No. 17-10833

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

EDWARD C. HUGLER, Acting Secretary, U.S. Department of Labor,
Plaintiff-Appellant,

v.

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

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

SECRETARY OF LABOR'S OPENING BRIEF

NICHOLAS C. GEALE
Acting 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

U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
CERTIFICATE OF INTERESTED PERSONS
PURSUANT TO 11th Cir. R. 26.1-1

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.

Wall, Jeffrey B., Acting Solicitor General of the United States

Geale, Nicholas C., Acting Solicitor of Labor

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

Hauser, Timothy D., Deputy Assistant Secretary for Program Operations, Employee Benefits Security Administration, U.S. Department of Labor

LaVoie, Andrew J.

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

Hugler, Edward C., Acting U.S. Secretary of Labor

Preston, Robert N.

Schreeder, Wheeler & Flint, LLP

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

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

STATEMENT REGARDING ORAL ARGUMENT

The Secretary of Labor ("Secretary") requests oral argument. This appeal concerns whether the time limitation contained in Employee Retirement Income Security Act ("ERISA") section 413(1), 29 U.S.C. § 1113(1), is subject to express waiver. This issue has split the lower courts in this Circuit, and the decision in this case will determine whether a party may expressly waive the limitations defense under section 1113(1) in order to allow the Secretary and private ERISA parties to defer litigation in an effort to resolve ERISA violations without judicial intervention. The Secretary believes that oral argument will benefit the Court's consideration of this case.

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STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The Secretary brings this action under 29 U.S.C. §§ 1132(a)(2) and 1132(a)(5). The United States District Court for the Northern District of Georgia had federal question jurisdiction under 28 U.S.C. § 1331, and exclusive subject matter jurisdiction under 29 U.S.C. § 1132(e)(2).

The Court of Appeals for the Eleventh Circuit granted the Secretary's petition for permission to file an interlocutory appeal from the district court's October 27, 2015 and May 2, 2016 orders, and has jurisdiction pursuant to 28 U.S.C. § 1292(b). A notice of appeal was entered on February 24, 2017.

STATEMENT OF THE ISSUE

Is the limitation of actions contained in ERISA section 413(1), 29 U.S.C. § 1113(1) subject to express waiver?

STATEMENT OF THE CASE

A. The Secretary's Fiduciary Breach and Prohibited Transaction Claims

Defendant Robert Preston was the owner and Chief Executive Officer of Defendant TPP Holdings, Inc. ("TPP") (collectively "Defendants"). Dkt. 1 ¶ 9.[1] In 2004, TPP established an ERISA-covered pension plan, the TPP Employee Stock Ownership Plan ("Plan" or "ESOP"), to provide retirement income for TPP

[1] Unless otherwise noted, the factual statements in this brief are based on the allegations in Secretary's Complaint.

employees. Id. ¶¶ 8, 10, 13-19. The Plan primarily invested in TPP stock. Id. The Plan purchased all of its TPP stock from Preston while he simultaneously served as the Plan trustee and, therefore, a fiduciary to the Plan under ERISA. Id. ¶¶ 7, 8, 12, 13. He was "responsible for administering and managing the assets of the Plan." Id. ¶ 11. TPP was the designated plan administrator and also a Plan fiduciary. Id. ¶ 7.

Preston sold TPP stock to the Plan on three occasions in 2004, 2006, and 2008. Id. ¶ 13. Over the course of those three stock transactions, the Plan paid Preston a total of $7 million for TPP stock, $6 million of which was paid in the 2006 and 2008 transactions at issue in this case. Id. ¶¶ 15, 17, 19. Preston, as both Plan trustee and the seller, acted simultaneously on both sides of the stock purchase transactions, representing adverse and conflicting interests (the Plan's interests as a buyer and his personal interests as a seller). See id. ¶ 25. Acting with this conflict of interest, Defendants "imprudently accepted and/or relied" on flawed valuation reports that inflated the value of Preston's TPP stock in both transactions. Id. Preston knew the reports were flawed and contained several errors, including: overly optimistic projections of TPP's growth, unrealistically low estimates of TPP's future expenses, and a failure to consider the "slowing economic conditions in the Company's industry and related industries." Id. ¶¶ 25-26. By knowingly relying on flawed and inflated valuations, Preston acted in his own interests when

he caused the Plan to overpay him for his stock, thereby engaging in self-dealing with plan assets, which is prohibited by ERISA. Id. ¶¶ 27, 40.

Less than two years after the Plan's final stock purchase, the stock was worthless. Id. ¶ 28. "Defendant Robert N. Preston sent a memo to the ESOP participants on December 17, 2009, notifying them that the ESOP was being terminated because the most recent valuation reflected that the Company had no value." Id. The Plan was officially terminated on December 18, 2009, and the employees lost their entire retirement savings in the Plan. Id.

The Secretary of Labor is responsible for enforcing ERISA to protect the interests of plan participants and beneficiaries in their retirement benefits and to recover losses suffered by plans caused by fiduciary breaches. 29 U.S.C. §§ 1132, 1134. On December 30, 2014, the Secretary sued Defendants to recover the Plan's losses caused by Defendants' violations of ERISA. The Complaint alleges that Defendants violated their ERISA fiduciary duties of loyalty, prudence, and fidelity to the terms of the Plan, 29 U.S.C. § 1104, entered into transactions prohibited by ERISA, 29 U.S.C. § 1106(a), and engaged in prohibited self-dealing, 29 U.S.C. § 1106(b), when they caused the Plan to purchase TPP stock from Preston for greater than fair market value in 2006 and 2008, resulting in a substantial loss to the employees' retirement funds. Dkt. 1 ¶¶ 25-27, 40-41.

The Secretary also sued Defendants for several other fiduciary breaches and

prohibited transactions. These violations arose from Defendants' disloyal and imprudent actions related to their erroneous distributions of employer stock to participants and their co-mingling of the Plan's assets with corporate funds. Id. ¶¶ 30-41. The Secretary alleges that Defendants breached their fiduciary duties by failing to pay distributions required by the Plan to over 330 participants in the Plan. Id. ¶¶ 30-37, 40-41. For the 2007 plan year, Defendants allocated 40,299 fewer shares of TPP stock to participants' accounts than the Plan required. Id. ¶¶ 30-31. During 2007 and 2008 plan years, Defendants failed to distribute shares to certain participants who had terminated their employment even though the Plan had promised that "participants are 100% vested in their ESOP account balances at termination." Id. ¶¶ 32-37. The Secretary also asserts that Defendants committed prohibited self-dealing in violation of ERISA by permitting a bank account containing Plan assets to be used as a corporate checking account from April to June 2009. Id. ¶¶ 38-41. Among other things, the Secretary seeks to restore to the Plan all losses caused by Defendants' violations, and to permanently enjoin Defendants from serving as ERISA fiduciaries. Id. at 13.

B. The Secretary Delayed Filing Suit in Reliance on Defendants' Express Waivers of Any Timeliness Defense.

Prior to filing suit, the Secretary conducted an investigation of Defendants' fiduciary conduct in administering the Plan pursuant to ERISA. Cf. Dkts. 10-1 to 10-4. During that investigation, Defendants entered into four separate agreements

with the Secretary in which they explicitly waived their rights to raise affirmative defenses based on the timeliness of the suit. That included any defense based on ERISA's six-year limitations period contained in 29 U.S.C. § 1113(1), which states that fiduciary breach claims must be brought within six years of the breach. Dkts. 10-1 to 10-4.[2] The purpose of these agreements was to allow the parties to "meet and exchange additional information with respect to claims under Title I of ERISA that may be asserted by the Secretary, and if appropriate, to negotiate with respect to such claims." See, e.g., Dkt. 10-1 at 1. The parties intended the agreements to achieve this purpose through two provisions. First, the Secretary agreed not to "institute legal proceedings against" Defendants before a specified future date.

[2] 29 U.S.C. § 1113 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 (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or
> >
> > (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

(emphasis added).

