for such conduct because he failed to fulfill his duties as Plan administrator to oversee Dr. Sherrod.

Between 2013 and 2017, the Plan distributed checks to Dr. Sherrod totaling hundreds of thousands of dollars. Dr. Sherrod asserts that many of those payments were, in fact, reimbursements for necessary and reasonable Plan expenses. Dr. Sherrod also argues that to the extent she did receive benefits, she was entitled to those benefits as a Plan participant. In other words, Dr. Sherrod does not dispute the Secretary's evidence that she made such withdrawals from the Plan, Rather, she maintains that it is not her burden to prove such withdrawals were proper. Certainly, as the plaintiff, the Secretary bears the burden of establishing each element of the breach of fiduciary duty claims. And in seeking summary judgment, the Secretary bears the burden of demonstrating that the undisputed material facts show the Secretary is entitled to judgment.

See Hummel, 817 F.3d at 1015. But the Secretary has presented undisputed facts showing that between 2013 and 2017, Dr. Sherrod, a Plan fiduciary, directed hundreds of thousands of dollars to be paid to herself out of Plan funds. That evidence is sufficient to prove that Dr. Sherrod put her own interests above those of Plan participants and beneficiaries in violation of §404(a)(1)(A). Indeed, those types of transactions qualify as self-dealing, a *per se* prohibited transaction under ERISA § 406.[7] *See* 29

7. In her surreply, Dr. Sherrod argues that the Secretary's arguments concerning *per se* prohibited transactions under § 406 are improper new arguments, falling outside the scope of the complaint and the Secretary's opening memorandum in support of summary judgment. But the Secretary's complaint in this case clearly alleges that Dr. Sherrod directed multiple payments to herself from the Plan fund. (*See* Compl. ¶¶ 16, 201.) Therefore, Defendants have been on notice since the beginning of the case that the Secretary has accused Dr. Sherrod of self-dealing—precisely the type of conduct prohibited under § 406 of ERISA. *See McDonald v. Household Int'l, Inc.*, 425 F.3d 424, 428 (7th Cir.2005) ("The real question [is] whether relief [is] possible based on any legal theory . . . under any set of facts that could be established consistent with the allegations."); *Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1078 (7th Cir.1992) ("[T]he complaint need not identify a legal theory, and specifying an incorrect theory is not fatal."). In addition, the Seventh Circuit has explained that § 406 merely "supplements an ERISA fiduciary's general duties of loyalty and prudence to the plan's beneficiaries, as set forth in [§] 404, 29 U.S.C. § 1104, by categorically barring certain transactions deemed likely to injure the pension plan." *Keach v. U.S. Tr. Co.*, 419 F.3d 626, 635 (7th Cir. 2005) (internal quotation marks omitted). Section 406 is intended to "make much simpler the enforcement of ERISA's more general fiduciary obligations." *Leigh v. Engle*, 727 F.2d 113, 123 (7th Cir. 1984). The Court thus finds it appropriate to consider whether Defendants have engaged in the kind of conduct prohibited under § 406.

U.S.C. § 1106(a)(1)(D) ("A fiduciary with respect to a plan shall not cause the plan to engage in a transaction . . . [that] constitutes a direct or indirect transfer to, or use by or for the benefit of a party in interest, of any assets of the plan[.]"); *see also id.* § 1002(14)(A) (defining "party in interest" as "any fiduciary"). An ERISA fiduciary who engages in a prohibited transaction like self-dealing bears the burden of demonstrating that the transaction was actually permissible under ERISA. *See Allen v. GreatBanc Tr. Co.*, 835 F.3d 670, 676 (7th Cir. 2016); *see also Lowen v. Tower Asset Mgmt., Inc.*, 829 F.2d 1209, 1217 (2d Cir. 1987) ("In response to the overwhelming evidence of kickbacks, defendants offered largely conclusory statements that fell far short of carrying the heavy burden they face.").

