APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

No. 17-15864

CHRISTOPHER M. SULYMA, and all others similarly situated,
Plaintiff-Appellant,

v.

INTEL CORPORATION INVESTMENT POLICY COMMITTEE, FINANCE COMMITTEE OF THE INTEL CORPORATION BOARD OF DIRECTORS, INTEL RETIREMENT PLANS ADMINISTRATIVE COMMITTEE, CHARLENE BARSHEFSKY, FRANK D. YEARY; JAMES D. PLUMMER, REED E. HUNDT; SUSAN L. DECKER; JOHN J. DONAHOE; DAVID S. POTTRUCK; RAVI JACOB; INTEL 401(K) SAVINGS PLAN; INTEL RETIREMENT CONTRIBUTION PLAN,
Defendants-Appellees.

Argued October 18, 2018
Decided November 28, 2018

Before: J. Clifford Wallace and Susan P. Graber, Circuit Judges, and Robert S. Lasnik,[*] District Judge.

OPINION

WALLACE, Circuit Judge:

A former employee and participant in Intel's retirement plans sued the company for allegedly investing retirement funds in violation of the Employee Retirement Income Security Act (ERISA). Intel moved to dismiss the complaint on the ground that the limitations period for his claims had expired. The magistrate judge[1] converted Intel's motion to dismiss into a motion for summary judgment and entered summary judgment in favor of Intel. The employee now appeals, arguing that the district court erred by concluding he had the requisite "actual knowledge" required by ERISA to trigger the limitations period. We have jurisdiction under 28 U.S.C. § 1291, and we reverse.

I.

Christopher Sulyma worked at Intel between 2010 and 2012 and participated in two of Intel's retirement plans, both governed by ERISA. The first was the Intel Retirement Plan, also known as the Intel Retirement Contribution Plan. The second was the Intel 401(k) Savings Plan.

Sulyma's account performance depended in part on investment decisions controlled by Intel, through the

[*] The Honorable Robert S. Lasnik, United States Ditrict Judge for the Western District of Washington, sitting by designation.

[1] The parties consented to the jurisdiction of a magistrate judge. *See* 28 U.S.C. § 636.

performance of different Intel "funds." Sulyma's Retirement Plan account was invested in the Intel Global Diversified Fund. Sulyma's Savings Plan account was invested in the Intel Target Date 2045 Fund. The Funds were managed by an Intel investment committee responsible for choosing and managing the Funds' asset allocations. The investment committee members were appointed and supervised by a finance committee formed by members of the Intel Board of Directors. A third administrative committee was responsible for disclosing information about the Plans to plan participants. This opinion refers to these various groups as "Intel" unless the context otherwise requires.

When the Funds were established, they did not include significant "alternative investments," such as hedge funds. Intel increased the Funds' alternative investments to reduce the investment risk to the funds through greater diversification. But the reduction in investment risk came at the cost of higher fees and lower performance during periods of strong returns in the equity market. When equity markets did in fact begin to improve after the Great Recession, the Funds' performances lagged compared to index funds and comparable portfolios. Intel disclosed these investment decisions to Sulyma through various documents hosted on two websites. The documents disclosed both the fact of the alternative investments and the basic strategy behind the decision to invest in them. For instance, "Fund Fact Sheets" created in 2010 disclosed that the 2045 Fund was invested more in hedge funds than comparable portfolios, and that it was not performing as well as a result. Sulyma accessed some of this information on the websites, but he testified that

he was not actually aware that his retirement accounts were invested in alternative investments while working at Intel.

Sulyma alleges that he eventually learned about the Funds' poor performance; he thereafter filed this action against Intel on October 29, 2015, raising six claims. His first and third claims alleged that the investment committee violated 29 U.S.C. § 1104 by imprudently investing in alternative investments. His second and fourth claims alleged that the administrative committee violated 29 U.S.C. § 1104 and 29 C.F.R. § 2250.404a-5(a) by failing to disclose adequately information about the alternative investments. His fifth claim alleged that the finance committee violated 29 U.S.C. § 1104 by failing to monitor the investment and administrative committees. His sixth claim alleged that all defendants were liable for knowing of the other defendants' ERISA violations and failing to remedy them.

Intel moved to dismiss the complaint as time-barred under 29 U.S.C. § 1113(2), which provides that an action under section 1104 may not be commenced more than "three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation." The district court converted the motion to dismiss into a motion for summary judgment and ordered discovery limited to the statute of limitations issue. After discovery, the district court ruled that there was no dispute of material fact that Sulyma had actual knowledge of the alternative investments more than three years before filing this action, and entered summary judgment in favor of Intel. Sulyma appeals, arguing that the district court applied the wrong

standard of "actual knowledge" to his imprudent investing and derivative liability claims.[2]

II.

We review a district court's summary judgment de novo. *Curley v. City of North Las Vegas*, 772 F.3d 629, 631 (9th Cir. 2014). "We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the substantive law." *Id.*

III.

ERISA imposes "a duty of care with respect to the management of existing trust funds, along with liability for breach of that duty, upon plan fiduciaries." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). Fiduciaries are required to act "solely in the interest of the participants and beneficiaries" and must exercise "the care, skill, prudence, and diligence ... that a prudent man acting in a like capacity and familiar with such matters would use." 29 U.S.C. § 1104(a)(1). A claim that an ERISA fiduciary has breached this prudent investor rule must be brought within six years after "the date of the last action which constituted a part of the breach or violation," or within three years after "the earliest date on which the plaintiff had actual knowledge of the breach or violation." *Id.* § 1113.

[2] The district court also granted summary judgment to Intel on Sulyma's failure-to-disclose claims. Sulyma has not appealed that ruling, and therefore we do not address it.

Sulyma initiated this action on October 29, 2015, and Intel has not argued that he did so beyond the six-year limitations period. The only issue on appeal is, therefore, whether Sulyma had "actual knowledge of the breach or violation" beyond the three-year limitations period, i.e., before October 29, 2012. Because there has been some confusion in our case law over the scope of the "actual knowledge" standard, we begin by explaining what it means for a plaintiff to have actual knowledge of a breach. We then apply that standard to each of Sulyma's claims.

A.

We follow a two-step test to determine whether a claim is barred by section 1113(2). *Ziegler v. Conn. Gen. Life Ins. Co*, 916 F.2d 548, 550 (9th Cir. 1990). First, we "isolate and define the underlying violation upon which [the] plaintiff's claim is founded." *Id*. at 551 (alterations omitted) (quoting *Meagher v. Int'l Ass'n of Machinists & Aerospace Workers Pension Plan*, 856 F.2d 1418, 1422 (9th Cir. 1988)). Second, we "inquire when [the plaintiff] had 'actual knowledge' of the alleged breach or violation." *Id.* at 552 (emphasis omitted) (quoting 29 U.S.C. § 1113(2)). "This inquiry into [the] plaintiff['s] actual knowledge is entirely factual, requiring examination of the record. Identifying the breach may end the analysis in cases where the breach coincides with an ERISA plaintiff's actual knowledge of the breach." *Id.*

ERISA does not define "knowledge" or "actual knowledge." *See* 29 U.S.C. § 1002. But when Congress first enacted ERISA in 1974, section 1113 contained two kinds of knowledge requirement, actual

knowledge and constructive knowledge. 29 U.S.C. § 1113(a)(2) (1976). The actual knowledge provision was identical to current section 1113(2), but the constructive knowledge provision provided that an action could not be commenced more than three years after the earliest date "on which a report from which [the plaintiff] could reasonably be expected to have obtained knowledge of such breach or violation was filed with the secretary under this title." *Id.* § 1113(a)(2)(B) (1976). Congress repealed the constructive knowledge provision in 1987, leaving only the actual knowledge requirement. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 9342(b), 101 Stat. 1330. Since that time, the Supreme Court has not provided an authoritative construction for section 1113(2). *See Tibble v. Edison Int'l*, 135 S. Ct. 1823 (2015). Our own interpretations have likewise not always been straightforward, leading to some confusion in our district courts over what "actual knowledge" entails. *See, e.g.*, *In re Northrop Grumman Corp. ERISA Litigation*, 2015 WL 10433713, at *20 n.140 (C.D. Cal. Nov. 24, 2015) ("The court acknowledges that it is difficult to harmonize *Waller* [*v. Blue Cross of California*]'s holding with the rule announced in *Blanton* [*v. Anzalone*]"). Faced with this confusion, we begin our analysis by carefully examining our past cases to determine the meaning of "actual knowledge" in this circuit.

