No. 16- ____

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

THOMAS E. PEREZ, Secretary, U.S. Department of Labor,
Plaintiff-Petitioner,

v.

ROBERT N. PRESTON, et al.,
Defendants-Respondents.

On Petition from the United States District Court
for the Northern District of Georgia

SECRETARY'S PETITION FOR PERMISSION TO APPEAL CERTIFIED INTERLOCUTORY ORDER PURSUANT TO 28 U.S.C. § 1292(b)

M. PATRICIA SMITH
Solicitor of Labor

THOMAS TSO
Counsel for Appellate
and Special Litigation

G. WILLIAM SCOTT
Associate Solicitor
for Plan Benefits Security

STEPHEN SILVERMAN
Senior Trial Attorney
U.S. Department of Labor
200 Constitution Ave., N.W., N-4611
Washington, D.C. 20210
(202) 693-5623

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases:

Federal Cases (Continued):

Federal Cases (Continued):

State Cases:

State Cases-cont.:

Federal Statutes:

Title 18, Crimes and Criminal Procedure:

Title 28, Judiciary and Judicial Procedure:

Employee Retirement Income Security Act of 1974 (Title I), 29 U.S.C. § 1001 et seq.:

Miscellaneous:

U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Borzi, Phyllis C., Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor

Colon, Isabel, Regional Director, Employee Benefits Security Administration, U.S. Department of Labor, Atlanta

Egemonye, Uche, MSHA Counsel, U.S. Department of Labor, Atlanta

Flint, David H.

Flint, Michael D.

Keen, Stanley, Regional Solicitor, U.S. Department of Labor, Atlanta

Gershengorn, Ian, U.S. Solicitor General

Lavore, Andrew J.

Lewis, Robert, ERISA Counsel, U.S. Department of Labor, Atlanta

Perez, Thomas, U.S. Secretary of Labor

Preston, Robert N.

Scott, G. William, Associate Solicitor, U.S. Department of Labor

Schreeder, Wheeler & Flint, LLP

Silverman, Stephen A., Senior Trial Attorney, U.S. Department of Labor

Smith, M. Patricia, Solicitor of Labor

TPP Holdings, Inc. d/b/a The Preston Partnership, LLC

TPP Holdings, Inc. Employee Stock Ownership Plan

Tso, Thomas, Counsel for U.S. Department of Labor

Walker, Amy, Senior Trial Attorney, U.S. Department of Labor, Atlanta

No publicly traded company or corporation has an interest in the outcome of this matter

Pursuant to Federal Rule of Appellate Procedure 5, the Secretary of Labor petitions this Court for permission to appeal an order partially granting Defendants' motion to dismiss, which the district court certified for interlocutory review under 28 U.S.C. § 1292(b). Order, Perez v. Preston, Case No. 4:10-cv-4214 (N.D. Ga. Nov. 22, 2016) (Dkt. 29) (Ex. 1 hereto) ("Certification Order"). As the district court's Certification Order explains, the question certified for immediate review – "[i]s the limitation of actions contained in [ERISA section 413,] 29 U.S.C. § 1113 subject to express waiver?" – satisfies the statutory requirement for interlocutory appeal as (1) a pure, "controlling question of law" on which there is (2) clearly "substantial ground for difference of opinion" and (3) whose resolution will "materially advance the ultimate termination of the litigation." See id. at 3 (citing 28 U.S.C. § 1292(b)).

Only section 413(1), 29 U.S.C. § 1113(1), is at issue. It states: "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 . . . the date of the last action which constituted a part of the breach or violation[.]" Deciding the question certified in this case will resolve an intra-circuit conflict that affects the Secretary's ERISA investigations and enforcement actions and private ERISA lawsuits across this Circuit.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