As discussed above, the Secretary has presented evidence that Dr. Sherrod breached her duty of loyalty to the Plan by making checks to herself drawn out of Plan funds. In opposing summary judgment on those grounds, Dr. Sherrod must come forward with evidence showing at least a genuine dispute of material fact as to whether she was entitled to those funds. Dr. Sherrod's assertion that she was entitled to take distributions as a Plan participant who had reached the age of retirement does not meet that burden. *See Lowen*, 89 F.2d at 1217. In the years 2013 through 2017, Dr. Sherrod has acknowledged that she directed the Plan to pay her distributions totaling $241,215. (*See* Sherrod RPSOMF ¶¶ 63, 65-67.) Dr. Sherrod has not presented any evidence that she was entitled to benefits in that amount or that the amount of distributions reflects her actual interest in the Plan.

Dr. Sherrod also contends that many of the funds she paid to herself out of the Plan were intended as reimbursements for reasonable legal fees on behalf of the Plan. For instance, the Secretary has shown that the Plan made thirty-seven payments to Dr. Sherrod in the year 2014, totaling $286,905. (Sherrod RPSOMF ¶ 64.) Dr. Sherrod disputes the assertion concerning those payments by stating that she "used her own cash and charge cards to pay the attorneys' fees and costs associated with freeing up the Plan's assets and defending the instant lawsuit, and then had to seek reimbursement from the Plan." (*Id.* (citing Sherrod's Resp. in Opp'n, Ex. 5, Dkt. No. 211).)

The Court has reviewed the exhibit that Dr. Sherrod offers in support of her assertion that the 2014 Plan withdrawals reimbursed her for reasonable legal fees incurred on the Plan's behalf. The exhibit includes more than seventy pages and shows various copies (in some cases, faded and illegible) of postal money orders, invoices, and communications with counsel regarding attorneys' fees. (*See* Sherrod's Resp. in Opp'n, Ex. 5, 60-134 of 134.) Defendants have not offered an accounting of these documents or matched them to Dr. Sherrod's withdrawals, and it is not the Court's job to piece together an argument for them. *See Estate of Moreland v. Dieter*, 395 F.3d 747, 759 (7th Cir. 2005); *Little v. Cox's Supermarkets*, 71 F.3d 637, 641 (7th Cir. 1995). Nonetheless, the Court has reviewed all the relevant exhibits pertaining to the year 2014 and concludes that they do not create a genuine issue as to whether all the funds Dr. Sherrod withdrew actually went towards reasonable legal fees that she had incurred on the Plan's behalf. The evidence that various attorneys invoiced Dr. Sherrod in certain amounts does

not demonstrate that she used her personal funds to pay those fees. And the numerous copies of postal money orders offered—which the Court assumes Dr. Sherrod has offered to prove that she herself paid those bills—contain little information. They do not list, for instance, the account the money is coming from or the account to which the money is going.

The Court similarly has reviewed the exhibits Dr. Sherrod submitted to demonstrate that she reimbursed herself for reasonable Plan legal fees in the years 2015, 2016, and 2017. After briefing concluded, the Secretary moved for sanctions against Dr. Sherrod and Johnson to exclude the exhibits offered for those years, arguing that they failed to disclose them during discovery.[8] (Dkt. No. 229.) In opposing sanctions, Defendants essentially respond that they acted in good faith and attempted to respond fully to the Secretary's discovery requests throughout the litigation.[9] (*See* Def. Sherrod's Resp. in Opp'n to Sanctions at 2, Dkt. No. 234 ("Dr. Sherrod produced what she believed to be responsive and what was available to her at the time."[10])); *see Johnson v. J.B.*

8. In connection with the Court's prior ruling (Dkt. No. 259), this includes consideration of the surreply filed by Dr. Sherrod. (Dkt. No. 225.)

9. After the sanctions motion was fully briefed, Johnson also moved for leave to file a surreply in opposition to the Secretary's motion. (Dkt. No. 242.) The Court has considered Johnson's surreply in its present ruling and his motion for leave is therefore granted.