See, e.g., id. ¶ 1. Second, Defendants agreed that the "running of the statute of limitations contained in ERISA § 413, 29 U.S.C. § 1113 . . . shall be tolled" for a specified period of time "with respect to any action brought by the Secretary under Title I of ERISA" concerning the Plan, and that they would not "assert in any manner the defense of statute of limitations, the doctrine of waiver, laches, or estoppel, or any other matter constituting an avoidance of the Secretary's claims that is based on the time within which the Secretary commenced such action." See, e.g., id. ¶ 2.

The parties signed the first of these agreements in August 2011, well before the six-year time limitation had run on any claims filed in this case. Dkt. 10-1. In these agreements, Defendants expressly agreed to waive any timeliness defenses to any of the Secretary's claims that could have been timely filed within ERISA's time-limitations on July 6, 2011. Dkts. 10-1 to 10-4. Under ERISA's six-year limitations period, a party could have timely sued on July 6, 2011, for any breach that occurred on or after July 6, 2005 (six years prior to suit). See 29 U.S.C. § 1113(1). Accordingly, by waiving the six-year limitations period for any claim that could have been timely filed on July 6, 2011, Defendants waived their six-year limitations defense for any breach that occurred on or after July 6, 2005. Compare id. with Dkts. 10-1 to 10-4. On the other hand, they expressly preserved their defenses under the six-year statute for any breach that occurred before July 6,

2005, because those breaches did not occur within the six-year period before July 6, 2011. E.g., Dkt. 10-1 ¶ 3. The first agreement was extended three times, preserving Defendants' July 6, 2011 waiver date in each extension. See Dkts. 10-2 to 10-4. The last agreement was signed in May 2014, with an expiration date of December 31, 2014. Dkt. 10-4.

The Secretary relied on Defendants' express waivers of timeliness defenses and complied with his agreement to defer filing suit to give the parties an opportunity to exchange information and settle this case without judicial intervention. See Dkts. 10-1 to 10-4. The parties did not reach a settlement, so the Secretary filed suit on December 30, 2014. See Dkt. 1. On its face, the Secretary's complaint only alleges breaches that occurred after July 6, 2005.[3] Defendants expressly waived any timeliness defense to those claims under the six-year statute in the agreements. E.g., Dkts. 10-1 to 10-4.

Agreements to expressly waive timeliness defenses are not unusual in light of the enormity of the Secretary's enforcement responsibilities and potential defendants' interests in not being sued. The Secretary is responsible for enforcing ERISA to protect the participants and beneficiaries of over 680,000 retirement plans and approximately 2.3 million health and welfare plans holding over $8.7

[3] The Secretary did not sue for fiduciary breaches and prohibited transactions arising from the Plan's 2004 purchase of stock from Preston.

trillion in assets. Dkt. 26-3 ¶ 2. Potential defendants voluntarily waive their timeliness defenses during ERISA investigations conducted by the Secretary in order to allow the parties the opportunity to resolve the matter without a lawsuit. As of August 2016, the Secretary had signed such agreements with potential defendants willing to waive their timeliness defenses in approximately 235 pending matters nationwide. Id. ¶ 3.

C. Defendants Violated Their Agreements When They Moved to Dismiss the Secretary's Complaint Based on Timeliness Defenses that They Expressly Waived.

Defendants waived their right to assert the six-year time limit as an affirmative defense to any of the Secretary's claims for fiduciary breaches and prohibited transactions that occurred after July 6, 2005. Supra at 4-7. Despite their prior agreements and express waivers, Defendants moved to dismiss all of the Secretary's claims that were based on violations that occurred before December 30, 2008, that is, more than six years before the suit was filed on December 30, 2014. Dkt. 5. Defendants argued that their waivers and agreements were invalid and unenforceable because ERISA's six-year limitations period "establishes an unyielding statute of repose" that is not subject to express waiver by agreement of the parties. Dkt. 5-1 & Dkt. 14 at 6-17. Accordingly, Defendants asserted that all claims for breaches that occurred prior to December 30, 2008, were untimely, including the Secretary's claim that Defendants breached their duties by buying

TPP stock from Preston for greater than fair market value in 2006 and 2008 and the Secretary's claim that Defendants failed to make required distributions to Plan participants during the 2007 and 2008 plan years. Compare Dkt. 17 (Dismissal Order) with Dkt. 18 (Secretary's Response to Court Regarding Remaining Claims).

D. The District Court Dismissed Most of the Secretary's Claims.

The district court agreed with Defendants that the six-year period in 29 U.S.C. § 1113(1) is a statute of repose and categorically held "that a statute of repose is not subject to waiver – even express waiver." Dkt. 17 at 3-4. The district court relied on the distinction between statutes of repose and limitations described in the Supreme Court's decision in CTS v. Waldburger, 134 S. Ct. 2175 (2014):

> In the ordinary course, a statute of limitations creates "a time limit for suing in a civil case, based on the date when the claim accrued." . . . A statute of repose, on the other hand, puts an outer limit on the right to bring a civil action. That limit is measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant.

Dkt. 17 at 3 (quoting CTS, 134 S. Ct. at 2182).

The district court accordingly dismissed all of the Secretary's claims that arose more than six years before the suit was filed. Id. at 4-7. Certain claims concerning Plan distributions as well as claims that Plan assets were commingled with corporate assets survived the dismissal because they concerned breaches that occurred after December 30, 2008. Dkt. 18.

The Secretary moved for reconsideration of the dismissal order, arguing that

the district court's categorical approach to "statutes of repose" was inconsistent with the Supreme Court's and this Court's precedents. Dkt. 20-1. 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 United States 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. The district court denied the Secretary's reconsideration motion, but acknowledged that the dismissal involved a controlling question of law as to which there is substantial ground for difference of opinion. Dkt. 25 at 6.

E. The Secretary Obtained Interlocutory Review.

The Secretary moved for an interlocutory appeal and the district court certified its order pursuant to 28 U.S.C. § 1292(b). See Dkt. 29. The Secretary then timely petitioned this Court for interlocutory review. Case No. 16-90019-B (filed Dec. 2, 2016). On February 24, 2017, this Court granted the Secretary permission "to appeal from the district court's October 27, 2015 order dismissing some of the [Secretary's] lawsuit as untimely under 29 U.S.C. § 1113(1), and from the district court's May 2, 2016 order denying reconsideration of the earlier order." Id. (filed Feb. 24, 2017).

STANDARD OF REVIEW

The district court granted Defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), concluding that Defendants' express waivers of timeliness defenses were ineffective and the Secretary's claims concerning events that occurred prior to December 30, 2008, were time-barred under 29 U.S.C. § 1113(1). Dkt. 17 at 7. This Court "review[s] the district court's interpretation and application of statutes of limitations de novo." Ctr. for Biological Diversity v. Hamilton, 453 F.3d 1331, 1334 (11th Cir. 2006).

SUMMARY OF THE ARGUMENT

The Supreme Court has repeatedly held that that a federal statutory limitations period does not deprive the federal courts of subject-matter jurisdiction and is a waivable affirmative defense, *unless* Congress clearly expressed an intent to the contrary. To "clear [the] high bar" to establish that a federal time limit is jurisdictional, Kwai Fun Wong, 135 S. Ct. at 1632, a clear congressional intent must be demonstrated by the statute's plain text, its context, and its legislative history.

This Court in Pugh adopted and applied this well-established principle as dispositive for determining whether a federal statutory limitations period can be waived. 158 F.3d at 530, 533-34. Pugh expressly rejected the argument that a limitations period cannot be waived if it is construed to be a "statute of repose" and

may only be waived if it is construed to be a "statute of limitations." Therefore, this Court has rejected the very foundation of the district court's decision and Defendants' argument in this case. Instead, this Court in Pugh applied the settled principle: Federal statutory limitation periods are non-jurisdictional and waivable absent a clearly expressed congressional intent to the contrary.

Applying this principle, this Court must hold that ERISA's six-year limitations period, 29 U.S.C. § 1113(1), is an ordinary federal time limit that is both non-jurisdictional and waivable. Neither Defendants nor the district court identify a clear congressional intent to withhold jurisdiction from the federal courts to redress fiduciary breaches that occurred more than six years before a suit is filed. In fact, an examination of the plain language of the statute, its context, the statutory structure, the legislative history, and the regulatory scheme all support the conclusion that ERISA's six-year limitations period is non-jurisdictional and subject to express waiver.