We first interpreted section 1113 in *Blanton v. Anzalone*, 760 F.2d 989 (9th Cir. 1985), decided before the 1987 amendment. In that case, the beneficiary of an ERISA plan account sued the plan's trustees. *Id.* at 991. The beneficiary alleged that the trustees breached their fiduciary duties by renting a building

allegedly owned by the account to a corporation, of which the trustees were officers and shareholders. *Id.* The trustees counterclaimed for a declaration that the account did not have any interest in the building, arguing that the transaction that placed the interest in the beneficiary's account was void under 29 U.S.C. § 1106. *Id.* We held that the trustees' counterclaim was barred by section 1113 because the transaction took place in September 1977, more than three years prior to the action's commencement in June 1981. *Id.* In reaching our holding, we reasoned that the trustees "had actual knowledge of the transaction at the time it took place because they, as trustees, were parties to the transaction, and they . . . actually made the decision to undertake the transaction." *Id.* We rejected the trustees' argument that they "did not have actual knowledge of the violation until their attorney advised them that the transaction was prohibited" because section 1113 "is triggered by the [trustees'] knowledge of the transaction that constituted the alleged violation, not by their knowledge of the law." *Id.* at 991–92.

We relied on *Blanton* in *Meagher*, 856 F.2d at 1423. In that case, the plaintiff was the beneficiary of an International Association of Machinists pension. *Id.* at 1419–20. The Association voted to amend the pension plan, reducing the plaintiff's benefits. *Id.* at 1420. The plaintiff retired in 1977 and began receiving checks with the reduced amount. *Id.* at 1419. In 1986, he filed an ERISA action under 29 U.S.C. § 1054. *Id.* at 1419, 1421. We held that the amendment was ineffective, and that every application of the amendment in the form of a reduced check constituted a violation of ERISA. *Id.* at 1423. We then quoted

Blanton's rule that the "statute of limitations is triggered by [a claimant's] knowledge of the transaction that constituted the alleged violation, not by [his] knowledge of the law," and concluded that every time the plaintiff received a reduced check "he had knowledge of the transaction, though he may not have known at the time that the reduction in benefits was unlawful under ERISA." *Id.* (alterations in original). Applying that reasoning, we held that the plaintiff had timely brought claims only for checks issued within the three years before he filed the action. *Id.*

Meagher applied the pre-1987 version of section 1113. Our first case interpreting the amended section was *Ziegler*, 916 F.2d 548. In that case, pension plan administrators contracted with an insurance company to invest the pension's funds. *Id.* at 549. The contract provided that, upon termination of the agreement, the insurance company would transfer the funds according to one of two options, a "book value" over five years, or a "market value" in a lump sum that adjusted the amount based on the insurance company's "market value formula." *Id.* The administrators opted for the lump sum, but then sued the insurance company under sections 1104 and 1106 for retaining the "market value" adjustment. *Id.* at 550. We held that the administrators' action was time-barred, reasoning that they had actual knowledge of the ERISA violation when the insurance company informed them that selection of the "market value" option would result in the insurance company's retaining a substantial portion of pension funds. *Id.* at 552. This holding was consistent with Blanton and Meagher, although *Ziegler* did not cite those cases in its analysis of actual knowledge. *See id.*

We next interpreted section 1113 in *Phillips v. Alaska Hotel & Restaurant Employees Pension Fund*, 944 F.2d 509 (9th Cir. 1991). In that case, pension plan contributors sued the pension fund administrators under section 1104 for maintaining restrictive vesting requirements that excluded many contributors from obtaining benefits. *Id.* at 512. The plaintiffs had actual knowledge of the restrictive vesting requirements more than three years before they filed the action, but the district court nonetheless held that section 1113 was not a bar because the failure to relax the vesting requirement was a "continuing breach." *Id.* at 520. We reversed, holding that actual knowledge is "measured from the 'earliest date' on which [the plaintiff] knew of the breach." *Id.* We reasoned that, although a "continuous series of breaches may allow a plaintiff to argue that a new cause of action accrues with each new breach . . . [,] if the breaches are of the same kind and nature and the plaintiff had actual knowledge of one of them more than three years before commencing suit, [section 1113] bars the action." *Id.* at 521. A different rule, we explained, "essentially reads the 'actual knowledge' standard out of the statute." *Id.* at 520.

The foregoing cases establish that knowledge of illegality under ERISA is not required to trigger section 1113's three-year limitations period. Instead, knowledge of the allegedly illegal action or transaction can be sufficient. However, none of these cases squarely held that knowledge of the transaction *alone* was sufficient "actual knowledge" under the statute. Rather, in each case the plaintiffs were parties to the transaction, *Blanton*, 760 F.2d at 991, or were specif-

ically informed by the plan administrator of the action, *see Ziegler*, 916 F.2d at 552; *Meagher*, 856 F.2d at 1421, or actual knowledge of the breach was not at issue, *Phillips*, 944 F.2d at 520–21.

We first addressed whether knowledge of the underlying transaction was *necessarily* sufficient to trigger the three-year limitations period in *Waller v. Blue Cross of California*, 32 F.3d 1337 (9th Cir. 1994). In that case, retirement plan participants sued plan administrators under section 1104 for terminating the plan, using plan assets to purchase annuities on behalf of the participants, and retaining the remaining assets. *Id.* at 1338. The administrators moved to dismiss the complaint as time-barred, arguing that the three-year limitations period began to run as soon as the plaintiffs learned about the purchase of annuities. *Id.* at 1340–41. We rejected that argument, reasoning that "[w]e decline to equate knowledge of the purchase of annuities in this case with actual knowledge of the alleged breach of fiduciary duty," and we favorably quoted the D.C. Circuit rule that "[t]he disclosure of a transaction that is not inherently a statutory breach of fiduciary duty cannot communicate the existence of an underlying breach." *Id.* at 1341 (alteration omitted) (quoting *Fink v. Nat'l Sav. & Trust Co.*, 772 F.2d 951, 957 (D.C. Cir. 1985)). Although in some tension with our previous cases, Waller's holding did not conflict with the holdings in those cases because Waller considered only whether knowledge of the underlying transaction *alone* triggers section 1113(2). As previously explained, our earlier cases, while perhaps suggesting that rule, never squarely adopted it. Waller was thus the first case to consider whether "actual knowledge of the breach" means only knowledge of the

underlying transaction, and it established that actual knowledge must mean something more, at least in cases in which the underlying transaction does not disclose the nature of the breach.

The lesson we draw from these cases is thus two-fold. First, "actual knowledge of the breach" does not mean that a plaintiff has knowledge that the underlying action violated ERISA. *Blanton*, 760 F.2d at 992. Second, "actual knowledge of the breach" does not merely mean that a plaintiff has knowledge that the underlying action occurred. *Waller*, 32 F.3d at 1341. "Actual knowledge" must therefore mean something between bare knowledge of the underlying transaction, which would trigger the limitations period before a plaintiff was aware he or she had reason to sue, and actual legal knowledge, which only a lawyer would normally possess.

This leads us to the question of what this extra "something" must entail. In light of the statutory text and our case law, we conclude that the defendant must show that the plaintiff was actually aware of the nature of the alleged breach more than three years before the plaintiff's action is filed. The exact knowledge required will thus vary depending on the plaintiff's claim. For instance, in a section 1104 case, the plaintiff must be aware that the defendant has acted and that those acts were imprudent. *See, e.g.*, *Waller*, 32 F.3d at 1341. But in, for example, a section 1106 case, the plaintiff need only be aware that the defendant has engaged in a prohibited transaction, because knowledge of the transaction is all that is necessary to know that a prohibited transaction has occurred. *See, e.g.*, *Blanton*, 760 F.2d at 991–92. This interpretation

is consistent with our statement in *Ziegler* that "[i]dentifying the breach may end the analysis in cases where the breach coincides with an ERISA plaintiff's actual knowledge of the breach," 916 F.2d at 552, reconciles what could appear to be conflicting rules in Blanton and Waller, and flows naturally from section 1113(2)'s text: "three years after the earliest date on which the plaintiff had actual knowledge *of the breach or violation*." (Emphasis added.) The key is that, whatever the underlying ERISA claim, the limitations period begins to run once the plaintiff has sufficient knowledge to be alerted to the particular claim.