10. While Dr. Sherrod's response implies that she has not had the benefit of counsel during this litigation, she has been represented throughout the case by various attorneys. Dr. Sherrod has had more

Hunt Transp., Inc., 280 F.3d 1125, 1132 (7th Cir. 2002) ("Litigants are expected to act in good faith in complying with their discovery obligations . . . .").

The rationale for excluding evidence that parties failed to timely produce during discovery "is to avoid an unfair 'ambush' in which a party advances new theories or evidence to which its opponent has insufficient time to formulate a response." *Rowe Int'l Corp. v. Ecast, Inc.*, 586 F. Supp. 2d 924, 934 (N.D. Ill. 2008) (quoting *Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 741 n.6 (7th Cir. 1998)). But because the Court concludes that the exhibits the Secretary seeks to exclude do not aid Defendants' case, the Secretary's motion to strike such exhibits is denied. *See Only The First, Ltd. v. Seiko Epson Corp.*, 822 F. Supp. 2d 767, 780 (N.D. Ill. 2011) (denying motion to strike new declarations submitted for the first time at summary judgment because the declarations did not prejudice the plaintiff). As with the exhibits in support of reimbursements for the year 2014, the exhibits on which Defendants rely for the years 2015 through 2017 include only bills for legal fees. The exhibits do not show that Dr. Sherrod paid those bills in full using her personal finances; nor do they prove that such legal fees were accrued on behalf of the Plan, rather than on Dr. Sherrod's personal behalf or that of the Company.

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than one retained counsel who eventually sought and was granted leave to withdraw. (*See* Dkt. Nos. 59, 85, 107, 114, 174.) Most recently, the Court granted Dr. Sherrod's motion for attorney representation and recruited counsel on her behalf so that she could respond effectively to the Secretary's motion for summary judgment. (*See* Dkt. No. 199.)

In sum, no reasonable jury could conclude from the evidence Dr. Sherrod has offered that she was entitled to reimbursement out of Plan funds for thousands of dollars of legal fees, as she asserts. And no reasonable jury could conclude that Dr. Sherrod's distributions from the Plan in the years 2013 through 2017 were appropriate in light of her status as a Plan participant. *See Modrowski*, 712 F.3d at 1167 (explaining that the court will enter summary judgment against a party who cannot "come forward with evidence that would reasonably permit the finder of fact to find in her favor on a material question" (internal quotation marks omitted)). The Secretary's motion for summary judgment is therefore granted with respect to those distributions. And because the undisputed evidence shows that the Plan required Johnson to direct and oversee Dr. Sherrod, and that instead he allowed her to exercise unfettered control over the Plan funds, the Court concludes that Johnson is also liable for such distributions under § 404(a).

IV. Injunctive Relief

Having found that the Secretary is entitled to summary judgment against both Defendants, the Court turns to the requested relief. In his memorandum in support of his motion, the Secretary requests that the Court immediately remove Defendants from their fiduciary positions with the Plan; permanently bar them from providing any further services to any ERISA-covered plan, as fiduciaries or otherwise; and appoint an independent fiduciary to administer and terminate the Plan, and to perform an accounting of the use of all Plan

assets from January 11, 2011 to the present, with the cost borne by Dr. Sherrod.

Although the Secretary provides a brief discussion of why each component of the requested relief is appropriate, neither Dr. Sherrod nor Johnson responds to those arguments in their response briefs. Given the nature of the relief sought, including permanent bars against any future association with ERISA-covered plans, the Court will give Defendants an opportunity to file supplemental memoranda limited to the subject of whether the Secretary's requested relief should be granted.

CONCLUSION

Accordingly, for the reasons discussed above, the Secretary's motion for summary judgment (Dkt. No. 167) is granted. Defendants shall have fourteen days to file a supplemental memorandum for the limited purpose of responding to the Secretary's request for injunctive and other equitable relief.