A. Initial Dismissal

TPP Holdings, Inc. ("TPP") sponsors the TPP Employee Stock Ownership Plan ("Plan" or "ESOP"), a pension plan that primarily invests in employer stock. Compl. (Dkt. 1) at ¶¶ 7, 8, 13. The Plan purchased TPP stock in 2008. Id. In January 2009, the Secretary opened an investigation into the Plan. Before reaching the statutory time limit to file suit, the Secretary and Defendants signed agreements in which Defendants expressly waived their rights under ERISA's statute of limitations, including its six-year time limit, section 413(1), 29 U.S.C. § 1113(1), for specified periods of time. See Dismissal Order (Dkt. 17) at 4 (Ex. 2 hereto); Tolling Agreements. (Dkts. 10-1 to 10-4). In exchange, the Secretary promised not to file suit until each period elapsed. Id. at 2. The agreements permitted the parties to pursue settlement negotiations. Id. The parties did not reach a settlement, so the Secretary filed suit once the period of time elapsed. See id. at 1-4.

The Secretary's suit alleges that TPP and its owner, Robert Preston, breached fiduciary duties and committed prohibited transactions under ERISA when they caused the Plan to purchase TPP stock from Preston at an inflated price, failed to pay participants proper distributions due from the Plan, and permitted a bank account containing Plan assets to be used as a corporate checking account. See Ex. 1 at 1; see also Compl. (Dkt. 1) ¶¶ 38-39. Disregarding their prior agreements and

express waivers of statute of limitations defenses, Defendants moved to dismiss as untimely all claims arising more than six years before the Secretary filed suit. Ex. 2 at 2-3. Defendants argued that the prior agreements are invalid because ERISA's six-year limitations period is a statute of repose. Id. The district court agreed and dismissed the claims that arose more than six years before the suit was filed, while acknowledging that "[n]o published opinion has weighed in on the question of whether the statute of repose in [ERISA section 413(1)] can be waived." Id. at 4. The court determined that ERISA section 413(1) is a statute of repose, and held that no statute of repose is waivable under any circumstance, including by agreement of the parties. Id. at 4-7.

B. Motion for Reconsideration

The Secretary then sought reconsideration of the district court's partial dismissal because the court's generalized and categorical approach to "statutes of repose" is inconsistent with the Supreme Court's and this Court's precedents. In particular, the Secretary argued that the court failed to analyze ERISA's six-year limitations period as required by In re Pugh, 158 F.3d 530, 533-34 (11th Cir. 1998), and U.S. v. Kwai Fun Wong, 135 S. Ct. 1625 (2015), which set forth the correct analysis for determining whether a federal time limit can be waived. Under these controlling cases, courts should enforce waivers unless Congress specifically intended the time limit to deprive the court of subject-matter jurisdiction.

Enforcement of waivers does not turn on whether a time limit is labeled a "statute of limitation" or a "statute of repose." The Secretary argued below that under the proper jurisdictional analysis, section 413(1) is non-jurisdictional and, therefore, express waivers of an affirmative defense based on section 413(1) are enforceable.

The district court denied the Secretary's reconsideration motion. Order Den. Recons. (Dkt. 25) at 6 (Ex. 3 hereto). The court was "not convinced of Pugh's applicability" to the limitations inquiry because section 413(1) contains different language than the provisions analyzed in Pugh, and because it believed (incorrectly) that an unpublished Eleventh Circuit case aligned with a categorical approach to statutes of repose. Id. at 3. The court further concluded that it would reach the same result applying the Secretary's approach, but it avoided any analysis of congressional intent, ignoring the instructions in Pugh. Id. at 3-5.

The district court also disagreed with the Secretary's argument that the Supreme Court's decision in Kwai Fun Wong supports the conclusion that section 413 is not jurisdictional. Ex. 3 at 5. While Kwai Fun Wong plainly adopted a presumption that time bars in federal statutes are not jurisdictional and thus waivable, 135 S. Ct. at 1634-35, the court relied on the dissent in that decision to conclude that "when a significant line of cases 'left undisturbed by Congress' has adopted the position that a particular time limit in a statute is treated as jurisdictional, the presumption flips." Ex. 3 at 5. In the court's view, ERISA

section 413(1) was presumptively jurisdictional because "numerous cases" identified by the court had treated section 413(1) as such. Id. In fact, only one case cited by the court, a 2014 Mississippi district court case, held that ERISA section 413(1) is jurisdictional in an unpublished decision. See id. Other cited decisions stated that ERISA section 413(1) is a statute of repose; however, they did not conclude that ERISA section 413(1) is jurisdictional or non-waivable. See id.