In reaching this holding, we emphasize that for a plaintiff to have sufficient knowledge to be alerted to his or her claim, the plaintiff must have *actual* knowledge, rather than constructive knowledge. As we explained in the Digital Millennium Copyright Act context, "[t]he statutory phrase 'actual knowledge' means what it says: knowledge that is actual, not merely a possible inference from ambiguous circumstances." *Ventura Content, Ltd. v. Motherless, Inc.*, 885 F.3d 597, 609 (9th Cir. 2018), *cert. denied,* 139 S.Ct. 419, WL 4031239 (U.S. Oct. 29, 2018) (No. 18-235). The text of section 1113 uses this statutory phrase, and Congress removed the constructive knowledge provision from the statute in 1987. This amendment strongly suggests that Congress intended for only an actual knowledge standard to apply. Thus, as in Ventura, we hold that the phrase "actual knowledge" means the plaintiff is actually aware of the facts constituting the breach, not merely that those facts were available to the plaintiff. To prevail on a statute of limitations defense on a section 1104 claim, as here, therefore, the defendant must show

that there is no dispute of material fact that the plaintiff was actually aware that the defendant acted imprudently.

We recognize that this understanding of actual knowledge conflicts with the Sixth Circuit's reasoning in *Brown v. Owens Corning Investment Review Committee*, 622 F.3d 564, 571 (6th Cir. 2010). In that case, the Sixth Circuit held that, "[w]hen a plan participant is given specific instructions on how to access plan documents, their failure to read the documents will not shield them from having actual knowledge of the documents' terms." *Id.* We respectfully disagree with that analysis. As we have previously recognized, "plan participants who have been provided with [summary plan descriptions] are charged with *constructive* knowledge of the contents of the document," not actual knowledge. *See Scharff v. Raytheon Co. Short Term Disability Plan*, 581 F.3d 899, 908 (9th Cir. 2009) (emphasis added). We would therefore characterize the plaintiff described in Brown as having constructive knowledge only. Under our interpretation of ERISA, such knowledge is insufficient.

We also recognize Intel's argument that there are "strong policy reasons" to conclude that "actual knowledge" has a broader meaning, including knowledge that a plaintiff can glean from corporate disclosures. However, we are not persuaded that Intel's proffered policy reasons have force in this context. To begin with, Sulyma might just as easily argue that there are "strong policy reasons" to interpret actual knowledge narrowly, such as to promote fiduciary accountability. Which way the policy rationale cuts depends on the person making the argument. Second,

and more fundamentally, weighing the policy merits of different knowledge standards was for Congress to undertake when it enacted, and then amended, section 1113, not for this court. Our task is not to make policy decisions, but to interpret the statute as enacted. Although policy reasoning may be relevant to our interpretation of the statute when grounded in ERISA's text or other congressional intent, Intel has not provided us with any such reasoning. We therefore hold that section 1113 means what it says: to trigger the three-year limitations period, a plaintiff must have "actual knowledge of the breach or violation."

B.

Applying this standard de novo to Sulyma's appealed claims, we conclude that the district court erred by entering summary judgment in favor of Intel.

1.

Sulyma's first claim alleged that the investment committee violated section 1104 by "adopting an asset allocation model such that the Intel [Target Date Fund portfolios] were and are comprised of approximately 20–25% Hedge Funds, 4–5% commodities, and where international equities account for over 50% of equity holdings." Sulyma alleged that this selection was unduly risky and that Intel acted imprudently by disregarding those risks or by insufficiently considering them before acting. Sulyma's third claim similarly alleged that the investment committee violated section 1104 by "increas[ing] the Diversified Fund's allocations to hedge funds and private equity and add[ing] allocations to commodities, resulting in 22.23% of fund assets, approximately $1.2 billion, allocated to

these alternative investments." Sulyma alleged that, "[b]y the end of 2013, the Investment Committee had caused the Diversified Fund to allocate 36.71%, $2.33 billion, to such alternative investments." As with his first claim, Sulyma alleged that this selection was unduly risky and that the investment committee acted imprudently by disregarding or insufficiently considering those risks.

Intel argues that Sulyma had actual knowledge of this alleged breach because it disclosed information about plan asset allocation and the investment strategy behind that allocation before October 29, 2012. Intel points to Fund Fact Sheets in 2010, 2011, and 2012, a 2011 Qualified Default Investment Alternative Notice, a 2012 Summary Plan Description, 2012 Annual Disclosures, and several disclosures on Intel's website that explained Intel's alternative investments, the strategy behind those investments, and possible risks. Intel argues that, by disclosing the mix of investments that Sulyma claims was imprudent, along with the costs and benefits of such an approach, Sulyma had "actual knowledge of the breach."

We agree that Intel's evidence demonstrates that Sulyma had sufficient information available to him to know about the allegedly imprudent investments before October 29, 2012. However, that is insufficient. Because Sulyma brought a claim under section 1104, he was required to have actual knowledge both that those investments occurred, and that they were imprudent. But Sulyma declared that he was "unaware that the monies that [he] had invested through the Intel retirement plans had been invested in hedge funds or private equity" and that he did "not recall seeing

any documents during [his] employment at Intel that alerted [him] to the fact that [his] retirement monies were significantly invested in hedge funds or private equity." Sulyma also testified that he was unaware of documents making these disclosures when specifically deposed on this point. These statements created a dispute of material fact that precluded summary judgment on these claims. On this record, only a fact-finder could have determined that Sulyma had the requisite "actual knowledge of the breach" for section 1113(2) to bar the action.

2.

Sulyma also appeals from the district court's summary judgment on his derivative liability claims. Sulyma's fifth claim alleged that the finance committee violated section 1104 by failing to monitor the performance of the investment committees responsible for making the allegedly imprudent investment allocations. Sulyma's sixth claim alleged that all defendants violated section 1105 by knowing of the other defendants' breaches and taking no steps to remedy them.

Sulyma argues that the limitations period for his derivative claims could not begin to run until the end-point of the limitations period on his primary claims. That is incorrect. As we have previously explained, when an ERISA breach is ongoing such that it may be characterized as multiple violations, "[t]he earliest date on which a plaintiff became aware of any breach . . . start[s] the limitation period of [section 1113] running." *Phillips*, 944 F.2d at 520. Rather, as with Sulyma's first and third claims, summary judgment

was inappropriate because there was a dispute of material fact over whether Sulyma had "actual knowledge of the breach" by 2012. If Sulyma in fact never looked at the documents Intel provided, he cannot have had "actual knowledge of the breach" because he cannot have been aware that imprudent investments were made and that other Intel fiduciaries were failing to monitor or remedy that imprudence. Because there was a dispute of material fact over Sulyma's actual knowledge, the district court erred by entering summary judgment in favor of Intel on these claims. We therefore reverse the district court's summary judgment and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA

CHRISTOPHER M. SULYMA, et al.,
Plaintiffs,

v.

INTEL CORPORATION INVESTMENT POLICY COMMITTEE, et al.,
Defendants.

CASE NO. 15-CV-04977 NC

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Re: Dkt. No. 122

In this putative class action, former Intel employee Christopher Sulyma sues various fiduciaries of his Intel retirement accounts. While he worked for Intel, Sulyma participated in two retirement plans that invested in conventional investments, such as stocks and bonds, but also invested substantially in alternative investments, such as hedge funds and private equity. Sulyma sues plan fiduciaries for what he alleges were imprudent investments and inadequate disclosures.

Defendants move for summary judgment on all of Sulyma's claims, arguing that the claims are time-barred under the statute of limitations. The key issue is whether Sulyma had actual knowledge of the underlying facts constituting his claim within 3 years of filing his lawsuit. If Sulyma had such knowledge, under federal law his claims are time-barred. Because there is no genuine dispute of material fact that Sulyma had actual knowledge of the facts comprising claims I and III, as well as knowledge of the disclosures he alleges were unlawfully inadequate in claims II and IV, the Court GRANTS defendants' motion for summary judgment on those claims, finding them time-barred.

Without live primary claims, the Court also GRANTS summary judgment on Sulyma's derivative duty to monitor and co-fiduciary liability claims (claims V and VI).

I. BACKGROUND

A. Procedural History

In this putative class action seeking relief under the Employee Retirement Income Security Act (ERISA), Sulyma seeks to represent two classes of plaintiffs: (1) participants in the 401(k) Plan and the Retirement Plan whose accounts were invested in the Target Date Fund 2045 (TDF);[1] and (2) participants

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[1] The complaint states that Sulyma's account in the 401(k) Plan was invested in the Intel Target Date 2045 "Fund," but states that the Intel Target Date accounts were actually "a suite of custom target date portfolios" and therefore uses the term Target Date Portfolios (or TDPs). Dkt. No. 93 at 4, 5. Because the

in the 401(k) Plan and the Retirement Plan whose accounts were invested in the Global Diversified Fund (GDF). Dkt. No. 93 at 4. Defendants include the members of the Investment Committee,[2] the Administrative Committee,[3] and the Finance Committee of the Intel Board of Directors,[4] as well as the committee entities. Sulyma also names the Intel Corporation 401(k) Savings Plan and the Intel Retirement Contribution Plan as nominal defendants. *Id.* at 15-16.