Dated: March 31, 2022

ENTERED:

/s/ Andrea R. Wood
Andrea R. Wood
United States District Judge

APPENDIX E — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, FILED MARCH 27, 2017

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 16 C 4825

EDWARD HUGLER, ACTING SECRETARY OF LABOR,[1] UNITED STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

SHIRLEY T. SHERROD, *et al.*,

Defendants.

MEMORANDUM OPINION AND ORDER

Acting Secretary of Labor Edward Hugler (the "Secretary"), as named representative for the Department of Labor (the "Department"), pursues this action

1. This action was filed by then United States Secretary of Labor Thomas E. Perez, who has since been replaced by Acting Secretary Edward Hugler. Pursuant to Fed. R. Civ. P. ("Rule") 25(d), which provides for the automatic substitution of parties when the original party is a public officer who ceases to hold office while an action is pending, this Court has caused the Clerk's Office to replace Secretary Perez with Acting Secretary Hugler as the named representative for the Department.

under the civil enforcement provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1132(a)(2) and (5),[2] to enjoin alleged acts and practices that violate the provisions of ERISA's Title I and to obtain relief for breaches of fiduciary duty under Section 1109 and further equitable relief as may be appropriate (Complaint ¶ 1). Defendants Shirley Sherrod ("Sherrod"), Leroy Johnson ("Johnson"), Shirley T. Sherrod, M.D., P.C. ("Sherrod PC") and Target Benefit Pension Plan (the "Plan") have responded by joining in a motion for leave to file amended answers and affirmative defenses under Rule 15(a)(2), including an affirmative defense that challenges the Secretary's allegations based on (1) Sherrod's use of Plan funds to post bond in a court case and (2) her then improperly accounting for those funds (Section 1113). In turn the Secretary has filed an objection to that aspect of Defendants' Motion for Leave To Amend. For reasons explained in this memorandum opinion and order, defendants' motion to add the affirmative defense referred to earlier in this opening paragraph is denied because that proposed defense is untimely advanced.

Background

Sherrod PC established the Plan in 1987 to provide retirement benefits to the participants, who were Sherrod PC employees (Complaint ¶ 2). Sherrod has been the named trustee of the Plan since January 1987, and she is a Plan fiduciary within the meaning of Section 1002(21)(A) (*Id.* ¶ 7). Sherrod was the Plan administrator until May 30, 2012, at which time she appointed Leroy Johnson to

2. Future references to "29 U.S.C. § --" will take the form "Section --," omitting the prefatory "29 U.S.C."

be the administrator (*Id.* ¶ 14). Johnson was the Plan Administrator at least during the period from May 30, 2012 to August 4, 2014 (Answer ¶ 8).

Sherrod PC terminated all its employees on or before December 31, 2008 (Complaint ¶ 11). At that time there were 19 former employee Plan participants -- ten with balances under $5,000 and nine with balances over that amount (Answer ¶ 11). Plan documents require that participants with account balances less than $5,000 at the time of termination receive distributions as soon as administratively feasible (Complaint ¶ 12). For those with balances over $5,000, the Secretary contends that the Plan requires that they be presented with the option for an elective distribution after their termination (*Id.*).

According to the Secretary, Sherrod processed her own request for a Plan distribution and withdrew $253,114 from the Plan on or about November 10, 2011 (*Id.* ¶ 16), but defendants deny that allegation (Answer ¶ 16).[3] Since at least May 30, 2012 no participants have received distributions from the Plan except for Sherrod (Complaint ¶ 15).