Two days after the court denied reconsideration, another district court in this Circuit upheld the validity of an agreement with the Secretary in which the defendant expressly waived his defense under ERISA section 413(1), just as the Defendants here did. Order on Mot. to Dismiss, Perez v. Commodity Control Corp., No. 1:16-cv-20245-UU (S.D. Fl. May 4, 2016) (Dkt. 36) (Ex. 4 hereto).

C. Motion for Certification for Interlocutory Appeal

In light of this intra-circuit conflict and the importance of this question, the Secretary moved to certify the dismissal for an interlocutory appeal under 28 U.S.C. § 1292(b). The district court granted the motion. The court's Certification Order found all the elements of section 1292(b) satisfied because "there is clearly substantial ground for difference of opinion" on the issue, which "will materially advance the ultimate termination of the litigation," and the court "cannot imagine a better example of a 'pure, controlling question of law.'" Ex. 1 at 3. The court explained that, because some claims survived dismissal, "there is a good chance

that this case will come back for a second round if the Eleventh Circuit disagrees with this Court" and it will "significantly further the cause of judicial efficiency to resolve this question before continuing on with this matter." Id.

II. QUESTION PRESENTED

Is the limitation of actions contained in 29 U.S.C. § 1113(1) subject to express waiver?

III. REASONS TO GRANT THE PETITION

The Secretary is responsible for enforcing ERISA to protect the participants and beneficiaries of over 650,000 retirement plans and approximately 2.3 million health and welfare plans holding over $8.7 trillion in assets. Bach Decl. (Dkt. 26-3 ¶ 2). Potential defendants routinely waive the statute of limitations during ERISA investigations in order to allow the parties the opportunity to resolve the matter short of a lawsuit. In this way, these express waivers help to reduce litigation and attendant burdens on courts and expense to the parties. As of August 2016, the Secretary had signed such agreements with potential defendants in approximately 235 matters nationwide. Id. ¶ 3. In this case, the Secretary postponed filing suit by the limitation date, relying on Defendants' promises not to assert timeliness defenses. Defendants failed to uphold their end of the bargain and, instead, breached their express agreement. Defendants' conduct should not be rewarded at the expense of the public interest and the innocent participants they harmed.

Against this backdrop, the district court's Dismissal Order creates uncertainty as to the validity of these waiver agreements. This uncertainty disrupts the Secretary's ability to enforce ERISA's protections, particularly in this Circuit, forcing the Secretary to file suit in cases that might have otherwise been resolved without litigation or prosecuted after a more complete investigation. These consequences are in no one's interest: neither the Secretary's interest in protecting participants, nor the interest of potential defendants in resolving matters short of litigation, nor the Court's interest in reducing unnecessary litigation.

This Court has discretion under 28 U.S.C. § 1292(b) to permit an interlocutory appeal where, as here, the district court certifies that its order meets the statutory requirements. Defendants offered no argument below that the dismissal fails to satisfy these requirements, and thereby waived any argument on appeal. See In re Osterman, 296 F. App'x 900, 902–03 (11th Cir. Oct. 21, 2008); compare Defs.' Resp. to Sec'y's Mot. (Dkt. 27). Certification will permit this Court to resolve a legal issue significant for this case and for ERISA's enforcement generally on which district courts in this Circuit have disagreed.

A. The Issue for Appeal Is a Controlling Question of Law

The district court's Dismissal Order decided a controlling question of law: whether ERISA's six-year limitations period is subject to express waiver. All the facts necessary for a resolution of that legal question are undisputed. The Order

dismissed with prejudice the central claims in this case based on a pure legal conclusion that ERISA section 413(1) is a "statute of repose" and all "statutes of repose" categorically bar express waivers.