The gravamen of Sulyma's complaint is that the defendant fiduciaries of the Retirement Plan and 401(k) Plan imprudently over-allocated to hedge funds and private equity investments. Dkt. No. 93 at 4. Defendants allegedly breached their fiduciary duties by investing in such funds, which "presented unconventional, significant and undue risk of unduly high fees and costs." *Id.* These allocations "departed dramatically" from prevailing industry standards. *Id.* According to Sulyma, these investment decisions caused "massive losses and enormous excess fees" to the plans and their participants. *Id.*

Intel Target Date 2045 Fund is entitled Fund, not Portfolio, throughout the financial disclosures, the Court will use the term TDF instead of TDP.

[2] Christopher Geczy, Ravi Jacob, Nanci S. Palmintere, David S. Pottruck, Arvind Sodhani, and Richard Taylor. Dkt. No. 93 at 11-14.

[3] Terra Castaldi, Ronald D. Dickel, Tiffany Doon Silva, Tami Graham, Cary Klafter, and Stuart Odell. Dkt. No. 93 at 14-15.

[4] Charlene Barshefsky, Susan L. Decker, John J. Donahoe, Reed E. Hundt, James D. Plummer, and Frank D. Yeary. Dkt. No. 93 at 9-11.

Sulyma brings six claims: claims I and III allege the Investment Committee Defendants breached their fiduciary duties by over-allocating the assets of the 401(k) Plan and Retirement Plan to hedge fund, private equity, and other alternative investments. *Id.* at 64-66, 68-70. Claims II and IV allege the Administrative Committee Defendants breached their fiduciary duties by failing to disclose required information about the funds. Dkt. No. 93 at 67-68, 70-72. Claim V alleges that the Finance Committee Defendants breached their fiduciary duties by failing to monitor the Investment Committee and Administrative Committee. *Id.* at 72-73. Claim VI alleges that each defendant has derivative liability for the actions of the other defendants. *Id.* at 73-75.

Defendants move for summary judgment on all claims. Dkt. No. 122 at 7. According to defendants, Sulyma had actual knowledge of the facts constituting the alleged violations of ERISA more than three years before he sued, through "annual notices, quarterly Fund Fact Sheets, targeted emails, and two separate websites." *Id.* at 7-8. The Court held a hearing on defendants' motion on December 14, 2016. Dkt. No. 140. All parties consented to the jurisdiction of a magistrate judge under 28 U.S.C. § 636(c). Dkt. Nos. 30, 50.

B. Finding of Fact

Sulyma worked for Intel between 2010 and 2012, and participated in two ERISA-governed retirement plans. Dkt. No. 93 at 9. The first was the Intel Retirement Contribution Plan, where Sulyma's retirement assets were invested in the GDF. *Id.* The second was the Intel 401(k) Savings Plan, where Sulyma's retirement assets were invested in the TDF. *Id.*

According to Sulyma, while he worked at Intel, he had little experience with financial issues, and didn't know what "hedge funds," "alternative investments," and "private equity" were. Dkt. No. 134 at 13. While an Intel employee, as Intel's exhibits demonstrate,[5]

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[5] Sulyma argues Intel's Clickstream Activity Log, dkt. no. 125-3, is not admissible evidence that may be used on a motion for summary judgment because it is a "sham affidavit," hearsay, and does not comport with Federal Rule of Evidence 1006. Dkt. No. 134 at 43-44. The Court disagrees. Mr. Vogel did not testify at the October 6, 2016, deposition as a designee of Fidelity Workplace Services, so Sulyma's "sham affidavit" argument holds no water. Dkt. No. 133-3 at 4 (Vogel Dep.). Second, as to Sulyma's hearsay objection under Rule 803(6), the Court rejects this argument. Vogel's declaration regarding the Log provides that it "is a true and correct copy of a document generated from Fidelity's systems that shows the activity tracked on Fidelity's NetBenefits portal associated with Mr. Sulyma's account." Dkt. No. 122-1 at 3 (Vogel Decl.). Vogel attested that the exhibits, included the Log "were copies of records that were received or prepared by Fidelity and kept by Fidelity in the ordinary course of regularly conducted business." *Id.* Under *U-Haul Int'l, Inc. v. Lumbermens Mut. Cas. Co.*, " 'printouts prepared specifically for litigation from databases that were compiled in the ordinary course of business are admissible as business records to the same extent as if the printouts were, themselves, prepared in the ordinary course of business. The important issue is whether the database, not the printout from the database, was compiled in the ordinary course of business.' " 576 F.3d 1040, 1043-44 (9th Cir. 2009), (quoting B. Weinstein and M.A. Berger, Weinstein's Federal Evidence § 901.08[1] (2d. ed. 2006), citing *United States v. Fujii*, 301 F.3d 535, 539 (7th Cir. 2002) and *Potamkin Cadillac Corp. v. B.R.I. Coverage Corp.*, 38 F.3d 627, 632 (2d Cir. 1994)). The Court finds Rule 1006 inapplicable, because the Log is a business record, and a piece of evidence in itself, not a summary within the meaning of that rule. *See Smith v. Alternative Res. Corp.*, 128 Fed.Appx. 614, 615 (9th Cir. 2005).

Sulyma had access to a number of financial documents pertaining to the GDF and TDF. Many of these documents, such as Fund Facts Sheets, Qualified Default Investment Alternatives Notices, and Summary Plan Descriptions, were made available by Fidelity Workplace Services LLC, "which is the service provider for ... Intel Retirement Contribution Plan and Intel 401(k) Savings Plan." Dkt. No. 122-1 at 1-2 (Vogel Decl.). Fidelity made these documents available on the NetBenefits website. *Id.* at 2. Sulyma never saw the Fund Facts Sheets or Morningstar reports, and cannot recall receiving or review the Intel plans' Summary Plan Descriptions. Dkt. No. 134 at 13.[6] Sulyma acknowledged it was possible he accessed the NetBenefits website 68 times during his employment at Intel. Dkt. No. 135-3 (Sulyma Dep.) at 27. Sulyma asserts the financial documents Intel uses to attribute actual knowledge on his part were not easily accessible, and often misleading or inconsistent, though he admits he never looked at those documents to begin with. Dkt. No. 134 at 27 ("Mr. Sulyma repeatedly testified that he had not seen the purported "disclosures" on Intel's website."). The documents Sulyma acknowledges receiving and reviewing are the Intel 401(k) and Intel Retirement Contribution Retirement Savings Statements, which "consistently advised him from 2010 to 2013 that he was invested in 'stock 63 percent, bonds 16%, short-term 21 percent.' " *Id.* at 14; *see* Dkt. Nos. 128-3 (Defs. Ex. 29), 128-4 (Defs. Ex. 30). The Savings

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[6] *See* Dkt. Nos. 126–127-3 (Defs. Exs. 12-21; Morningstar's TDF Fund Fact Sheets), Dkt. Nos. 127-4–128-1 (Defs. Exs. 22-27; Morningstar's GDF Fund Fact Sheet), and Dkt. Nos. 123-3–124 (Defs. Exs. 3-5; 2010, 2011, and 2012 Summary Plan Descriptions).

Statements say nothing about investments in private equity or hedge funds.

II. Legal Standard

Summary judgment may be granted only when, drawing all inferences and resolving all doubts in favor of the nonmoving party, there is no genuine dispute as to any material fact. Fed. R. Civ. P. 56(a); *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is material when, under governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* Bald assertions that genuine issues of material fact exist are insufficient. *Galen v. Cnty. of L.A.*, 477 F.3d 652, 658 (9th Cir. 2007).

The moving party bears the burden of identifying those portions of the pleadings, discovery, and affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Once the moving party meets its initial burden, the nonmoving party must go beyond the pleadings, and, by its own affidavits or discovery, set forth specific facts showing that a genuine issue of fact exists for trial. Fed. R. Civ. P. 56(c); *Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1004 (9th Cir. 1990) (citing *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983)). All justifiable inferences, however, must be drawn in the light most favorable to the nonmoving party. *Tolan*, 134 S. Ct. at 1863 (citing *Liberty Lobby*, 477 U.S. at 255).

III. Discussion

The issues presented are (1) whether claims I-IV (primary breach of fiduciary duty claims) are time-barred; and (2) if so, whether Sulyma's derivative liability claims (V and VI) are also time-barred.

A. Claims I and III are Time-Barred.

Claims I and III allege the Investment Committee Defendants breached their fiduciary duties by over-allocating the assets of the 401(k) Plan and Retirement Plan to hedge fund, private equity, and other "alternative investments." Dkt. No. 93 at 64-66, 68-70.