In 2008 Sherrod became the subject of a state court action in Michigan, which in 2011 resulted in a judgment against her and an order to freeze Sherrod's assets,

3. On the other hand, defendants' proposed affirmative defense relies on the notion that the Secretary had actual knowledge as early as 2012 that Sherrod used the $253,114 to post bond, an assertion that causes this Court to call into question defendants' basis for denying the allegation in the first place.

including the Plan (S. Mem. 2-3).[4] Sherrod sought to appeal that judgment, but the Michigan appellate court required her to post a $250,000 bond to do so (D. Mem. 1). To enable her to post the bond, Sherrod and Johnson then "took steps to unfreeze [Sherrod's] Plan account, including seeking a reversal of the state court's order" (*Id.*). And in 2012 Sherrod and Johnson also brought an action in this District Court against Merrill Lynch, the custodian that held the Plan assets, under the contention that the custodian's refusal to release the funds pursuant to the state court order violated the federal Section 1056(d) directive that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated" (D. Mem. 1, 2 n.1).[5]

On November 10, 2011 Sherrod signed an affidavit and sent it to Merrill Lynch directing that $250,000 be

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4. References to the parties' memoranda will take the following forms: for the Secretary's Memorandum in Opposition to Defendants' Motion To Amend Answer, "S. Mem. --," for Defendants' Memorandum in Support of Motion for Leave To File Their Amended Answer and Affirmative Defenses, "D. Mem. --" and for Defendants' Reply Memorandum, "D. Reply --."

5. This Court's colleague, Honorable John Darrah, dismissed the Johnson and Sherrod case against Merrill Lynch for lack of subject matter jurisdiction because (1) the injury in question was not traceable to named defendant Merrill Lynch, which had sided with Sherrod and Johnson in opposing the state court's order to freeze the Plan, and (2) in light of Sherrod's and Johnson's appeal from the state court's freeze order to the Michigan appellate court, the *Rooker-Feldman* doctrine barred any litigations seeking the same relief in federal court (*Johnson v. Merrill Lynch, Pierce, Fenner, & Smith*, 12 C 2545, 2012 U.S. Dist. LEXIS 169149, 2012 WL 5989345, at * 4 (N.D. Ill. Nov. 28, 2012), aff'd 719 F.3d 601, 605 (7th Cir. 2013)).

paid directly to post the bond, with another $3,000 going directly to a surety agency to file the bond (S. Mem. 3). Merrill Lynch then released from the Plan only the funds needed to post the $250,000 bond in reliance on Sherrod's representations that the money released was allocated to her account and that her assets contained sufficient funds (S. Mem. Ex. 5 at 2). Sherrod did not post the bond in the name of the Plan (S. Mem. 3).

Based on those facts, the Secretary alleges that defendants violated ERISA by misallocating the $253,000 that was withdrawn from the Plan as "losses" to all participants, and by failing to correct their misallocation (S. Mem. 4). In addition to the dispute about the $253,114 distribution,[6] the Secretary's complaint lists a series of unaccounted-for withdrawals and misallocations by defendants, and it claims (1) that from January 1, 2015 to the present Sherrod has continued to withdraw funds from the Plan and (2) that she and Johnson continually fail to account for those distributions properly (Complaint ¶ ¶ 17, 20, 21-25).

Legal Standards

Rule 15(a)(2) instructs that with regard to motions to amend a party's pleadings "[t]he court should freely give leave when justice so requires." But such cases as *Indiana Funeral Directors Ins. Trust v. Trustmark*

6. Neither side has accounted for the $114 difference between what is listed in the Complaint as a withdrawal of $253,114 from the Plan on or about November 2011 and the $253,000 discussed in the Secretary's Memorandum.

Ins. Corp., 347 F.3d 652, 655 (7th Cir. 2003) stand for the related corollary that "[u]nder Rule 15, courts may deny an amendment for undue delay, bad faith, dilatory motive, prejudice, or futility." Failure to assert a defense when the facts on which it is based were well known to a defendant at the time of the initial pleading may be a ground on which a motion to amend may be denied as untimely (see, e.g., *Cont'l Bank, N.A. v. Meyer*, 10 F.3d 1293, 1298 (7th Cir. 1993)).