Moreover, an issue of law is controlling where "the certified issue could have precedential value for a large number of cases." In re Suntrust Banks, Inc. ERISA Litig., 2011 WL 13824, at *2 (N.D. Ga. Jan. 3, 2011). Determinations based on time limits, "which go directly to the plaintiff's ability to maintain some or all of its claims, are precisely the type of legal issue that Congress intended to be addressed through the section 1292(b) procedure." Fed. Hous. Fin. Agency v. UBS Americas, Inc., 858 F. Supp. 2d 306, 337 (S.D.N.Y. 2012); see S.R. v. United States, 555 F. Supp. 2d 1350, 1360-61 (S.D. Fl. 2008); cf. Deen v. Egleston, 597 F.3d 1223, 1228-38 (11th Cir. 2010). By holding for the first time in this Circuit (and second time anywhere) that express waivers of the ERISA's six-year limit are invalid, the Dismissal Order exerts influence on hundreds of ERISA investigations and lawsuits seeking to remedy violations in this Circuit and nationwide.

B. Substantial Grounds Exist for Difference of Opinion on the Issue

Substantial grounds for difference of opinion clearly exist as to whether ERISA's six-year limitations period is subject to waiver by agreement of the parties. There are substantial grounds for difference of opinion when, as here, court rulings on an issue within the controlling circuit are conflicting, or when

there is an issue of broad application with "general relevance to other cases in the same area of law." See McFarlin v. Conseco Services, LLC, 381 F.3d 1251, 1259 (11th Cir. 2004). Correcting the district court's error in this case will resolve a conflict in the lower courts in this Circuit, while also resolving an important issue with relevance to numerous pending ERISA investigations and actions.

1. The district court misapplied this Court's precedent in *Pugh*

The district court acknowledged that "[n]o published opinion has weighed in on the question of whether the [the six-year limit] in § 1113 can be waived." Ex. 2 at 4. In determining that parties cannot expressly waive ERISA's six-year limit, the district court relied on a perceived distinction between "statutes of repose" and "statutes of limitations" for express waivers that finds no basis in Pugh. See 158 F.3d at 533-34. In Pugh, this Court considered whether parties may waive time limits in two sections of the federal Bankruptcy Code, and this Court explicitly rejected as irrelevant the categorical distinction between "statutes of repose" and ordinary "statute of limitations." Id. This Court held that it is "more conductive to reasoned analysis . . . to [determine] . . . whether [limitations] provisions constitute grants of subject matter jurisdiction that leave a court without any authority to hear certain proceedings . . . after the limitations period has elapsed, or whether they are true statutes of limitations." Id. (emphasis added). Therefore, a statutory provision setting a federal time limit, like ERISA section 413(1), is waivable under Pugh

unless Congress intended the provision to constitute a grant of subject-matter jurisdiction and not merely to set forth a limitations period. Id.

To determine whether the time limits at issue were non-jurisdictional and thus waivable, Pugh exhaustively analyzed Congressional intent, looking to "the plain language of [the] provisions, the decisions of other courts, the legislative history of the provisions, and the statutory scheme." Id. at 538. Pugh noted that Supreme Court decisions, such as Midstate Horticultural Co. v. Pennsylvania R.R. Co., 320 U.S. 356, 360 (1943), "confirm[] the important role that legislative intent plays in determining whether a limitations period can be waived or tolled." 158 F.3d at 537.[1] Pugh rejected the Sixth Circuit's contrary conclusion in In re Butcher, 829 F.2d 596 (6th Cir. 1987), that one of the bankruptcy limitations periods at issue was "automatically" jurisdictional and non-waivable just because it was located in the same part of the statute that created the cause of action. 158

[1] The district court incorrectly concluded that Midstate supported its dismissal. Ex. 2 at 6. In Midstate, the Supreme Court treated the statute of limitation in the Interstate Commerce Act as jurisdictional without calling it a statute of repose or suggesting that all statutes of repose are jurisdictional. 320 U.S. at 364-67. Instead, the Court analyzed the statutory language, structure, and legislative history at issue to conclude that the time limitation dictated the courts' jurisdiction and therefore could not be voluntarily waived. Id. Two years later, the Supreme Court read Midstate as holding that courts must determine whether waiver of a right "affecting the public interest . . . contravenes the statutory policy" by examining "specific Congressional intent." Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 704-05 (1945). The district court's analysis and conclusion regarding ERISA section 413(1) are inconsistent with these authorities.