1. Standard For Fiduciary Duties and Statute of Limitations Under ERISA.

The prudent man standard of care, 29 U.S.C. § 1104(a)(1) (ERISA § 404), provides that the plan fiduciary must discharge his plan duties "solely in the interest of the participants and beneficiaries" and:

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims[.]

ERISA's statute of limitations for breaches of fiduciary duties bars actions commenced "after the earlier of" either 6 years after the act or omission constituting the breach, or 3 years "after the earliest date on which the plaintiff had actual knowledge of the breach." 29 U.S.C. § 1113 (ERISA § 413). The three-year limitations period begins on "the date on which the person bringing the suit acquires actual knowledge." *Landwher v. DuPree*, 72 F.3d 726, 733 (9th Cir. 1996). Constructive knowledge, or "knowledge of facts sufficient to prompt an inquiry which would have uncovered the breach," does not suffice. *Martin v. Pac. Lumber Co.*, 1993 WL 832744, at *2 (N.D. Cal. Jan. 15, 1993); *but see Brown v. Owens Corning Inv. Review Comm.*, 622 F.3d 564, 571 (6th Cir. 2010) (finding that where participants were provided access to Summary Plan Descriptions, but there existed no proof the plaintiffs "actually saw or read the documents that disclosed the allegedly harmful investments," actual knowledge existed) (internal quotations marks omitted).

To apply the statute of limitations requiring "actual knowledge," the court "must first isolate and define the underlying violation." *Ziegler v. Conn. Gen. Life Ins. Co.*, 916 F.2d 548, 550-51 (9th Cir. 1990). Second, the Court must inquire when the plaintiff had "actual knowledge" of the alleged breach or violation. *Id.* at 552. "This inquiry into plaintiffs' actual knowledge is entirely factual, requiring examination of the record." *Id.* Therefore, as to claims I and III, the Court must look to the evidence presented to see if the financial disclosures presented notice sufficient to "isolate and define the underlying violation" and provide "actual knowledge" of the violation or breach. *Id.* at 551-52 (citing *Meagher v. International Ass'n of*

Machinists and Aerospace Workers Pension Plan, 856 F.2d 1418, 1422 (9th Cir. 1988)).

2. Standard for Actual Knowledge of a Substantive Claim.

For a substantive claim alleging imprudent investment under 29 U.S.C. § 1104, the statute of limitations is triggered by the plaintiffs' "knowledge of the transaction that constituted the alleged violation, not by their knowledge of the law." *Blanton v. Anzalone*, 760 F.2d 989, 992 (9th Cir. 1985); *see In re Northrop*, 2015 WL 10433713, at *18 (C.D. Cal. Nov. 24, 2015) (a plaintiff must "have 'knowledge of the facts or transaction that constituted the alleged violation; it is not necessary that the plaintiff also have actual knowledge that the facts establish a cognizable legal claim under ERISA in order to trigger the running of the statute.' ") (quoting *Browning v. Tigers Eye Benefits Consulting*, 313 Fed.Appx. 656, 660 (4th Cir. Feb. 26, 2009)); *see also Meagher*, 856 F.2d at 1423 ("Each time Meagher received a check, he had knowledge of the transaction, though he may not have known at the time that the reduction in benefits was unlawful under ERISA[,]" citing *Blanton*) *and Lee v. United States*, 809 F.2d 1406, 1410 (9th Cir. 1987) ("A claim accrues as soon as a potential claimant either is aware or should be aware of the existence of and source of his injury, not when he knows or should know that the injury constitutes a legal wrong. A different rule

would require insufficient diligence on the part of potential claimants," citing *Blanton*).[7]

Sulyma argues for a more permissive rule, piggybacking off of a statement in *Ziegler*: "an ERISA plaintiff's cause of action cannot accrue and the statute of limitations cannot begin to run until the plaintiff has actual knowledge of the breach, regardless of when the breach actually occurred." 916 F.2d at 552. This statement, and the holding in *Waller v. Blue Cross of California*, 32 F.3d 1337, 1341 (9th Cir. 1994) ("The disclosure of a transaction that is not inherently a statutory breach of fiduciary duty . . . cannot communicate the existence of an underlying breach"), gave rise to *Spragg v. Pac. Telesis Grp.* 168 F.3d 501 (9th Cir. 1999). To understand this Court's disagreement with *Spragg*, an unpublished opinion, requires analyzing *Waller.*

In *Waller*, the plaintiffs alleged defendants breached fiduciary duties by "employing an infirm bidding process" aimed at selecting annuity providers

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[7] "[T]here is a split of authority regarding the 'actual knowledge' requirement of § 1113." *In re Northrop*, 2015 WL 10433713, at *18. *Browning* discussed the Sixth, Seventh, Ninth, and Eleventh Circuit's standard for actual knowledge, citing *Wright v. Heyne*, 349 F.3d 321, 330 (6th Cir. 2003), *Martin v. Consultants & Adm'rs, Inc.*, 966 F.2d 1078, 1086 (7th Cir. 1992), *Blanton*, 760 F.2d at 992, and *Brock v. Nellis*, 809 F.2d 753, 755 (11th Cir. 1987), and contrasted it with "[t]he Third and Fifth Circuits' narrow interpretation of actual knowledge in section 413 'requires a showing that plaintiffs actually knew not only of the events that occurred which constitute the breach or violation but also that those events supported a claim of breach of fiduciary duty or violation under ERISA.' " [citations omitted]. 313 Fed.Appx. at 660.

enabling the defendants to obtain a maximum reversion. 32 F.3d at 1339. The Ninth Circuit held, *for purposes of a motion to dismiss*, that the three-year limitations period did not run from the date when the plaintiffs purchased the annuities because plaintiffs' theory of breach was that fiduciaries unlawfully employed an infirm bidding process to acquire the annuities. *Id.* at 1341 (accepting plaintiffs lacked "actual knowledge . . . until the publicized account of ELIC's financial difficulties and its ultimate insolvency and the subsequent investigation by counsel for plaintiffs...." (internal citations omitted)) (italics added). Sulyma and *Spragg* cite the court's "*cf.*" citation in *Waller* to *Fink v. National Sav. and Trust Co.*, 772 F.2d 951, 957 (D.C. Cir. 1985), that "[t]he disclosure of a transaction that is not inherently a statutory breach of fiduciary duty ... cannot communicate the existence of an underlying breach." *Id.*; *Spragg*, 168 F.3d 501. A "*cf.*" citation means that the cited authority supports a proposition different from the main proposition, but that is sufficiently analogous to lend support. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 58 (20th ed. 2015). Such reasoning by analogy does not change the rule in *Blanton* that actual knowledge exists when a plaintiff knows of the transaction constituting the alleged violation. 760 F.2d at 992. Thus, the Court joins *In re Northrop* in rejecting this extension.[8] 2015 WL 10433713, at *20 n.140.

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[8] The Court notes Sulyma argues other circuits interpret *Waller* to be more far-reaching than its language and procedural posture suggest. Dkt. No. 134 at 24 n.8; *see Wright v. Heyne*, 349 F.3d 321, 329 (6th Cir. 2003), *Brown v. Am. Life Holdings, Inc.*,

The Court also rejects Sulyma's argument that it should adopt a "willful blindness" standard for actual knowledge. Dkt. No. 134 at 12. The cases cited by Sulyma are unpersuasive and do not address ERISA. *See e.g.*, *Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 768 (2011) (addressing patent infringement). As Sulyma stated: "the Ninth Circuit has never adopted willful blindness as a substitute for actual knowledge under ERISA", dkt. no. 134 at 28; this Court will not be the first to do so.

Sulyma also argues actual knowledge requires him to know "all material facts necessary to understand that some claim exists," which could require "opinions of experts." Dkt. No. 134 at 30. (citing *Fish v. Great-Banc Trust Co.*, 749 F.3d 671, 679 (7th Cir. 2014)). But his reliance on that sentence in *Fish* is misplaced because the court was discussing standards for "actual knowledge" different than that adopted by the Ninth Circuit. 749 F.3d at 679 (citing, but not adopting the Fifth Circuit's language in *Maher*, 68 F.3d at 954 and *Caputo v. Pfizer, Inc.*, 267 F.3d 181, 193 (2d Cir. 2001)); *see also In re Northrop*, 2015 WL 10433713, at *18-*19 (discussing circuit split). The Ninth Circuit's standard is expressed in *Blanton.* 760 F.2d at 992.