Finally, even if the district court correctly decided that ERISA's six-year limitations period is a statute of repose and that the distinction between statutes of repose and statutes of limitations is relevant to the question presented, Defendants' waivers remain valid and enforceable. Contrary to the district court's categorical conclusion that statutes of repose are not subject to express waiver, this Court's precedent and persuasive federal and state authorities all support the conclusion

that "statutes of repose" are subject to express waiver.

ARGUMENT

I. A Federal Statutory Limitations Period is Waivable Unless a Close Examination of Congressional Intent Clearly Indicates the Limitation is a Jurisdictional Requirement that Bars Waivers.

A. This Court's Decisions in *Pugh* and *Trusted Net Media* Set the Analytical Framework: Whether a Federal Time Limit is Waivable Turns On Whether The Limit is Jurisdictional or Non-Jurisdictional.

ERISA's six-year limitations period states in pertinent part: "No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part. . . (1) six years after . . . the date of the last action which constituted a part of the breach or violation, or . . . in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation[.]" 29 U.S.C. § 1113(1). Whether this provision is subject to express waiver is dictated by this Court's decision in Pugh and its en banc endorsement of Pugh's analysis in In re Trusted Net Media Holdings, LLC, 550 F.3d 1035, 1042-44 (11th Cir. 2008).

In Pugh, the Court considered whether parties can waive the limitations period in two sections of the federal Bankruptcy Code. 158 F.3d at 530. The Court held that the answer to that question did not turn on whether the statutes could be characterized as a "statutes of repose or statutes of limitation" or whether they could be construed as "'substantive' (also called 'jurisdictional') or

'procedural' statutes of limitations." Id. at 533-34 (citations omitted). The Court explicitly rejected as irrelevant both of these analytical approaches. Id.[4]

Instead, this Court in Pugh decided that the dispositive question is whether the statutory provisions operated to divest a "court of subject matter jurisdiction once they have elapsed, or do these periods constitute statutes of limitations that can be waived." 158 F.3d at 530. This Court held that "[i]t is more conducive to reasoned analysis" to consider "whether these code provisions constitute grants of subject matter jurisdiction that leave a court without any authority to hear certain proceedings – i.e., that extinguish the right of action itself by divesting a court of its subject matter jurisdiction over certain proceedings – after the limitations period has elapsed, or whether they are true statutes of limitations that restrict the power of a court to grant certain remedies in a proceeding over which it has subject matter jurisdiction." Id. at 533-34 (citation omitted) (emphasis added). In short, to determine whether a federal time limitation can be waived, a court must decide whether Congress intended the limitation to deprive the court of subject matter jurisdiction; if not, a limitations period is waivable. Id. This Court, sitting en

[4] Neither the Supreme Court nor the Eleventh Circuit have ever described 29 U.S.C. § 1113(1) as a statute of repose. See Tibble v. Edison Int'l, 135 S. Ct. 1823, 1825 (2015) (calling section 1113(1) "the 6-year limitations period"); Brock v. Nellis, 809 F.2d 753, 754 (11th Cir. 1987) (calling section 1113 a "statute of limitations"). Whether section 1113(1) is technically a "statute of repose" is irrelevant to this case under Pugh's binding analysis.

banc, subsequently endorsed the Pugh analysis and required a "'clearly state[d]'" congressional intent to deprive a court of subject matter jurisdiction. Trusted Net Media, 550 F.3d at 1042-43 (quoting Arbaugh v. Y&H Corp., 546 U.S. 500, 515-16 (2006)).

Determining whether Congress clearly intended a statutory limitations period to be jurisdictional (and not waivable) or non-jurisdictional (and waivable) requires a close analysis of the provision. Pugh, 158 F.3d at 535-36. This Court rejected "relying wholly on th[e] semantic analogy" that the provisions at issue are "linguistically similar to the typical statutes of limitations noted by the [Supreme] Court." Id. at 534. The Court considered such an approach to be an example of the "categorical approach" that "[t]he Supreme Court has rightly rejected." Id. Indeed, Pugh concluded that the most-cited decision finding the bankruptcy code provisions jurisdictional was "unpersuasive" because it was "devoid of analysis" of congressional intent. Id. (discussing In re Butcher, 829 F.2d 596 (6th Cir. 1987)). Other rulings also "offer[ed] little analysis to support their position" that the bankruptcy code provisions at issue were jurisdictional, and were therefore "no more convincing." See id. at 536-37.

Pugh thus rejected any approach that categorizes a limitations period as "jurisdictional" and non-waivable without identifying a specific legislative intent. It instead requires a more searching examination of "the plain language of [the]

provisions, the decisions of other courts, the legislative history of the provisions, and the statutory scheme." 158 F.3d. at 538; id. at 534 (same). Accordingly, Pugh 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. Pugh, 158 F.3d at 536. Applying the foregoing principles, Pugh determined that, "[i]n this case, the legislative history and the statutory scheme confirm the conclusion that [the bankruptcy code provisions] are waivable statutes of limitations." Id. at 537.

Pugh also relied on Supreme Court decisions, such as Midstate Horticultural Co. v. Pennsylvania R.R. Co., 320 U.S. 356 (1943), in support of its analytical approach. 158 F.3d at 534, 537. In Midstate Horticultural, the Supreme Court closely analyzed the statutory language, structure, and legislative history of the Interstate Commerce Act before concluding that the Act's time limitation barred waivers or tolling. 320 U.S. at 364-67; see Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 704-05 (1945) (Midstate Horticultural requires courts to determine if waiver of a right "affecting the public interest . . . contravenes the statutory policy" by examining "specific Congressional intent."); see also Burnett v. New York Cent. R. Co., 380 U.S. 424, 426 (1965) ("The basic question to be answered in determining whether, under a given set of facts, a statute of limitations is to be

tolled, is one 'of legislative intent whether the right shall be enforceable . . . after the prescribed time.'") (quoting Midstate Horticultural, 320 U.S. at 360).

This Court en banc in Trusted Net Media reaffirmed Pugh and used its framework to find another bankruptcy time limit non-jurisdictional. 550 F.3d at 1042-44. In Trusted Net Media, the Court stated that a long line of Supreme Court authorities reinforce this Court's precedent holding that federal time limits are deemed to be "waivable statutes of limitation rather than restrictions on the [ ] courts' subject matter jurisdiction" unless Congress "'clearly state[d]'" an intent to render a time limit jurisdictional. Id. (citations omitted).

Pugh's framework is not limited to the Bankruptcy Code. Pugh itself cited cases involving the Sherman Antitrust Act and the Interstate Commerce Act in support of its analytical approach. 158 F.3d at 537. This Court has also cited Pugh in deciding non-bankruptcy time limits. See, e.g., Davenport Recycling Assocs. v. C.I.R., 220 F.3d 1255, 1259-1260 (11th Cir. 2000) (agreeing that limitations period in the tax code is a statute of limitations that does not implicate a court's jurisdiction); cf. United States v. DiFalco, 837 F.3d 1207, 1215 (11th Cir. 2016) (considering the validity of a waiver of the right to appeal a criminal sentence under 21 U.S.C. § 851, and stating "[t]he first question before us, then, boils down to whether § 851 is in fact a jurisdictional requirement"). Accordingly, Pugh's analysis also applies to 29 U.S.C. § 1113(1).

B. *Pugh*'s and *Trusted Net Media's* Analytical Framework is Confirmed by Supreme Court Precedent

Under Pugh and Trusted Net Media, the question of whether a federal time-limitation is waivable turns on whether the time limitation is jurisdictional or non-jurisdictional, and not whether the limitation is a "statute of repose" or not. Supreme Court precedent compels the conclusion that, ordinarily, federal time limitations, like 29 U.S.C. § 1113(1), are non-jurisdictional and thus waivable. 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").