Untimeliness and Lack of Evidentiary Support

Defendants now seek leave to inject into the case a statute of limitations defense to allegations stemming from Complaint ¶¶ 16 to 18. That calls for consideration of Section 1113, which reads in relevant part:

> 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.

Appendix E

As defendants would have it, the Department had actual knowledge as early as 2012 that in 2011 Sherrod used her $253,000 withdrawal to post bond for her state court appeal. So they claim that the statute of limitations bars the Complaint ¶¶ 16 to 18 allegations (1) that Sherrod withdrew the $253,114 from the Plan and accounted for it incorrectly and (2) that her actions caused all the other participants' vested benefits to be decreased (D. Mem. Ex. B ¶ 19). But analysis clearly shows that neither of Section 1113's alternatives bars the Secretary's ERISA claims.

Defendants attempt to support their proposed amendment with two newly-filed submissions. First they tender a fax from the Plan's then lawyer Edwin Conger to the Department dated December 20, 2012, notifying the Department that Johnson had succeeded Sherrod as Plan administrator (D. Mem. Ex. C):

> Pursuant to our conversation I am transmitting a copy of the appointment dated May 30, 2012 of Leroy Johnson as successor Plan administrator of the Shirley T Sherrod MD PC Target Pension Plan and Trust.

That fax also referred to the Sherrod and Johnson federal case briefly and tangentially:

> For your further information a Notice of Appeal was filed yesterday from the orders entered November 28, 2012 in the District Court in Chicago in Case No. 12 C 2545. I am transmitting a copy of this notice as well.

According to defendants the fax should have alerted the Secretary that Sherrod had posted the bond with Plan assets (D. Mem. 2 n.1) (apparently the docket in the federal case made documents publicly available that showed Sherrod used Plan assets to pay her state court bond (*Id.*)).

Second, defendants submit an earlier email from Sherrod to the Department (dated August 10, 2012) inquiring about alienation of Plan assets by the state court (D. Mem. Ex. E). Attached to that email is a demand letter dated February 14 of that year from Sherrod's lawyers to Merrill Lynch insisting that it ignore the state court's order to freeze the Plan assets. In that letter Sherrod's lawyers said in part:

> Merrill Lynch has refused to follow the directions from the Plan Administrator, except once where Merrill Lynch forced Ms. Sherrod to sign an affidavit stating the funds would be used to post a bond in a state court proceeding.

Defendants' contend that the Department, having received that letter on August 10, 2012 in the form of an email attachment, ought to have known that Sherrod used Plan assets to pay the bond in her state court appeal.

Defendants' effort to cobble together the brief references in those two cases as somehow triggering an obligation on the Secretary's part to engage in active outside research that could have turned up Sherrod's breach of her own fiduciary obligations -- thus starting a limitations clock that would relieve Sherrod of responsibility for

the illegal actions that she herself had taken -- is truly disingenuous. As stated earlier, a court may deny a party's motion to amend when a proposed amendment is based on information and documents about which the party knew when it filed its original pleading (*Cont'l Bank, N.A.*, 10 F.3d at 1298) -- indeed, that case goes farther, extending responsibility to matters of which the party itself *should have been* aware. Here it is extraordinarily ironic for defendants to attempt to disclaim such responsibility by stating in their memorandum, not once but twice (D. Mem. at 2, 4), that the documents were "discovered in their own files" after they had submitted their Answer. This opinion will go on to look at the situation in that respect, first addressing the earlier Sherrod email and then the later Conger fax.

As for the first, it is certainly no excuse that Sherrod may have forgotten the email that she herself authored that contained the sidelong reference that her counsel now tries to stress -- much more tellingly, of course she had unquestionably *not* forgotten the far more directly relevant information: the knowledge that she had committed the act on which the Complaint is mounted. By sharp contrast, the notion that the brief statement in the letter attached to the email gave the Department "actual knowledge of the breach or violation" (the unambiguous language of Section 1113(2)) loads that figurative linguistic beast with more baggage than it can figuratively carry.