3. Standard for Actual Knowledge of a Process-Based Claim.

The second type of claim under the prudent investor rule is a process-based claim, in which a plaintiff

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190 F.3d 856, 859 (8th Cir. 1999), *Maher v. Strachan Shipping Co.*, 68 F.3d 951, 955 (5th Cir. 1995) (but noting *Waller*'s procedural posture as on a motion to dismiss). The Court declines to also extend *Waller.*

alleges some infirmity or self-dealing in the defendant's investment decision-making process. "When beneficiaries claim 'the fiduciary made an *imprudent* investment, actual knowledge of the breach [will] usually require some knowledge of how the fiduciary selected the investment.' " *Tibble v. Edison Int'l*, 729 F.3d 1110, 1120-21 (9th Cir. 2013), *vacated on other grounds*, 135 S. Ct. 1823 (2015) (quoting *Brown v. Am. Life Holdings, Inc.*, 190 F.3d 856, 859 (8th Cir. 1999)) (emphasis in original); *see also Fish*, 749 F.3d at 681 ("to trigger the 'actual knowledge' statute of limitations clock under § 1113(2) for a process-based claim, the plaintiffs 'must have been aware of the process utilized by [the fiduciary] in order to have had actual knowledge of the resulting breach of fiduciary duty.' " (quoting *Maher*, 68 F.3d at 956)).

Notably, in *Tibble*, the Ninth Circuit found that financial disclosure documents, including Summary Plan Descriptions and prospectuses notifying participants about the nature of plan investment menu fell "short of providing 'actual knowledge of the breach or violation' " where the claims hinged on "infirmities" in the investment selection process. 729 F.3d at 1121 (internal citation omitted). In addition, upon review of the Ninth Circuit's decision, the Supreme Court found that an ERISA "trustee has a continuing duty 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." *Tibble*, 135 S. Ct. at 1828.

4. What is Sulyma's Alleged "Underlying Violation"?

Step one is to "first isolate and define the underlying violation." *Ziegler*, 916 F.2d at 550-51. Claims I and III allege violations of 29 U.S.C. § 1104(a)(1)(A)-(B) by the Investment Committee Defendants managing the TDF and GDF. *See* Dkt. No. 93 at 64-66, 68-70. The imprudence allegations rest on two pieces of information: (1) the decision to invest in alternative investment options; and (2) to do so at a level between 25 and 40% of the assets. Sulyma argues his claims include process-based claims, and he lacked actual knowledge of his claims. Dkt. No. 134 at 11. Sulyma alleges defendants breached their fiduciary duties by investing a significant portion of assets in hedge funds and private equity, "which presented unconventional, significant and undue risks and unduly high fees and costs," and by "adopting asset allocation models and asset allocations for participant accounts that departed dramatically from" industry standards. Dkt. No. 93 at 4.

5. The Financial Documents Available to Sulyma Gave Actual Knowledge of the Alleged Violations, Whether Substantive or Procedural.

   a. Any Substantive Claim for Brach of Fiduciary Duty is Time Barred.

First, insofar as Sulyma brings a substantive claim, his claims are time-barred. Sulyma disputes he received sufficient notice to provide him with actual knowledge of the alleged fiduciary breaches. *Blanton* provides that the ERISA "statute of limitations is triggered by [plaintiffs'] knowledge of the transaction that constituted the alleged violation, not by their

knowledge of the law." 760 F.2d at 991-92.[9] Here, the Court finds that Sulyma had actual knowledge of the facts underlying his substantive claims because the financial disclosures provided information about plan asset allocation and an overview of the logic behind investment strategy. *See* Dkt. No. 122 at 23-25.

The 2011 Qualified Default Investment Alternatives Notice, 2012 Summary Plan Description, 2012 Annual Disclosures, and targeted emails notified Sulyma of the challenged investment allocations. *Id.* at 25-27. Taking into consideration the parties' arguments at the December 14, 2016, hearing, and after review of these documents, the Court agrees these documents provided Sulyma notice of how his investments were allocated.

Though he does not recall reviewing the Summary Plan Descriptions, each year Sulyma was a plan participant, a Summary Plan Description was made available on the NetBenefits website describing the assets held by the two funds in which he invested, the GDF and TDF. Dkt. Nos. 122-1 at 2 (Vogel Decl.), 123-3 (2010 Summary Plan Description), 123-4 (2011 Summary Plan Description), 124 (2012 Summary Plan Description). Sulyma does not deny he received

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[9] As discussed above, *In re Northrop* recently addressed tension between *Waller* and *Blanton* in defining the standard for actual knowledge under § 1313, finding "*Blanton* more likely expresses the current rule in the Ninth Circuit." 2015 WL 10433713, at *20 n. 140. In so finding, the court considered that "[w]hen other appellate courts have discussed the circuit split that exists regarding the actual knowledge standard, they have consistently cited *Blanton*, not *Waller*, as evidence of the Ninth Circuit's standard." *Id.* (internal citations and quotations omitted).

the Plan Descriptions. Dkt. No. 135-3 at 68-70 (Sulyma Dep.). Regarding Sulyma's holdings in the TDF, for example, the 2012 Summary Plan Description advised Sulyma that "[e]ach fund offers a broadly diversified mix of domestic and international stocks and bonds, and includes investments not typically available to individual investors, such as hedge funds and commodities." Dkt. No. 124 at 12. As to the GDF, the same Plan Description advised Sulyma that the asset mix of the GDF included "domestic and international equity, global bond and short-term investments, hedge funds, private equity, and real assets (e.g. commodities, real estate & natural resource-focused private equity)." *Id.* Thus, the Summary Plan Descriptions informed plan participants that the TDF and GDF contained the alternative investments he now alleges were imprudent.

Furthermore, the Summary Plan Descriptions directed Sulyma to review the additional fund information available in the Fund Fact Sheets such as those referenced in the complaint:

> You should review the fund prospectus and/or fund fact sheet available for each of the funds in which you are interested. Those documents provide information about the Fund's investment strategy, expenses, and operation (including any trade limitations)
>
> To view the available funds, most recent fund performance, or the Morningstar quarterly fund fact sheets for the Target Date and Core Funds, visit Fidelity's

> NetBenefits website or call the Fidelity Service Center.

Id. at 11-12. Fund Facts Sheets available to Sulyma on the NetBenefits website disclosed the amount in which the TDF and GDF were invested in hedge funds or private equity in narrative and graphic formats, and explanations for the inclusion of those alternative investments. Dkt. No. 122 at 25. Fund Fact Sheets for the GDF and TDF were available to Sulyma throughout the time he participated in the Plans. Dkt. Nos. 122-1 at 2 (Vogel Decl.).

For example, the "Investment Overview" section of the GDF Fact Sheet dated June 30, 2012, described the same asset allocation Sulyma asserts was imprudently excessive in the complaint. Dkt. No. 93 at 35, 65, 69 (allegations of over-allocation); Dkt. No. 128-1 at 4 (Defs. Ex. 4). It states that the GDF "invests globally to both traditional and alternative asset classes," with a "current target asset allocation" of "35% Global Equity (Long-only), 25% Hedge Funds, 25% Global Fixed Income (Bonds), 10% Real Assets (e.g. Commodities, Real Estate and Natural Resource-focused Private Equity), and 5% Private Equity." *Id.* This same allocation was called out through graphs and tables. *Id.* (graph displaying historical allocation).

The TDF Fact Sheet dated June 30, 2012, provides similar disclosures, that the target asset allocation was 10% global bond funds and short-term investments, 60% domestic and international equity funds, 25% hedge funds, and 5% commodities. Dkt. No. 127-3 at 3 (Defs. Ex. 21). Over time, the fund would shift to a more conservative asset mix by incrementally decreasing its equity allocation and increasing its bond

allocation, while maintaining a fixed allocation to hedge funds. *Compare id. with* Dkt. No. 93 at 35, 65, 69 (allegations of over-allocation).

These June 2012 Fund Fact Sheets demonstrate Sulyma had actual knowledge of the elements of his imprudence claims more than three years before he filed suit regarding the allocations. *Compare* Dkt. No. 128-1 at 2 (Defs. Ex. 27) (showing 35.36% allocation to alternative investments), *with* Dkt. No. 93 at 69 (alleging alternative investment allocation ranging up to 36.71%); *compare also* Dkt. No. 127-3 at 3 (showing 25% allocation to hedge funds and 5% to commodities, and showing international and domestic equities as 60%), *with* Dkt. No. 93 at 65 ("The Investment Committee Defendants breached those duties by adopting an asset allocation model such that the Intel TD[F]s were and are comprised of approximately 20-25% Hedge Funds, 4-5% commodities, and where international equities account for over 50% of equity holdings.").