The only exception to this general rule that federal statutory limitations periods are non-jurisdictional and waivable is the presence of "clear indication" of legislative intent to the contrary. See Musacchio v. United States, 136 S. Ct. 709, 716-17 (2016) (citation omitted). The Supreme Court recently reaffirmed that a party "must clear a high bar to establish that a statute of limitations is jurisdictional. In recent years, we have repeated held that procedural rules, including time bars, cabin a court's power only if Congress has 'clearly state[d]' as much." Kwai Fun Wong, 135 S. Ct. at 1632 (citations omitted) (emphasis added).

"'[A]bsent such a clear statement, . . . 'courts should treat the restriction as nonjurisdictional.'" Id. (citations omitted). Thus, "traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences . . . [a]nd in applying that clear statement rule, we have made plain that most time bars are nonjurisdictional." Id. (citing Sebelius v. Auburn Regional Medical Ctr., 133 S. Ct. 817, 825 (2013) (noting the rarity of jurisdictional time limits)). Accordingly, time limits are waivable unless Congress clearly states the limit is jurisdictional. See Eberhart v. United States, 546 U.S. 12, 13, 16 (2005) (even though Fed. R. Crim. P. 33's timeliness requirement is "rigid" and mandatory, it does not speak to district court's authority over subject matter of case and is not immune from forfeiture); DiFalco, 837 F.3d at 1218 ("In short, . . . 'where Congress does not say there is a jurisdictional bar, there is none.'") (citation omitted).

In order to determine whether Congress "clearly state[d] that a threshold limitation on a statute's scope shall count as jurisdictional," courts must ask if the statutory provision unequivocally "speak[s] in jurisdictional terms or refer[s] in any way to the jurisdiction of the district courts." Arbaugh, 546 U.S. at 515-16; Trusted Net Media, 550 F.3d at 1042 ("courts should look to whether Congress has included jurisdictional language in the statute in question [by asking] '[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count

as jurisdictional'") (quoting Arbaugh, 546 U.S. at 515-16) (emphasis in original). Discerning such congressional intent requires an examination of the "text, context, and relevant historical treatment" of the statutory time limit's "legal character," Reed Elsevier v. Muchnick, 559 U.S. 154, 166 (2010) (citation omitted), and "what they reveal about the purposes [the limitation] is designed to serve," Dolan v. United States, 560 U.S. 605, 610 (2010).

Recent Supreme Court decisions re-affirm this Court's conclusion in Pugh that "[t]he Supreme Court repeatedly has confirmed the important role that legislative intent plays in determining whether a limitations period can be waived or tolled." 158 F.3d at 537 (citations omitted). In Kwai Fun Wong, the Supreme Court concluded that "[n]either the text nor the context nor the legislative history indicates (much less does so plainly) that Congress meant to enact something other than a standard time bar" when it held that the limitations period in the Federal Tort Claims Act is non-jurisdictional. 135 S. Ct. at 1632 (Congress "provided no clear statement indicating that [it] [was one of] the rare statute of limitations that can deprive a court of jurisdiction."). The Court also used the same framework last year in Musacchio to hold that the general statute of limitations for federal crimes is non-jurisdictional and waivable, because Congress did not make the "necessary clear statement" to the contrary; "[r]ather, the statutory text, context, and history establish that [the provision] imposes a non-jurisdictional defense." 136 S. Ct. at

717.

II. ERISA's Six-Year Limitations Period, 29 U.S.C. § 1113(1), is Non-jurisdictional and Subject to Waiver.

Nothing in the text, context, or legislative history of 29 U.S.C. § 1113(1), or in the controlling case law supports any argument that this limitations period is jurisdictional or that Defendants' knowing and voluntary waivers of their timeliness defenses are unenforceable. Congress did not clearly state an intent that section 1113(1) is jurisdictional or bars waivers. In fact, a close examination of the statute indicates that Congress expected the time limit in section 1113(1) to be an ordinary time limitation that is non-jurisdictional and thus subject to waiver. Defendants cannot "clear [the] high bar" to establish that section 1113(1) is jurisdictional, see Kwai Fun Wong, 135 S. Ct. at 1632, and their waivers of their timeliness defenses are therefore valid and enforceable.

A. ERISA Contains No Clear Statement That the Time Limit in Section 1113(1) is Jurisdictional and Not Waivable.

Nothing in the text of 29 U.S.C. § 1113(1) "clearly states" that Congress intended it to be a jurisdictional limitation or expresses a legislative intent to bar voluntary waiver. Section 1113, entitled "Limitations of actions," sets the time limits for ERISA causes of actions but, like the time limits in Pugh, "'does not speak in jurisdictional terms or refer in any way to the jurisdiction of the . . . courts.'" Pugh, 158 F.3d at 538 (quoting Zipes v. Trans World Airlines, Inc., 455

U.S. 385, 394 (1982)); see Santiago-Lugo v. Warden, 785 F.3d 467, 473 (11th Cir. 2015). This Court in Santiago-Lugo contrasted a non-jurisdictional time limit with a jurisdictional time bar in the same statute by noting that the latter provision clearly stated that "[n]o court, justice, or judge shall have jurisdiction" after a period of time. 785 F.3d at 473. Section 1113 does not reference a court's jurisdiction to hear the Secretary's claims; it limits plaintiffs' actions but not the court's authority. 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"); see United States v. Wilson, 699 F.3d 789, 795–96 (4th Cir. 2012) (treating as non-jurisdictional a provision that speaks to plaintiff's, and not the court's powers). Furthermore, the statutory text of section 1113 contains a "fraud or concealment" exception to the six-year limitation, which is Congress' express statement that it did not establish the six-year time limit as an absolute bar against any form of extension. See 29 U.S.C. § 1113; Avila-Santoyo v. U.S. Atty. Gen., 713 F.3d 1357, 1362 (11th Cir. 2013) (en banc) (noting that regulatory exceptions support a limit's non-jurisdictional nature).

Like the statute in Pugh, the statutory language here "confirms the conclusion that" section 1113(1) is not an extraordinary jurisdictional bar but is instead an ordinary "waivable statute[] of limitations." Pugh, 158 F.3d at 538.

B. Congressional Intent and Policy Underlying ERISA's Time Limits Support the Availability of Voluntary Waiver.

All available indications of congressional intent point to a finding that 29 U.S.C. § 1113(1) is not jurisdictional and therefore subject to waiver. First, the location of section 1113(1) supports the conclusion that it is not jurisdictional. Congress put section 1113 in Part 4 of the statute (titled "Fiduciary Responsibility"), which sets forth the substantive fiduciary standards applicable to plan fiduciaries, see generally 29 U.S.C. §§ 1101-1113, and makes them personally liable for any fiduciary breach or violation, 29 U.S.C. § 1109. In contrast, enforcement of these fiduciary standards through civil actions brought under ERISA section 502, 29 U.S.C. § 1132, is covered in a different part of ERISA ("Part 5 – Administration and Enforcement"). Indeed, ERISA section 502(e), 29 U.S.C. § 1132(e), which is found in Part 5, is specifically entitled "Jurisdiction" and defines the state and federal courts' subject-matter jurisdiction over ERISA causes of actions. The location of section 1113(1) in a part of ERISA unrelated to jurisdiction counsels against imputing any Congressional intent that it is a jurisdictional limit and is hardly a clear statement that it is jurisdictional. See Reed Elsevier, 559 U.S. at 164-65; Avila-Santoyo, 713 F.3d at 1361. Thus, "[t]he entire structure of ERISA supports the conclusion that [section 1113(1)] is not a jurisdictional bar, but rather operates as a defense to an action." PBI Bank, 69 F. Supp. 3d at 910.