As for the fax, defendants claim that the death of Conger complicated their efforts to obtain the document (D. Reply 5). But even if it is assumed arguendo that

defendants were unable, despite good faith efforts, to locate the document before filing their original Affirmative Defenses, that would not call for granting defendants' motion to amend. Once again it involves an impermissible stretch to characterize the fax as showing that the Department had actual knowledge that Sherrod withdrew funds from the Plan's general assets to pay her state court bond -- after all, the fax was nothing more than a routine notification to the Department about a change in Plan administrator. It cannot fairly be said that a fax cover note that offhandedly mentions a federal case having nothing whatever to do with the type of wrongdoing alleged here could have imparted "actual knowledge" of such wrongdoing to the Secretary.

In brief, even on defendants' distorted reading of the Section 1113(2) "actual knowledge" requirement as discussed in the next paragraph of this opinion, they have really offered nothing to suggest that the Secretary had such suspicions as to Sherrod's improper use of Plan funds as would call for her to engage in an investigation of documents in Sherrod's federal case when the fax was transmitted in 2012. Moreover, the notion that the Secretary would otherwise randomly search a federal docket is patently absurd. Here defendants have not claimed that the Department actually undertook that improbable course -- thus they have made no credible assertion that the fax imparted to the Secretary "actual knowledge" that would bring the statute of limitations into play.

To be blunt on that score, defendants' strained arguments that the analysis to this point has already

rejected are even more fundamentally flawed, for everything that defendants have put forth ignores the stringency of the concept of "actual knowledge" that must be met to cut the Section 1113 limitations period in half -- from six years in Section 1113(1) to three years in Section 1113(2). What defendants have sought to do in that regard is to apply the concept of "inquiry notice" embodied in such statutes as RICO with the far more demanding "actual knowledge" test under ERISA.

That conceptual contrast has been explained well by the Court of Appeals for the Third Circuit in *Cetel v. Kirwan Fin'l Group, Inc.*, 460 F.3d 494 (3rd Cir. 2006), where an explanation and application of RICO's "inquiry notice" requirement (*Id.* at 507-08) was followed by this exposition of ERISA's far stricter "actual notice" requirement (*Id.* at 511):

> By its terms then, ERISA's statute of limitations provision offers a choice of periods, depending on "whether the plaintiff has actual knowledge of the breach. . . ." *Kurz v. Phila. Elec. Co.*, 96 F.3d 1544, 1551 (3d Cir. 1996). In *Gluck v. Unisys Corp.*, we established that:
>
> > Actual knowledge of a breach or violation requires that a plaintiff have actual knowledge of all material facts necessary to understand that some claim exists, which facts could include necessary opinions of experts, knowledge of a transactions's harmful consequences, or even actual harm.

> 960 F.2d 1168, 1178 (3d Cir.1992) (internal citations omitted). We have thus stated that for purposes of determining actual knowledge, it must be shown 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." *Montrose Med. Group Participating Sav. Plan v. Bulger*, 243 F.3d 773, 787 (3d Cir. 2001) (citations omitted). In other words, where a claim is for breach of fiduciary duty, to be charged with actual knowledge "requires knowledge of all relevant facts at least sufficient to give the plaintiff knowledge that a fiduciary duty has been breached or ERISA provision violated." *Gluck*, 960 F.2d at 1178.

That plain-language conceptualization of the Section 1113(2) standard was acknowledged by the *Cetel* court as "[r]ecognizing that the § 1113 statute of limitations sets a 'high standard for barring claims against fiduciaries prior to the expiration of the six-year limitations' and the requirements must be interpreted 'stringently,' *Montrose*, 243 F.3d at 778."