The Fund Fact Sheets explained both the strategy behind the inclusion of alternative investments and the potential impact of that strategy on performance. They discussed that costs would increase as a result. Regarding strategy, the Fund Fact Sheets explained that "[t]he objective of these alternative assets is to provide exposure to investments which have a low (or negative) correlation to the broad equity and fixed income markets, providing further diversification to the Fund." Dkt. No. 128-1 at 4 (Defs. Ex. 27). This increased diversification was intended to "dampen the impact any one investment category has on the total performance," so as to reduce volatility:

> The Investment Policy Committee believes that the new asset allocation of the Global Diversified Fund provides an improved balance between risk and reward through enhanced diversification. Relative to a portfolio of U.S. equities, the Fund's asset allocation is expected to result in lower volatility for participants as well as higher relative performance in certain economic scenarios. Finally, the portfolio is designed to mitigate the risk of dramatic declines resulting from U.S. equity market volatility, thus providing better protection for participants.

Id. (regarding the GDF); *see also* Dkt. No. 127-3 at 2 (Defs. Ex. 21) (regarding the TDF). The Fund Fact Sheet stated, "[t]he fund's steadier performance does come with a price":

> For starters, the fund's reduced market exposure is bound to serve as a drag when markets are experiencing rapid run-ups. Additionally, the fund's cost is higher than it used to be due to the fact that it invests less in passively run index funds and now devotes more to higher-cost actively run strategies. On balance, however, the improved diversification and opportunity set that these strategies offer are apt to outweigh their potential cost drag, awarding investors a more efficiently designed portfolio and help[ing] them experience a smoother ride.

Dkt. No. 128-1 at 2; *see also* Dkt. No. 127-3 at 3 (same). Statements such of these explain the higher costs and fees associated with the funds.

Sulyma points to inconsistencies between the documents made available to him, specifically the Retirement Savings Statements, as compared to the Fund Facts Sheets. Dkt. Nos. 135-10–135-19 (Pls. Exs. J-S). For example, the pie chart in the April 1, 2012—June 30, 2012, statement entitled "Your Asset Allocation" specified Sulyma was invested in 58% stocks, 20% bonds, and 22% short-term. Dkt. No. 135-18 at 3 (Pls. Ex. R). Yet the Fund Fact Sheet for the GDF as of June 30, 2012, stated that the fund was "comprised of 35% Global Equity (Long-only), 25% Hedge Funds; 25% Global Fixed Income (Bonds), 10% Real Assets (e.g., Commodities, Real Estate and Naural Resource-focused Private Equity), and 5% Private Equity." Dkt. No. 128-1 at 4 (Defs. Ex. 27). The TDF Fund Fact Sheet for the same period similarly did not match up with the Retirement Savings Statement. Dkt. No. 127-3 (Defs. Ex. 21) (providing an allocation of 23% domestic stock, 36% international stock, 26% hedge funds, 10% global bond, and 5% commodities). In addition, as discussed above, the Qualified Default Investment Alternatives Notice and 2012 Summary Plan Description likewise would have clarified to Sulyma what exactly his funds were invested in. Sulyma extensively argued this issue at the December 14, 2016, hearing, and the Court notes the inconsistency in the statements.

Defendants recognized the statements did not disclose the allocation of Sulyma's investments "well,"

but that the Court should still find Sulyma had "actual knowledge" of the asset allocation under a "totality of the information" theory, taking into account the disclosures on the 12 Fund Facts Sheets. Dkt. No. 143 at 27 (Hearing Transcript). The Savings Statements repeatedly made reference to the NetBenefits website where the Fund Facts Sheets were located, and repeatedly referred the reader to access the website. *See e.g.*, Dkt. No. 135-18 at 2, 4, 6. The Court does find persuasive the argument that most of the information made available regarding the TDF and GDF did disclose the investment in alternative investments, as well as the point that it was the Fund Facts Sheet, not the statements that provided information regarding the investment strategy. Lastly, Sulyma admitted he never looked at the documents made available to him on the NetBenefits website. Though inconsistencies existed in the documents made available to Sulyma, most of those documents reflected the high percentage of investments in hedge funds, private equity, and commodities.

The central issue here is not whether Sulyma knew he might have a legal claim against defendants regarding how his investments were allocated; rather, the issue is whether disclosures were made available to him in such a way that he knew the underlying facts constituting the transaction that formed the basis of his complaint. *Blanton*, 760 F.2d at 992. The latter is "actual knowledge," and there is no genuine dispute of fact as to whether he had such knowledge. Even making all inferences in Sulyma's favor that he only ever reviewed the statements, those statements repeatedly directed him to the NetBenefits website. It would be improper to allow Sulyma's claims to survive

merely because he did not look further into the disclosures made to him. Thus, Sulyma has not raised a genuine dispute as to any material fact regarding his "actual knowledge" of the alleged violations, when considering the disclosures that defendants have now shown were made to him. Fed. R. Civ. P. 56(a).

b. Any Process Claim for Breach of Fiduciary Duty is Time-Barred.

Second, Sulyma provided no facts to support a process claim. Sulyma offers *Tibble* as support for his assertion that the statute of limitations was not started in 2012 because "the occurrence of a breach does not necessarily coincide with actual knowledge of the breach." Dkt. No. 134 at 24 (citing 729 F.3d at 1121). As noted above, to find actual knowledge that a fiduciary imprudently invested funds, such a finding will "usually require some knowledge of how the fiduciary selected the investment." 729 F.3d at 1121.

Tibble is distinguishable. In *Tibble*, the "crux of beneficiaries' successful theory of liability at trial was that alternatives to retail shares had not been investigated—not simply that their inclusion had been imprudent." *Id.* at 1120. The plaintiffs sued for prohibited transactions and an imprudent investment claim based on the defendant's over-reliance on an outside consultant, which violated its fiduciary obligation to only reasonably rely upon consultant advice. *Id.* at 1138. *Tibble*'s allegations that the defendant imprudently relied on an outside consultant showed an infirmity in the process. Further, the *Tibble* plaintiffs objected to an inclusion of certain mutual funds, claiming their "inclusion had been imprudent, and that the practice of revenue sharing had violated both

the Plan document and a conflict-of-interest provision." *Id.* at 1118.

Here, the complaint contains only conclusory statements about process that do not allege problems with *how* Defendants made the decision to invest in alternative investments. *See e.g.*, Dkt. No. 93 at 66 ("On information and belief, including based on the statements of Stuart Odell, the Investment Committee Defendants did not understand and failed to give appropriate consideration to [the well-known risks associated with investment in alternative investments like hedge funds, private equity, and commodities], or disregarded such risks, when they selected and maintained the asset allocation for the Intel TD[F]s."). Sulyma completed discovery on the statute of limitations issue, *see* dkt. no. 117, and at summary judgment has not presented *any* evidence suggesting *any* infirmity in the process used to select the investments, and the extent to which the plans' funds were invested in such investments. *Galen*, 477 F.3d at 658; *see also Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Centers Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 718 (2d Cir. 2013) (allowing a claim lacking proof of well-pled factual allegations survive for purposes of a motion to dismiss).

As to Sulyma's discussion of the high fees participants paid for their investments, the Court notes that Sulyma made no allegations as to these fees violating any duty in the complaint's discussion of claims I and III. There is no explanation as to how these data points contribute to Sulyma's allegations that defendants breached their fiduciary duties by selecting hedge funds and other alternative investments, and

by selecting those investments as such a high percentage of the TDF and GDF. Sulyma's authorities that purport to support the inclusion of such allegations in this case are from the Second Circuit, which uses a different standard of "actual knowledge," and arise from a different procedural posture. *See e.g.*, *Young v. Gen. Motors Inv. Mgmt. Corp.*, 550 F. Supp. 2d 416, 420 (S.D.N.Y. 2008), *aff'd*, 325 Fed.Appx. 31 (2d Cir. 2009) (motion to dismiss), *Moreno v. Deutsche Bank Americas Holding Corp.*, No. 15-cv-9936 LGS, 2016 WL 5957307, at *4 (S.D.N.Y. Oct. 13, 2016) (same).