F.3d at 535. This Court called Butcher "devoid of analysis" and an example of the "categorical approach" that "[t]he Supreme Court has rightly rejected." Id.; see id. at 534 (also rejecting a "semantic analogy" between the provisions and "the typical statutes of limitations noted by the Court"). Instead, Pugh, 158 F.3d at 536, favorably cited In re Iron-Oak Supply Corp., 162 B.R. 301, 307 (Bankr. E.D. Cal. 1993), which held that a bankruptcy time limit is waivable because the "legislative scheme" did not "unequivocal[ly] and unambiguous[ly]" deem it jurisdictional.

This Court's decision in Pugh thus rejects any approach that deems a limitations period "jurisdictional" and non-waivable without identifying a specific legislative intent. This Court *en banc* reaffirmed Pugh and used its framework to find another bankruptcy time limit non-jurisdictional. In re Trusted Net Media Holdings, LLC, 550 F.3d 1035, 1042-44 (11th Cir. 2008) (en banc). Trusted Net Media affirmed that, consistent with Pugh, Congress must "'clearly state[ ]'" an intent to render a time limit jurisdictional. Id. at 1042 (quoting Arbaugh v. Y & H Corp., 546 U.S. 500, 515-16 (2006)). This Court's analysis in Pugh is not limited to cases under the Bankruptcy Code, 158 F.3d at 537 (citing cases regarding the Sherman Antitrust Act and the Interstate Commerce Act), and this Court has cited Pugh for non-bankruptcy time limits. E.g., Davenport Recycling Assocs. v. C.I.R., 220 F.3d 1255, 1259-1260 (11th Cir. 2000) (tax code).

The district court did not follow Pugh. Rather, the court suggested in its

Reconsideration Order that Pugh was called into question by Rogers v. Nacchio, 241 F. App'x. 602, 605 (11th Cir. July 12, 2007), an unpublished and non-precedential decision regarding the limitations period for asserting a private action under the Securities Exchange Act, because Nacchio allegedly "stat[ed]" in "decidedly categorical" fashion "that a statute of repose cannot be tolled." Ex. 3 at 3. But Nacchio does not adopt such a categorical rule. In stating that "tolling principles do not apply to the five-year statute of repose" in the Securities Exchange Act, Nacchio simply applied binding Supreme Court precedent which had held that the almost-identically worded three-year period of repose that previously applied to such actions was not subject to equitable tolling by a court based on the defendants' fraudulent or misleading conduct. Nacchio, 241 Fed. App'x. at 605 (citing Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 363 (1991)). Nacchio says nothing about an express waiver of a limitations period. Id. Lampf, the Supreme Court decision on which Nacchio's timeliness holding relied, also did not reach any categorical conclusions. Rather, Lampf analyzed the text and structure of the specific time limit, as well as commentary regarding congressional intent behind it, to conclude that the limitations period was not subject to equitable tolling doctrines; it did not address express waiver. 501 U.S. at 363 (citations omitted). This Court noted that Lampf's holding is narrowly tied to the securities statute in that case and not directly

applicable to other federal statutes. See Moore v. Liberty Nat'l Life Ins. Co., 267 F.3d 1209, 1215 n.1 (11th Cir. 2001). The district court's attempt to use Nacchio to justify its failure to follow Pugh is unpersuasive. Left uncorrected, the district court's decision will only confuse other courts on the vitality of Pugh for analyzing waivers of federal time limits in general, and the ERISA time limit at issue here.

2. The district court failed to properly apply Supreme Court precedent

This Court's holding in Pugh that limitations periods are waivable absent specific legislative intent to the contrary is reinforced by the recent line of Supreme Court cases holding that federal time bars are only jurisdictional if Congress has "'clearly stated' as much." See, e.g., Kwai Fun Wong, 135 S. Ct. at 1632 (quoting authorities). The Supreme Court has "'repeatedly stated that the enactment of time-limitation periods . . . without further elaboration, produces defenses that are nonjurisdictional and thus subject to waiver and forfeiture.'" Holland v. Florida, 560 U.S. 631, 645 (2010) (citation omitted); see John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 133 (2008) (non-jurisdictional federal time limits are generally "subject to rules of forfeiture and waiver"). Thus, in Kwai Fun Wong, for example, the Court held that the limitations period in the Federal Tort Claims Act is non-jurisdictional because Congress "provided no clear statement indicating that [it] [was one of] the rare statute of limitations that can deprive a court of jurisdiction." 135 S. Ct. at 1632. In so holding, the Court emphasized that parties