Second, consideration of how the time limit fits within the overall regulatory scheme supports a finding that Congress did not intend section 1113(1) to be jurisdictional. See Avila-Santoyo, 713 F.3d at 1362. Waivers of limitations defenses promote pre-litigation settlements and ensure that the Secretary will pursue in litigation only well-supported claims that cannot be resolved prior to litigation. Waivers of timeliness defenses are a mutually beneficial aspect of many enforcement regimes. Such agreements give parties under investigation more time to persuade the inquiring agency that no violation occurred without the public exposure caused by litigation. See, e.g., Hodgson v. Lodge 851, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO, 454 F.2d 545, 551-52 (7th Cir. 1971) (without waivers of Labor-Management Recording and Disclosure Act's statute of limitations, the Department of Labor would have to prosecute marginal cases which could easily be settled without suit; nearly half of cases over seven years had been settled without suit). Defendants here entered into four agreements to waive their defenses for just that purpose. See, e.g., Dkt. 10-1 at 1 ("the parties to this Agreement desire to enter into an agreement tolling the statute of limitations [] in order to meet and exchange information and, if appropriate, to conduct negotiations with respect to the [Secretary's claims]."). [5] ERISA's statutory

[5] As a general matter, the Enforcement Manual of the Employee Benefits Security Administration (EBSA) of the Department of Labor expressly endorses "tolling

scheme reflects a desire to encourage pre-litigation investigation and settlements. See 29 U.S.C. § 1134 (authorizing comprehensive investigations by the Secretary); 29 U.S.C. §§ 1132(l)(2), (3) (contemplating "settlement agreement[s] with the Secretary" and an administrative application process to waive or reduce civil penalties associated with violations). The statutory and regulatory regime also encourages resolution of prohibited transactions (such as those asserted in this case) through administrative procedures, including an exemption process, without resorting to litigation. See 29 U.S.C. § 1108(a); 29 CFR § 2570.35(a)(14) (permitting retroactive exemptions). Granting the Secretary the power to investigate, negotiate, and provide administrative procedures to resolve ERISA disputes suggests Congress intended the Secretary (representing the public interest) and parties to explore solutions to violations without litigation and did not intend to subject claims of ERISA violations to absolute time deadlines for filing suit.

Third, the potential for parallel civil and criminal investigations and proceedings under ERISA favors the conclusion that section 1113(1) is non-jurisdictional. See 29 U.S.C. §§ 1131 (criminal penalties), 1132 (civil enforcement); 18 U.S.C. § 664 (theft or embezzlement from employee benefit

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agreements" as useful tools to facilitate settlements and voluntary compliance with ERISA. EBSA Enforcement Manual, Chapter 34 "Voluntary Compliance Guidelines," § 9a, available at http://www.dol.gov/ebsa/oemanual/cha34.html (last visited March 9, 2017).

plans). Although civil cases can be filed and then stayed when parallel criminal proceedings are brought, a civil complaint need not be filed in many cases if the criminal case resolves all outstanding issues or the Department of Labor stays a civil investigation. Holding that section 1113(1) is jurisdictional or otherwise not subject to express waiver would disrupt this process because it may force the filing of a civil suit prior to the running of the limitations period, rather than allowing for waiver while the criminal process reaches its conclusion.

Fourth, the legislative history, although limited, does not support the conclusion that Congress intended section 1113 to be jurisdictional. Congress stated that "[t]he intent [of ERISA] . . . is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits due to participants." H.R. Rep. No. 93-553 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4655; S. Rep. No. 93-127 (1974), reprinted in 1974 U.S.C.C.A.N. 4838, 4871 (emphasis added); see 29 U.S.C. §1001(b) (recognizing as ERISA's policy to provide "ready access to the Federal courts" for participants and beneficiaries). One cannot plausibly infer that Congress removed jurisdictional obstacles only to tacitly substitute a jurisdictional obstacle in the form of a non-waivable six-year time limit. Pursuant to the legislative intent

analysis required by Circuit and Supreme Court precedent, section 1113(1) is non-jurisdictional and subject to waiver.

In addition, equity favors enforcement of waivers in agreements. It would be inequitable to permit Defendants to act inconsistently with their signed promises in the waiver and tolling agreements.[6] The Secretary acted consistently with those documents, foregoing an earlier filing in reliance on Defendants' promise not to raise any timeliness defense. If Defendants did not intend to abide by their representations and waivers, they should have notified the Secretary before they placed their signatures on multiple agreements. In Glus v. Brooklyn Eastern Dist. Terminal, 359 U.S. 231, 235 (1959), the Supreme Court affirmed that it would be inequitable to permit a defendant to defeat a claim based upon the statute of limitations where he gave assurances to the plaintiff that he would not insist on the

[6] The Secretary and Defendants entered into an agreement in which the Secretary agreed to forego suing for a period of time in exchange for Defendants' express waiver of their timeliness defenses. But Defendant's voluntary waiver alone (without an enforceable agreement or contract) would have been sufficient to overcome their timeliness defenses. E.g., Stange v. United States, 282 U.S. 270, 276 (1931) ("the provision requiring the Commissioner's signature was inserted for purely administrative purposes and not to convert [a voluntary waiver] into a contract"); Feldman v. C.I.R., 20 F.3d 1128, 1132 (11th Cir. 1994); United States v. Ford Motor Co., 497 F.3d 1331, 1336-37 (Fed. Cir. 2007) (government need not sign or accept letter waiving statute of limitations defense); Shambaugh v. Scofield, 132 F.2d 345, 347 (5th Cir. 1942) (rejecting defendants' argument that second and third tolling agreements were ineffective because unsigned by the Commissioner of Internal Revenue).

statute of limitations and the plaintiff relied on those assurances. The same is true here.

Accepting Defendants' argument could also have larger, unintended and unjust consequences. In Henderson v. Shinseki, the Supreme Court cautioned against the use of "jurisdictional" labels for federal time limits, because "the consequences that attach to the jurisdictional label may be so drastic" that it would "alter[ ] the normal operation of our adversarial system." 562 U.S. 428, 434 (2011); cf. Arbaugh, 546 U.S. at 511 (expressing concern about "less than meticulous . . . unrefined . . . 'drive-by jurisdictional rulings' that should be accorded 'no precedential effect'"). One concern that the Supreme Court has raised is that "[j]urisdictional rules may also result in the waste of judicial resources and may unfairly prejudice litigants." Henderson, 562 U.S. at 434. If the courts invalidated all express waivers during the Secretary's ERISA investigations, hundreds of millions of dollars of presently tolled claims would be considered untimely and thus unenforceable. More importantly, plan participants would immediately lose their rights to pension and health benefits based on their fiduciaries' false promises in waiver agreements to attempt to resolve their claims without costly litigation. Such a rule would unnecessarily burden the court system with future lawsuits that could otherwise be resolved amicably, and with unnecessary court-supervised discovery that could take place during the

Secretary's pre-litigation investigation pursuant to a waiver agreement. Neither ERISA nor the federal jurisprudence on statutes of limitations requires or countenances such a result. See Brock v. Nellis, 809 F.2d 753, 754 (11th Cir. 1987) (observing that "Congress evidently did not desire that those who violate [their fiduciary duty] could easily find refuge in a time bar").

C. The Ability to Waive ERISA's Six-Year Limitations Period is Supported by the Presumption that Statutory Rights Are Waivable and Background Common-Law Principles.

The conclusion that 29 U.S.C. § 1113(1) is waivable is further buttressed by two other overarching principles that govern federal statutory rights. First, statutory rights are presumptively waivable by agreement. New York v. Hill, 528 U.S. 110, 114 (2000). The Supreme Court has "'in the context of a broad array of constitutional and statutory provisions,' articulated a general rule that presumes the availability of waiver . . . absent some affirmative indication of Congress' intent to preclude waiver," or that a waiver would contravene public policy. Id. at 114, 116; United States v. Mezzanatto, 513 U.S. 196, 201 (1995) ("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."). As detailed above, allowing waiver of section 1113(1) by agreement furthers – rather than detracts from – the policies of ERISA. See supra at 23-29. Statutes of limitations such as section 1113(1) protect defendants against stale or unduly

delayed claims – concerns that are not present when defendants voluntarily waive these protections. See Hugler v. First Bankers Trust Servs., 2017 WL 1194692, at *8-*9 (S.D.N.Y. Mar. 30, 2017) (noting that a waiver of rights does not raise any policy concerns with respect to section 1113(1)). It "cannot be argued that" any supposed societal benefit derived from the six year limitations period set forth in section 1113(1) is "so central to" ERISA "that it is part of the unalterable 'statutory policy.'" Hill, 528 U.S. at 117 (citation omitted). The time limitation in section 1113(1) is a personal benefit, and its waiver does not contravene ERISA policy. See id. at 116-117 ("[i]t is not true that any private right that also benefits society cannot be waived."). As the district court in First Bankers Trust Services noted in its assessment of section 1113(1), "'[t]olling agreements allow parties to extend statutory periods while they evaluate their claims and defenses in the hope that they can resolve their dispute without litigation. In cases such as this one, such agreements can serve the interests of the parties, the public, and the courts.'" 2017 WL 1194692, at *9 (citation omitted); see also id. at *8 ("[Defendant's] interest in being free from liability after a legislatively-determined period of time is not implicated when, as here, it has contractually agreed to waive that right vis-à-vis a particular litigant.").