The complaint does not contain the process-based allegations the *Tibble* court found sufficient to prevent the claims being time-barred.[10] *Tibble* also pointed to *Waller.* 32 F.3d 1337. As discussed above, in *Waller*, the Ninth Circuit, in a motion to dismiss held the three-year limitations period did not run from the date when the plaintiffs purchased annuities because their theory of breach was that the fiduciaries unlawfully employed an infirm bidding process to acquire them. *Id.* at 1341. In *Tibble* and *Waller*, there were more elements to the plaintiffs' underlying claims because the plaintiffs alleged either a specifically flawed or fraudulent process. Here, claims I and III allege the Investment Committee "did not understand and failed to give appropriate consideration to [the risks of hedge funds and private equity]." Dkt. No. 93 at 66, 69. Unlike in *Waller*, Sulyma does not allege an infirm bidding process or self-dealing. 32 F.3d at 1341. Unlike

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[10] Insofar as Sulyma attempts to graft the Supreme Court's reasoning regarding ERISA § 413(1)'s statute of limitations onto § 413(2), dkt. no. 134 at 22, the Court rejects such an invitation. *Tibble*, 729 F.3d at 1119 (refusing to "equitably engraft" the continuing violation theory onto § 413(2)).

in *Tibble*, he does not allege specific infirmities such as overreliance on outside consultants. 711 F.3d at 1070. The financial disclosures available to Sulyma in 2012 provided the information he needed to allege his current claims.

Thus, the elements of claims I and III—the inclusion of alternative investments, their percentage allocations, the potential resulting "drag" on performance during "rapid run-ups," and the expected increase in costs—were disclosed to Sulyma more than three years before he sued. *See* Dkt. No. 122-1 at 2 (Vogel Decl.) (stating Fund Fact Sheets and other financial disclosures were available to plan participants on NetBenefits). The financial disclosures provided Sulyma notice of the elements of the "underlying violation" he alleges: (1) investing in hedge funds and private equity in (2) too high an allocation of the assets. *Ziegler*, 916 F.2d 550-51. Claims I and III are time-barred.

B. Claims II and IV are Time-Barred.

Claims II and IV allege the Administrative Committee Defendants breached their fiduciary duties by failing to disclose detailed information about the hedge funds and private equity investments held by the GDF and TDF. Dkt. No. 93 at 67-68, 71-72.

The court "must first isolate and define the underlying violation." *Ziegler*, 916 F.2d at 550-51. Claims II and IV allege violations of 29 U.S.C. § 1104(a)(1)(A)-(B) and 29 C.F.R. § 2550.404a-5 for failure to ensure plan participants were informed of their "rights and responsibilities" regarding the investment of their assets, and were "provided sufficient information re-

garding the plan, including fees and expenses, and regarding designated investment alternatives, including fees and expenses thereto, to make informed decisions" regarding account management. Dkt. No. 93 at 67-68 (citing 29 C.F.R. § 2550-404a-5(a)).

In his opposition brief, Sulyma failed to defend his 29 C.F.R. § 2550.404a-5 argument after defendants' motion,[11] *see* Dkt. No. 134 at 38-41, and instead concentrated on asserting these claims under 29 U.S.C. § 1104(a)(1)(A)-(B). Defendants argue that under § 1104, Sulyma had actual knowledge of the facts constituting the claimed violations more than three years before he filed suit. Dkt. No. 122 at 30.

Sulyma received Annual Disclosures in July 2012, for his 401(k) and Retirement Plan. Dkt. Nos. 124-1 through 125-1 (Defs. Exs. 6-8); *see* Dkt. Nos. 129-9, 129-10 (Defs. Exs. 44-45) (July 14, 2012, and August 30, 2012 emails to Sulyma providing links to these disclosures). These disclosures provided information on the performance, fees, and expenses associated with the various investment options available for each of the Plans, including the TDF and GDF, *see* dkt. nos. 125 at 7; 125-1 at 7, but no disclosures regarding the individual investments held. Defendants argue that even if these disclosures were inadequate, under *Blanton*, Sulyma should be charged with actual

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[11] In defendants' motion papers, they cite to arguments made in the motion to dismiss, dkt. no. 103, regarding the inapplicability of 20 C.F.R. § 2550.404a-5 to this case. Dkt. No. 122 at 30. Based on its review of that regulation, the Court finds that because the TDF and GDF are not "designated investment alternatives," that regulation does not apply to this case. *See* 20 C.F.R. § 2550.404a-5(h)(4).

knowledge of their inadequacy starting in the summer of 2012, because he need not have known the disclosures' legal import. Dkt. No. 122 at 30.

The Court finds these claims time-barred because the disclosures gave Sulyma "actual knowledge" of the transactions constituting the alleged violations, and the disclosures were made more than three years before Sulyma sued. *Blanton*, 760 F.3d at 992; *see also In re Northrop*, 2015 WL 10433713, at *23 (finding claims for excessive fees time-barred because the plaintiffs knew the fees via financial disclosures three years prior to filing suit). Sulyma's ignorance of the law is immaterial. *Blanton*, 760 F.3d at 992. Furthermore, though a "fiduciary has an obligation to convey complete and accurate information material to the beneficiary's circumstance, even when a beneficiary has not specifically asked for the information[,]" a plaintiff must still complain of incomplete or inaccurate information within the limitations period." *See Barker v. Am. Mobil Power Corp.*, 64 F.3d 1397, 1403 (9th Cir. 1995), *as amended* (Nov. 15, 1995).

Claims II and IV allege inadequate disclosure, similar to Sulyma's untimely imprudent allocation claims. Dkt. No. 93 at 67. Because the Court has found that Sulyma had actual knowledge of the elements of his imprudent allocation claims in 2012, inadequate disclosure claims tied to when he had sufficient information to bring the imprudent allocation claims are similarly time-barred.

Sulyma argues that even if defendants' disclosures were sufficient, defendants violated their duties by not complying in their fiduciary obligations when Sulyma requested disclosures in January, 2015. Dkt.

No. 134 at 40. This is the first time Sulyma has raised this issue in this case. The Court will not consider it for the first time on summary judgment. *See Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1080 (9th Cir. 2008) (refusing to hear a new claim on a summary judgment motion where the complaint lacked the necessary factual allegations). The elements of claims II and IV were known to Sulyma in 2012 when the financial disclosures he alleges were inadequate were already available to him.

C. Claims V and VI Are Time-Barred.

Claim V alleges the Finance Committee Defendants failed to monitor the Investment Committee Defendants and the Administrative Committee Defendants. Dkt. No. 93 at 72. Claim VI alleges co-fiduciary liability for all defendants for the breaches of all other defendants. *Id.* at 73-75. Defendants seek summary judgment on both of these claims because the claims "fail" due to the "primary breach" claims (I-IV) being time-barred. Dkt. No. 122 at 31. Sulyma argues that even if the primary claims are time-barred, that does not mean the fiduciaries did not breach their duties. Dkt. No. 134 at 41.

Co-fiduciary liability can only attach to live primary liability. *In re McKesson HBOC, Inc. ERISA Litig.*, No. 00-cv-20030 RMW, 2002 WL 31431588, at *17 (N.D. Cal. Sept. 30, 2002) (dismissing claim for co-fiduciary liability under ERISA § 405 because the court has dismissed with leave to amend the other two other claims for relief, upon which the co-fiduciary claim depends"). Sulyma alleges "no supporting factual allegations of any kind" as to claims V and VI, dkt. no. 137 at 26, and rests on bald assertions and a

recitation of legal elements. Furthermore, Sulyma failed to uncover any facts in discovery suggesting a failure to monitor by the Finance Committee Defendants, or grounds for imposing co-fiduciary liability.

As to Sulyma's argument that claims V and VI did not accrue until 2015, the Court finds this argument unpersuasive, first, because none of the cases cited for this proposition are from within this circuit, and second, because those cases are factually distinguishable from the allegations presented in this case.[12]

IV. CONCLUSION

Because Sulyma had actual knowledge of the elements of claims I and III more than three years before filing this case, as well as knowledge of the disclosures he alleges were unlawfully inadequate in claims II and IV, his primary claims are time barred. Thus, the Court GRANTS summary judgment as to claims I-IV. Without live primary claims, the Court also GRANTS summary judgment on Sulyma's derivative claims (claims V-VI).

The Court will enter judgment for defendants and terminate this case.

IT IS SO ORDERED.

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[12] *See Brown v. Owens Corning Inv. Review Comm.*, 622 F.3d 564, 576 (6th Cir. 2010) (alleging a breach of fiduciary duty where a fiduciary failed to sue another fiduciary on a motion to dismiss), *Blankenship v. Chamberlain*, 695 F. Supp. 2d 966, 971 (E.D. Mo. 2010) (same), *Martin v. Consultants & Administrators, Inc.*, 966 F.2d 1078, 1089 (7th Cir. 1992) (alleging a breach of fiduciary duty where fiduciaries failed to sue former fiduciaries).

Dated: March 31, 2017

/s/ Nathanael M. Cousins
NATHANAEL M. COUSINS
United States Magistrate Judge