"must clear a high bar to establish that a statute of limitations is jurisdictional" and that "most time bars are nonjurisdictional." Id. (citation omitted). The Court used the same framework in Musacchio v. United States to hold that the general statute of limitations for federal crimes, 18 U.S.C. §3282(a), is non-jurisdictional and waivable. 136 S. Ct. 709, 717 (2016). Congress did not make the "necessary clear statement" in section 3282(a); "[r]ather, the statutory text, context, and history establish that § 3282(a) imposes a non-jurisdictional defense." Id.

Under these authorities, a federal limitations period is waivable unless the party claiming otherwise can establish that Congress specifically intended the statute to deprive courts of jurisdiction once the limitations period elapses. E.g., Pugh, 158 F.3d at 533-34; Musacchio, 136 S. Ct. at 717; Kwai Fun Wong, 135 S. Ct. at 1632. These authorities follow the well-established rule that "absent some affirmative indication of Congress' intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties." United States v. Mezzanatto, 513 U.S. 196, 201 (1995).

Defendants have not and cannot make such a showing. Congress never stated that ERISA's time limits are jurisdictional; in fact, ERISA's text, structure and history indicate otherwise. See Sec'y's Briefs (Dkts. 10, 20-1, 26-1); see Perez v. PBI Bank, Inc., 69 F. Supp. 3d 906, 910 (N.D. Ind. 2014) (agreeing with the Secretary that "Congress has not spoken so clearly that the limitations provision in

29 U.S.C. § 1113 must be deemed jurisdictional"). For example, ERISA's limitations and jurisdictional provisions are separate. Id.; compare Pugh, 158 F.3d at 538. Under Pugh, because Congress did not clearly state that section 413(1) is jurisdictional, the six-year limitations period is waivable. At a minimum, these authorities establish substantial grounds for a difference of opinion on the correctness of the district court's analysis of section 413(1). Certification permits this Court to correct the district court's misapplication of binding precedent.

3. Numerous authorities conclude that statutes of repose are waivable

Even those authorities that have considered whether statutes of repose are waivable reach a different outcome than the district court below – further presenting substantial grounds for a difference of opinion. In Commodity Control, the District Court for the Southern District of Florida recently reached a different outcome. Ex. 4 at 7-8. The court ruled that, even if ERISA's six-year limit is a statute of repose, it can be expressly waived. Id. In so ruling, the court "agree[d] with [the] decisions" of "courts in other circuits [that] have held that parties can modify, extend, or waive a statute of repose based on a written agreement between the parties." Id. (citing cases). Commodity Control relied on the Seventh Circuit's statement that "'[a] statute of repose and a statute of limitations are ordinary defenses to liability, differing from each other only in length, accrual, and tolling rules . . . Both normally are waivable.'" Id. at 8 (quoting J.E. Liss & Co. v. Levin,

201 F.3d 848, 850 (7th Cir. 2000), abrogated on other grounds by Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 123 (2002)); see Solis v. Seibert, 2011 WL 398023, at *9 (M.D. Fl. Feb. 4, 2011) (finding Secretary's action timely based on parties' agreement).

After Commodity Control, the Supreme Court of Colorado held in Lewis v. Taylor that a Colorado limitations period that "contains the language of a statute of repose" may be waived by mutual agreement. 375 P.3d 1205, 1209, 1211-12 (Colo. 2016). The Court echoed Pugh's interpretation of Midstate, noting that "[t]o the extent Midstate created a general[] . . . rule regarding tolling statutes of repose, that rule can best be characterized as a directive to consider the legislative intent and policy purposes behind each statute under consideration, not as a universal prohibition on tolling." Lewis, 357 P.3d at 1209, 1211-12. Lewis supports the outcome in Commodity Control and undermines the district court's analysis here.