Second, the Supreme Court has stated that "[a]s applied to federal statutes of limitations, the inquiry begins with the understanding that Congress 'legislate[s]

against a background of common-law adjudicatory principles.'" Lozano v. Montoya-Alvarez, 134 S. Ct. 1224, 1232 (2014) (quoting Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991)). Waivers of timeliness defenses or agreements to toll are long-recognized in the common law. See, e.g., United States v. Buford, 28 U.S. 12, 29 (1830) ("the statute of limitations will bar a recovery of this claim, unless . . . by some promise or agreement between Morrison and Buford, the statute has been waived"); Heimeshoff v. Hartford Life & Acc. Ins. Co., 134 S. Ct. 604, 611 (2013) (noting the general rule that parties "are permitted to contract around a default statute of limitations"); see also Davis v. Humphreys, 747 F.3d 497, 499 (7th Cir. 2014) ("The Supreme Court treats tolling as one of those background understandings in American law that applies unless a statute modifies or excludes the doctrine."). Congress drafted ERISA's time limits, including section 1113(1), in light of the long-standing ability of parties to waive timeliness defenses by agreement, and there is no reason to believe that Congress intended to abrogate those rights.

III. The District Court Erred In Holding that ERISA's Six-Year Time-Limitation Cannot Be Expressly Waived.

The district court erred by following an analytical framework that has been rejected by this Court. In applying the incorrect analysis, the court erroneously adopted a categorical rule that statutes of repose cannot be expressly waived. Even assuming section 1113(1) is a statute of repose, no such categorical rule exists.

A. The District Court's Analysis Was Inconsistent with *Pugh* and *Trusted Net Media.*

The district court failed to follow Pugh and Trusted Net Media. Instead of engaging in the requisite jurisdictional analysis, the court mistakenly focused on whether section 1113(1) is a statute of limitations or a statute of repose. Dkt. 17 at 3-7. After finding that section 1113(1) is a "statute of repose," the court unconditionally concluded that "a statute of repose is not subject to waiver – even express waiver," and held that Defendants' waiver of their limitations defenses was not enforceable. Id. But this Court in Pugh squarely rejected that approach. 158 F.3d at 533-34. The district court's approach resorted to "semantic[s]" that are "unpersuasive," "devoid of analysis," and an example of the "categorical approach" that "[t]he Supreme Court has rightly rejected." Id. By failing to engage in the jurisdictional analysis required by this Court, the district court erred in dismissing the Secretary's claims.

The district court attempted to justify its departure from Pugh by suggesting that Pugh had been called into question by Rogers v. Nacchio, 241 F. App'x. 602, 605 (11th Cir. July 12, 2007) (unpublished). Dkt. 25 at 3. According to the district court, Rogers "stat[ed]" in "decidedly categorical" fashion "that a statute of repose cannot be tolled." Id. Not so. Rogers is an unpublished and non-precedential decision regarding the limitations period for asserting a private action under the Securities Exchange Act. 241 F. App'x. 602. In stating that "tolling principles do

not apply to the five-year statute of repose" in the Securities Exchange Act, Rogers 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. Id. at 605 (citing Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 363 (1991)). Equitable tolling refers to the ability of "courts [to] equitably toll statutes of limitations when an inequitable event prevented a plaintiff's timely action." Booth v. Carnival Corp., 522 F.3d 1148, 1150 (11th Cir. 2008) (citation omitted). Rogers says nothing about express waivers of a limitations period such as the waivers in this case. Id. Lampf, the Supreme Court decision upon which Rogers 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); see In re: Dynegy, Inc. Sec. Litig., 339 F. Supp. 2d 804 (S.D. Tex. 2004) (distinguishing Lampf as applying to equitable tolling and holding that the limitations period applicable to plaintiffs' § 10(b) claim can be waived by express agreement); see also First Bankers Trust Servs., 2017 WL 1194692, at *8-*9 (distinguishing equitable tolling and waivers). Moreover, this Court has 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. Life Ins. Co., 267 F.3d 1209, 1215 n.1 (11th Cir. 2001). Rogers does not justify the district court's failure to follow Pugh.

The district court was also "not convinced of Pugh's applicability" to the limitations inquiry because section 1113(1) contains different language than the provisions analyzed in Pugh. Dkt. 25 at 3. But nothing in Pugh indicates that its analytical framework for federal limitations periods is limited to provisions that have language similar to the bankruptcy code provisions in that case. Quite the contrary: Pugh expressly rejects any approach based primarily on whether a particular provision is "linguistically similar to the typical statutes of limitations noted by the [Supreme] Court" as "unpersuasive . . . semantics." 158 F.3d at 533-34. Pugh cited to cases analyzing other federal statutes (without reference to specific language) in its discussion, and courts have since relied on Pugh to analyze non-bankruptcy provisions without respect to linguistic similarity. See supra at 17.

The district court also asserted that "taking the Government's advocated approach to analysis of the issue leads to the same result." Dkt. 25 at 3. But the district court did not, in fact, engage in the Secretary's "advocated approach," based on Pugh and Supreme Court precedent. Instead, the district court first stated that "the plain language" of section 1113(1) was similar to the language of a statute

that the Supreme Court concluded was a statute of repose in CTS, 134 S. Ct. at 2186. This is the wrong approach because courts must look at the plain language for any "clear statement" that the provision is jurisdictional, see Musacchio, 136 S. Ct. at 717, not just for linguistic similarities with other statutes; doing the latter is just the sort of "semantic[s]" that Pugh and the Supreme Court have rejected. See Pugh, 158 F.3d at 534 (citations omitted).

Second, the district court cited to "numerous cases that have held that § 1113 is a statute of repose." Dkt. 25 at 4. This is also the wrong approach because the "statute of repose" label is irrelevant to the validity of express waivers under this Court's approach and Supreme Court precedent. Furthermore, only one district court case cited held in an unpublished decision that section 1113(1) is jurisdictional, and that court did not endeavor to make the required determination that Congress clearly intended to make section 1113(1) jurisdictional. See Dkt. 25 at 5.[7]

[7] In Harris v. Bruister, 2013 WL 6805155, *5-*6 (S.D. Miss. Dec. 20, 2013), the district court relied on two Fifth Circuit cases, Radford v. General Dynamics Corp. and Archer v. Nissan Motor Acceptance Corp., to conclude that section 1113(1) "is a jurisdictional prerequisite to suit that cannot be waived or tolled." 2013 WL 6805155, *5-*6. Neither case, however, concerned voluntary waiver. See First Bankers Trust Servs., 2017 WL 1194692, at *7-*8 & n.7 (distinguishing equitable tolling and waivers and finding Bruister and Archer "unpersuasive"). In Radford, 151 F.3d 396, 400 (5th Cir. 1998), the Fifth Circuit merely found that section 1113(1) is a statute of repose but did not consider whether it was jurisdictional or could be waived by agreement. Archer, 550 F.3d 506 (5th Cir. 2008), is not an

Third, the district court bluntly stated that "[l]egislative history offers no help in determining this issue." Id. at 6. The limited legislative history suggests an intent to remove jurisdictional hurdles for ERISA claims. See supra at 26-27. Moreover, because the courts must start with the presumption that federal limitations periods are waivable statutes of limitations, Kwai Fun Wong, 135 S. Ct. at 1632, the absence of evidence would actually support a conclusion that section 1113(1) is waivable.