Although the Third Circuit completed its treatment of the matter in *Cetel* by finding that the very different facts before it in that case met that more stringent standard, other courts too have given the ERISA statute its plain meaning and have accordingly rejected the efforts of parties such as defendants here to rewrite the statute,

consequently rejecting limitations arguments such as those advanced here by defendants (see, e.g., *Maher v. Strachan Shipping Co.*, 68 F.3d 951, 954-56 (5th Cir. 1995); *Caputo v. Pfizer, Inc.*, 267 F.3d 181, 193-94 (2d Cir. 2001), first citing *Maher* and later expressly rejecting the "should have known" approach urged by defendants here -- an impermissible "constructive knowledge" substitute for "actual knowledge"; and *LaScala v. Scrufari*, 479 F.3d 213, 220 n.1 (2d Cir. 2007), citing *Caputo* and following the same path to the same conclusion). It simply will not do for defendants -- or for this Court -- to play legislator and amend the ERISA statute by taking the quantum leap from a purported need to inquire further based on snippets of indirect references to the far more difficult "actual knowledge" test.

Secretary's Contention as to Futility

Courts also may deny a motion to amend for futility, meaning that it has no legal basis to affect the litigation (see, e.g. *Wilson v. Am. Trans Air, Inc.*, 874 F.2d 386, 392 (7th Cir. 1989). In that respect the Secretary seeks to invoke the recent Supreme Court decision on the application of Section 1113 in *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1829, 191 L. Ed. 2d 795 (2015), which teaches (1) that fiduciaries have a continuing duty to monitor a plan's investments and (2) that if a violation is of a type that can still be cured, the last date of the violation has yet to occur. In that regard the Secretary claims that ever since defendants' misallocation of those funds as Plan "losses," they have been bound by their fiduciary duty as described in Section 1104 to correct the misallocation -- a duty on

which they have failed to act to this day (S. Mem. 12). Hence the Secretary contends that defendants' violation is ongoing because they still have an opportunity to cure, a fact that assertedly torpedoes defendants' proposed limitations defense (S. Mem. 12).

But that attempted analogy to *Tibble* appears flawed, for the course of conduct alleged in this case -- discrete misallocations that have yet to be corrected by defendants -- does not parallel the breach of ongoing fiduciary duty at issue in that case. There the Supreme Court relied on the defendants' common law duty under trust law to "monitor trust investments and remove imprudent ones. This continuing duty exists separate and apart from the trustee's duty to exercise prudence in selecting investments at the outset" (135 S. Ct. at 1828). No such "continuing duty" is at issue here, where it is charged that defendants breached their duty to manage the Plan with the prudence required by Section 1104 when they misallocated Plan funds.

Under the Secretary's reading, ERISA's limitations clock would not begin to tick on any past wrongdoing that has yet to be corrected. To apply that approach to any breach of fiduciary duty that has yet to be cured could well negate Section 1113 altogether. This Court will not take that drastic step -- a declination that does not affect the result here in any event, for defendants' motion fails for the reasons explained earlier.

Appendix E

Conclusion

Defendants' Motion for Leave To File Their Amended Answer and Affirmative Defenses [Dkt. No. 25] is denied. This action is set for a status hearing at 9 a.m. April 3, 2017 to discuss the future course of proceeding with the litigation.[7]

/s/ Milton I. Shadur
Milton I. Shadur
Senior United States District Judge

Date: March 27, 2017

7. No change is made in the previously set April 27 status hearing date, which has been scheduled to address another matter on which the parties have joined issue.

APPENDIX F — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, CHICAGO, ILLINOIS, FILED JULY 10, 2023

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

July 10, 2023

Before

DAVID F. HAMILTON, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

No. 22-2205

JULIE A. SU, ACTING SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Plaintiff-Appellee,

v.

SHIRLEY T. SHERROD,

Defendant-Appellant.

Appendix F

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:16-cv-04825

Andrea R. Wood,
Judge.

ORDER

On consideration of defendant Shirley T. Sherrod's petition for rehearing, filed on June 23, 2023, all judges on the original panel have voted to deny the petition.

Accordingly, the petition for rehearing filed by defendant Shirley T. Sherrod is DENIED.