Where district courts within a circuit disagree regarding a legal issue *and* the issue is one of first impression, substantial grounds for difference of opinion clearly exist. Dial v. Healthspring of Ala., 612 F. Supp. 2d 1205, 1206-07 (S.D. Ala. 2007); see W. Tenn. Chapter of Associated Builders & Contractors v. Memphis, 138 F. Supp. 2d 1015, 1019 (W.D. Tenn. 2000). Both factors are satisfied here, because an intra-circuit split exists, and the issue is one of first impression that has neither been addressed by this Court nor analyzed by any other

federal court of appeals.

The district court here relied on decisions that do not support its conclusion that ERISA section 413(1) is not waivable and do not address Pugh's and Kwai Fun Wong's jurisdictional approaches. For example, the district court cited to the Supreme Court's decision in CTS Corp. v. Waldburger, 134 S. Ct. 2175 (2014), but that decision is inapposite and does not otherwise supersede Pugh's framework. In CTS, the Court determined that North Carolina's statute of repose is not preempted by the discovery rule in the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). 134 S. Ct. at 2187. In arriving at this conclusion, the Court did note that "state-enacted" "statutes of limitations" are generally subject to equitable tolling, while "statutes of repose" are not. Id. at 2182-83. However, the Court did not opine on express waivers, and the Court based its holding on the specific legislative intent behind the North Carolina law. Id. at 2187. As Lewis noted, "the policy concerns" behind CTS's treatment of the North Carolina statute of repose—"freeing defendants from the lingering threat of a lawsuit"—"do not apply. . . where the parties expressly agree[] not to assert. . . time limitations." 375 P.3d at 1212. The Supreme Court's conclusion that North Carolina's statute of repose is not preempted by CERCLA does not support a ruling here that ERISA section 413(1) cannot be expressly waived.

The district court's Dismissal Order cited other cases that are equally

inapposite. Five of the cases construe state statutes of repose, rather than federal time limits, and do not establish any categorical rules about statutes of repose. See Roskam Baking Co., Inc. v. Lanham Mach. Co., 288 F.3d 895, 903 (6th Cir. 2002) (deciding who has to plead the statute of repose under Michigan law); Fencorp Co. v. Ohio Ky. Oil Corp., 675 F.3d 933, 940 (6th Cir. 2012) (interpreting Ohio law to decide if defendants had vested rights to statute of repose); Moore v. Liberty Nat'l Life Ins. Co., 108 F. Supp. 2d 1266, 1275 (N.D. Ala. 2000) (refusing to apply an Alabama statute of repose to federal claims), aff'd, 267 F.3d 1209, 1215-19 (11th Cir. 2001); Stone & Webster Eng'g Corp. v. Duquesne Light Co., 79 F. Supp. 2d 1, 8 (D. Mass. 2000) (analyzing whether Pennsylvania courts would find a state statute of repose waivable); Sharon Steel Corp. v. Workmen's Comp. Appeal Bd., 670 A.2d 1194 (Pa. 1996) (holding that under Pennsylvania law, a plaintiff cannot revive a claim extinguished by a statute of repose). The sixth decision, Nat'l Credit Union Admin. Bd. v. Barclays Capital Inc., 785 F.3d 387, 390 (10th Cir. 2015), stated in a one-sentence dictum that a federal securities time limit was not waivable. However, this dictum was "devoid of analysis," Pugh, 158 F.3d at 535, and not the product of an examination of legislative intent that Pugh requires.

Indeed, many, if not most, courts recognize that state statutes of repose are waivable. E.g., Lewis, 375 P.3d at 1209, 1211-12 (limitations period that "contains the language of a statute of repose" waivable by agreement); Christie v.

Hartley Const., Inc., 766 S.E.2d 283, 287-88 (N.C. 2014) (permitting express waivers of statutes of repose). These decisions undermine the Dismissal Order.