Finally, the district court disagreed with the Secretary's argument that the Supreme Court's decision in Kwai Fun Wong supports the conclusion that section 1113 is not jurisdictional. Dkt. 25 at 5. While Kwai Fun Wong plainly held that, absent clear congressional intent to the contrary, time bars in federal statutes are non-jurisdictional and thus waivable, 135 S. Ct. at 1634-35, the district 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." Dkt. 25 at 5. In the court's view, section 1113(1) was presumptively jurisdictional because "[a]s noted

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ERISA case. There, the Fifth Circuit held that the Equal Credit Opportunity Act ("ECOA") limitations period is a statute of repose that stands as a jurisdictional bar, and, therefore, a discovery rule did not apply to extend the limitations period. Id. at 508. Archer's holding was specifically about the intent underlying the ECOA, not ERISA. Archer does not hold that section 1113(1) is jurisdictional, and cites Radford and section 1113(1) only in dicta. Id. Neither case examines the congressional intent behind 29 U.S.C. § 1113(1).

in the prior order and above, there are numerous cases that treat [29 U.S.C] § 1113 as jurisdictional." Id. This simply is not true. The district court cited only one unpublished 2013 district court decision holding that section 1113(1) is jurisdictional. Id. at 4 (citing Bruister, 2013 WL 6805155, at *5-*6). Moreover, as noted infra at 43-48, the district court did not acknowledge courts that have permitted waivers of section 1113(1).

B. The District Court Misread the Case Law in Adopting a Categorical Rule That All Statutes of Repose are Not Waivable.

Aside from its failure to apply the framework described in Pugh and Trust Net Media, the district court was incorrect that statutes of repose are categorically not subject to express waiver. Dkt. 17 at 3-7. The district court relied on the general description of a "statute of repose" the Supreme Court quoted in CTS: "[a] statute of repose 'bar[s] any suit that is brought after a specified time since the defendant acted (such as by designing or manufacturing a product), even if this period ends before the plaintiff has suffered a resulting injury.'" 134 S. Ct. at 2182 (citing Black's Law Dictionary). The district court's categorical rule based on this general description is inconsistent with Supreme Court and this Circuit's precedent. Last year, in Musacchio, the Supreme Court considered whether a defendant's attempt to raise a statute of limitations defense was untimely by examining whether the pertinent provision, which barred suit brought after a specified time after the defendant commits an offense, was waivable. 136 S. Ct. at

717-18.[8] The Court concluded that, based on "the statutory text, context, and history" and the absence of the requisite "clear statement," the provision was non-jurisdictional and could be waived. Id. Likewise, in Credit Suisse Sec. (USA) LLC v. Simmonds, the Supreme Court looked to congressional intent to determine if equitable tolling was available for a time limit in the federal securities law that the Court had previously described as a "period of repose," a limitations period that started to run after the defendants' violation; the Court did not just apply a categorical rule. 566 U.S. 221, 225-30 (2012) (citation omitted). This Court has similarly held that limitations periods that start on the date of the alleged violation are subject to equitable tolling and not jurisdictional bars. For example, in Sturniolo v. Sheaffter, Eaton, Inc., this Court held that the requirement that a claimant files a timely charge of discrimination with the EEOC, which begins when the alleged violation occurs, is subject to equitable tolling and is "not a jurisdictional prerequisite to sue in federal court." 15 F.3d 1023, 1024 (11th Cir. 1994); see also Stafford v. Muscogee Cnty. Bd. of Educ., 688 F.2d 1383, 1387 (11th Cir. 1982) (permitting tolling of, and finding non-jurisdictional, a time limit for filing Title VII charge that must be filed "within 180 days after the alleged

[8] The time limit at issue was 18 U.S.C. § 3282, which states that "no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

discriminatory practice occurred."). Accordingly, the district court's broad rule that all statutes that run from the defendant's violation and appear to meet the description of a "statute of repose" are not subject to tolling or waiver is inconsistent with Supreme Court and this Circuit's case law.

The district court cited two Supreme Court decisions in support of its conclusion that statutes of repose are not subject to waiver: Midstate Horticultural and CTS. Dkt. 17 at 4, 6. However, neither decision supports the court's position.

The district court misread Midstate Horticultural to mean that "federal statutes of repose may not be tolled by mutual agreement where the statute in question implicates national interests." Dkt. 17 at 6. In Midstate Horticultural, the Supreme Court treated the statute of limitation in the Interstate Commerce Act (ICC) as a bar against waiver and tolling but not because it found it to be a statute of repose or suggesting in any way that no statute of repose could be waived or tolled by agreement. See 320 U.S. at 361-64. The Court simply examined the legislative intent behind ICC (the statutory language, structure, and legislative history) and found that voluntary waivers were inconsistent with the entire statutory framework, including numerous provisions setting out very short time frames for challenging shipping rates. Id. at 361-66. Midstate Horticultural simply provides no support for the district court's categorical rule; in fact, this Court in

Pugh cited Midstate Horticultural as supporting an approach that focuses on legislative intent. 158 F.3d at 534, 537.

CTS is similarly unhelpful to the district court. There, the Supreme Court recognized that the preemption question turned on an analysis of the specific legislative intent behind North Carolina's statutes of repose in order to determine if these state laws were time limitations Congress intended to preempt under the Comprehensive Environmental Response, Compensation, and Liability Act. 134 S. Ct. at 2187. The Court did not even address, much less hold, that the state statutes of repose are not waivable. The Court's analysis confirms that the effect of a statute of repose on tolling turns on its specific legislative intent and statutes of repose do not categorically or automatically bar all forms of tolling. See id. (citing to North Carolina cases to establish intent behind the North Carolina statutes of repose); see also Bryant v. United States, 768 F.3d 1378, 1382 (11th Cir. 2014) (examining North Carolina's legislative intent as to the scope of the statute of repose). In fact, North Carolina courts permit tolling agreements to extend the time limits of the state's statutes of repose. Christie v. Hartley Const., Inc., 766 S.E.2d 283, 287-88 (N.C. 2014) (noting that "we see no public policy reason why the beneficiary of a statute of repose cannot bargain away, or even waive, that benefit," and permitting express waiver of statute of repose)).

The district court additionally relied on out-of-circuit cases, but none of these support a categorical rule barring a voluntary waiver of section 1113(1). Dkt. 17 at 5-6. Instead, each of these decisions merely interprets how state statutes of repose are intended to operate. See Roskam Baking Co., Inc. v. Lanham Machinery Co., Inc., 288 F.3d 895, 903 (6th Cir. 2002) (deciding who has to plead the statute of repose under Michigan law); Fencorp Co. v. Ohio Kentucky 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 Ins. Co., 108 F. Supp. 2d 1266, 1275 (N.D. Ala. 2000) (refusing to apply an Alabama statute of repose to federal claims); Stone & Webster Eng'g Corp. v. Duquesne Light Co., 79 F. Supp. 2d 1, 8 (D. Mass. 2000) (Pennsylvania law) (making an Erie guess about whether Pennsylvania courts would find a Pennsylvania statute of repose waivable); Sharon Steel Corp. v. Workmen's Compensation 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 after the time limitation has already run). The district court also cited Nat'l Credit Union Admin. Bd. v. Barclays Capital Inc., 785 F.3d 387, 390 (10th Cir. 2015), which stated in one-sentence dictum that a federal securities time limitation was non-waivable; this sentence was not the product of the rigorous analysis of legislative intent required under Pugh.

Several of these cases actually rejected a categorical rule that statutes of repose bar all forms of tolling or waiver and found the interpretation of the intent of state statutes of repose inapplicable to interpreting federal time limits. For instance, the court in Moore recognized that:

> By contrast, 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. Failure to create a rule of repose concerning a particular statute is not an invitation to apply a state law rule of repose in its absence, as such rules do not form a regular feature of the landscape in the prosecution of federal rights.

108 F. Supp. 2d at 1275. This Court later agreed with this statement on appeal. Moore, 267 F.3d at 1215 & n.1 ("[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."). The court in Stone & Webster also recognized that state laws are not uniform on whether state-law statutes of repose bar waiver, 79 F. Supp. 2d at 8 ("the issue is not free from doubt"), and it expressly limited its holding to the type of open-ended waiver in question in that case, which is different from the waiver in this case. Id. The waiver in this case was expressly limited to a certain time period. Importantly, the Stone & Webster court found that equitable tolling could be permitted for Pennsylvania statutes of repose, undermining a categorical rule that statutes of repose always bar all forms of tolling or waiver. See id.

The holding in Sharon Steel also fails to support the decision below. Under Sharon Steel, a party under Pennsylvania law cannot revive a claim extinguished by a statute of repose after the time limitation has already run. 670 A.2d at 1198. This rule has no relevance to the facts in this case as the tolling agreements here were completed before the six-year time limit had elapsed on the Secretary's claims. See supra at 6-7. Moreover, the court acknowledged that equitable estoppel may bar the defendant from raising the statute of repose as a defense, again undermining any categorical rules that a statute of repose always bars all forms of tolling or waiver, though the court did not find the elements of estoppel satisfied in that case. Sharon Steel, 670 A.2d at 1198. In short, the inapposite cases relied on by the district court undercut the court's adoption of a categorical rule against tolling or waiver, because – rather than take a blanket approach – the decisions attempt to make specific determinations of the legislative intent of state laws in deciding whether the provisions at issue can be tolled or waived.

C. Numerous authorities conclude that statutes of repose are waivable

Contrary to indications from the district court, many authorities have concluded that statutes of repose are waivable. Cf. Burnett, 380 U.S. at 426 ("policy of repose, designed to protect defendants, is frequently outweighed, however, where the interests of justice require vindication of the plaintiff's rights"). In Commodity Control, the District Court for the Southern District of

Florida recently ruled that, even if ERISA's six-year limit is a statute of repose, it can be expressly waived. Order on Mot. to Dismiss, Perez v. Commodity Control Corp., No. 1:16-cv-20245-UU (S.D. Fl. May 4, 2016) (Dkt. 36), at 7-8. 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); Chao v. Linder, 2007 WL 1655254, at *9 (N.D. Ill. May 31, 2007) (same); accord Cherochak v. Unum Life Ins. Co. of Am., 586 F. Supp. 2d 522, 533 (D.S.C. 2008); Wilson Land Corp. v. Smith Barney Inc., 1999 WL 1939270, at *8 (E.D.N.C. May 17, 1999) (finding the cause of action in an ERISA fiduciary action to be timely under such agreement). Recently, a district court in the Southern District of New York dismissed arguments similar to the ones raised by Defendants here, and upheld the tolling agreements and waiver with respect to section 1113(1). First Bankers Trust

Servs., 2017 WL 1194692, at *6-*9.

The Supreme Court of Colorado also recently held that a Colorado limitations period that "contains the language of a statute of repose" may be waived by mutual agreement. Lewis v. Taylor, 375 P.3d 1205, 1209, 1211-12 (Colo. 2016). The Supreme Court of Colorado echoed Pugh's interpretation of Midstate Horticultural, 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." Id. at 1209, 1211-12. The North Carolina Supreme Court has reached the same conclusion. See Christie, 766 S.E.2d at 287-88 (permitting express waivers of statutes of repose).

Numerous other courts have re-affirmed this principle and permitted waivers of statutes of repose. See ESI Montgomery County, Inc. v. Montenay Int'l Corp., 899 F. Supp. 1061, 1066 (S.D.N.Y. 1995) (parties may expressly waive a period of repose in a federal securities law); First Interstate Bank of Denver v. Central Bank & Trust Co., 937 P.2d 855, 860 (Colo. Ct. App. 1997) (holding that statute of repose is not jurisdictional and could be waived by express agreement); see also F.D.I.C. v. Jones, 2014 WL 4699511, *5 (D. Nev. Sept. 19, 2014) ("Even assuming that FIRREA's three-year limitations period is one of repose, defendants have not established conclusively that the parties could not expressly waive or

extend that repose period."); In re Building Materials Corp. of America Asphalt Roofing, 2013 WL 169289, *3-*4 (D.S.C. Jan. 16, 2013) (holding that a statute of repose extended "based upon evidence of a waiver contained in an extended warranty or contract"); In re: Lehman Bros. Sec. and ERISA Litig., 2012 WL 6584524 (S.D.N.Y. Dec. 18, 2012) (defendants waived statute of repose in tolling agreement). Thus, far from there being a categorical rule against waiving statutes of repose, many courts have held or indicated that such provisions are subject to express waiver.

This Court has described state statutes of repose as both an "affirmative defense," McElroy by McElroy v. Firestone Tire & Rubber Co., 894 F.2d 1504, 1507 n.4 (11th Cir. 1990) (describing Florida law), and as a "right" granted to defendants, Moore, 267 F.3d at 1218 (citations omitted). Under both conceptions, statutes of repose should be waivable. For example, this Court has stated the broad principle that: "the expiration of the statute of limitations does not divest a district court of subject matter jurisdiction, but rather constitutes an affirmative defense, which the defendant can waive." United States v. Najjar, 283 F.3d 1306, 1308–09 (11th Cir. 2002). Similarly, like an immunity from suit, the statute of repose is a "personal privilege which [the holder] may waive at pleasure." See College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675 (1999) (quoting Clark v. Barnard, 108 U.S. 436, 447 (1883)) (sovereign

immunity); see also Skrtich v. Thornton, 280 F.3d 1295, 1306 (11th Cir. 2002) (qualified immunity); Moore v. Morgan, 922 F.2d 1553, 1557 (11th Cir. 1991) (qualified immunity). Similarly, a statute of repose confers a waivable right against suit and does not speak to the jurisdiction of the courts. See C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411, 423 (2001) (recognizing tribe can waive immunity from suit in arbitration agreement); Mercantile Nat'l Bank at Dallas v. Langdeau, 371 U.S. 555, 561 n.12 (1963) (recognizing waiver of personal statutory rights to immunity from suit).

This view of state statutes of repose is consistent with numerous state decisions that consider statutes of repose to be waivable rights to an affirmative defense. Pratcher v. Methodist Healthcare Memphis Hosps., 407 S.W.3d 727, 738 (Tenn. 2013) (citing authorities, including Fed. Deposit Ins. Corp. v. Lenk, 361 S.W.3d 602, 609 (Tex. 2012); Pinigis v. Regions Bank, 942 So.2d 841, 847 (Ala. 2006); In re Estate of Palmer, 187 P.3d 758, 763 (Wash. Ct. App. 2008); Fazio v. Gruttadauria, 2008 WL 4175040, at *5 (Ohio Ct. App. 2008); see Townes v. Rusty Ellis Builders Inc., 98 So. 3d 1046, 1053 (Miss. 2012) (noting hornbook law that parties can contractually agree to modify statutes of limitations, including statutes of repose, "unless prohibited by public policy or statute"). More importantly, such a reading of state statutes of repose as presumptively affirmative defenses that are waivable is consistent with the overarching analysis required by Pugh and the

Supreme Court cases that discuss federal time limits. See Holland, 560 U.S. at 645 (Supreme Court has "'repeatedly stated that the enactment of time-limitation periods . . . without further elaboration, produces defenses that are non-jurisdictional and thus subject to waiver and forfeiture.'") (citation omitted) (emphasis added); accord Musacchio, 136 S. Ct. at 717 ("the statutory text, context, and history establish that [the provision] imposes a non-jurisdictional defense.") (emphasis added).

CONCLUSION

For the foregoing reasons, the Secretary respectfully asks this Court to reverse the district court's dismissal order.

Respectfully submitted,

NICHOLAS C. GEALE
Acting Solicitor of Labor

G. WILLIAM SCOTT
Associate Solicitor
For Plan Benefits Security

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
200 Constitution Avenue, N.W. N-4611
Washington, D.C. 20210
(202) 693-5623 – Phone
(202) 693-5610 – Fax
Silverman.stephen@dol.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically using the CM/ECF system, which will send notification of such filing to the following:

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

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1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because: this brief contains 11,084 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii)

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/s/ Stephen Silverman
Stephen Silverman
Counsel for the Secretary
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