Moreover, the district court cited Moore, which recognized that "blanket repose rules barring all federal claims after a period of time has passed do not exist to bar federal actions; such rules appear sparingly among federal statutes . . . and do not form a regular feature of the landscape in the prosecution of federal rights." 108 F. Supp. 2d at 1275. This Court adopted this conclusion and recognized that "[t]he absence of absolute rules of repose through most of the federal legal landscape makes it difficult to contend that statutes or rules of repose are 'universally familiar' in federal litigation." Moore, 267 F.3d at 1215 & n.1. The district court's use of inapposite state cases to create a rule of repose in ERISA that bars waivers will only encourage other courts to improperly import state rules into the federal landscape, a result Congress and this Court never intended.

C. Interlocutory Review Will Materially Advance this Case's Termination

Interlocutory review of the certified question will address the statute of limitations issue that is the basis for dismissing the Secretary's chief claims relating to the Plan's stock purchases and subsequent distributions to participants terminated more than six years before the Secretary's suit was filed. The remaining claims, not dismissed by the court, concern identical Plan distributions to participants terminated within the six years before the suit was filed. Both

distribution claims nevertheless overlap significantly, and resolving these claims together eliminate the possibility of duplicative discovery. While the dismissed claims challenging the price in the stock transactions are analytically separate from the distribution claims, the two sets of claims are still intertwined in important ways. First, the accuracy of a participant's distribution may depend on the proper value for the stock. See generally Herman v. NationsBank Tr. Co., 126 F.3d 1354, 1357 (11th Cir. 1997). Second, fact discovery for both sets of claims would involve the same fiduciaries and potentially the same experts. Finally, relief for any of these claims would require an independent fiduciary because the Plan is now terminated. In pragmatic terms, the most cost-effective and efficient remedy is to have one independent fiduciary distribute any and all relief in one round of distributions rather than wait for separate claims to be appealed and, perhaps, following remand, another round of distributions. As the Certification Order notes, "there is a good chance that this case will come back for a second round if the Eleventh Circuit disagrees with this Court" and it would "significantly further the cause of judicial efficiency to resolve this question before continuing on with this matter." Ex. 1 at 3. See 16 Wright, Miller, & Cooper, Fed. Prac. & Proc. § 3930, at 426 & n.25 (2d ed. 1996); see also McFarlin, 381 F.3d at 1256-57.

IV. CONCLUSION

For the foregoing reasons, this Court should grant the Secretary's petition.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

G. WILLIAM SCOTT
Acting Associate Solicitor
Plan Benefits Security Division

THOMAS TSO
Counsel for Appellate and
Special Litigation
Plan Benefits Security Division

/s/ Stephen Silverman
STEPHEN SILVERMAN
Senior Trial Attorney
Plan Benefits Security Division
U.S. Department of Labor
Room N-4611
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5623 – Phone
(202) 693-5610 – Fax
Silverman.stephen@dol.gov

CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMIT

Certificate of Compliance with Type-Volume Limit,
Typeface Requirements, and Type-Style Requirements

1. This document complies with the word limit of Fed. R. App. P. 5(c)(1) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f):

   This document contains 4874 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because:

   This document has been prepared in a proportionally spaced typeface using Microsoft Word 2010, Times New Roman, 14 point font.

/s/ _____
Stephen A. Silverman
Attorney for U.S. Department of Labor
Dated: December 1, 2016

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2016, one copy of the foregoing Petition for Permission to Appeal Certified Interlocutory Order Pursuant to 28 U.S.C. § 1292(b), and accompanying exhibits, was served using United Parcel Service (UPS), overnight delivery on the following individuals at the address below:

DAVID H. FLINT
MICHAEL H. FLINT
ANDREW J. LAVOIE
Schreeder, Wheeler & Flint, LLP
1100 Peachtree Street, N.E. Suite 800
Atlanta, GA 30309-4516
Telephone: (404) 681-3450
Facsimile: (404) 681-1046

E-mail: *dflint@swfllp.com*
E-mail: *mflint@swfllp.com*
E-mail: *alavoie@swfllp.com*

Attorneys for Defendants Robert N. Preston, TPP Holdings, Inc. d/b/a The Preston Partnership, LLC, and the TPP Holdings, Inc. Employee Stock Ownership Plan

/s/ _____
Stephen A. Silverman
Attorney for U.S. Department of Labor
Dated: December 1, 2016