No. 17-10833

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

R. ALEXANDER ACOSTA, Secretary, U.S. Department of Labor,
Plaintiff-Appellant,

v.

ROBERT N. PRESTON,
Defendants-Appellees.

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

SECRETARY OF LABOR'S REPLY BRIEF

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PURSUANT TO 11th Cir. R. 26.1-1

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

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INTRODUCTION

This Court agreed to review the pure legal question of whether "the limitation of actions contained in ERISA section 413(1), 29 U.S.C. § 1113(1), [is] subject to express waiver?" Dkt. 29 at 3. As explained in the Secretary's opening brief, under Circuit and Supreme Court precedent, answering that question requires this Court to determine whether section 1113(1) deprives federal courts of subject matter jurisdiction. A federal statutory limitations period such as section 1113(1) is presumptively not jurisdictional unless Congress has clearly expressed its intent to the contrary. The text, context, structure, and legislative history of section 1113(1) all indicate that the provision is not jurisdictional, and they give no countervailing indication otherwise, much less the requisite clear statement by Congress. As detailed by the Secretary, the district court did not engage in the required analysis of section 1113(1), and reached an incorrect conclusion that should be reversed by this Court.

Defendants' brief raises several arguments that call for a response. First, Defendants state incorrectly that this Court's standard of review on the certified issue is abuse of discretion. See, e.g., Brief of Defs.'/Appellees at 12 n.1, 39 ("Defs.' Br."). Second, Defendants mistakenly argue that Pugh is inapplicable because it involved a procedural waiver by failing to timely assert a limitations defense under the Bankruptcy Code, while this case involves an express

contractual waiver of a time limit under ERISA. Id. at 16. Third, Defendants erroneously contend that the district court's decision was correct, because "many courts" have held that the words "[n]o action may be commenced," which are found in section 1113(1), impose a jurisdictional bar in other federal statutes. See id. at 18-19. Fourth, Defendants mistakenly rely on a Supreme Court and Eleventh Circuit cases that are inapposite for numerous reasons, including that none engaged in the required jurisdictional analysis. See, e.g., id. at 11-12, 16, 19. Finally, Defendants incorrectly maintain that the Secretary waived certain arguments that he made in his opening brief concerning the certified issue by not raising them below. See, e.g., id. at 9. As discussed below, none of these arguments have merit.

ARGUMENT

I. This Court Reviews the Certified Question of Law *De Novo*.

Throughout their brief, Defendants incorrectly contend that this Court must engage in abuse-of-discretion review because this case includes an appeal from a denial of reconsideration. Defs.' Br. at 9, 12, 14-19, 22, 25, 29, 36 n.8, 41. The parties agree, however, that an appeal from an order granting a motion to dismiss, such as the order here, is subject to de novo review. Defs.' Br. at 9. This Court's interlocutory review of a dismissal order pursuant to 28 U.S.C. § 1292(b), which permits appeals from "a controlling question of law," remains de novo even if the

certified "question of law" is also addressed in a certified denial of reconsideration. See Hudson v. Delta Air Lines, Inc., 90 F.3d 451, 455 (11th Cir. 1996) (de novo review following section 1292(b) appeal from denial of motion for reconsideration of grant of motion to dismiss); Moorman v. UnumProvident Corp., 464 F.3d 1260, 1264 (11th Cir. 2006) (same, on grant of summary judgment). Defendants' citation to Region 8 Forest Serv. Timber Purchasers Counsel v. Alcock, 993 F.2d 800 (11th Cir. 1993), is inapposite, as the "abuse of discretion" review in that case concerned the district court's "grant" of reconsideration, not the ultimate merits of its reconsideration decision, which was reviewed de novo.

Moreover, the motion to dismiss and motion for reconsideration raised the same issues. The Secretary's response to the motion to dismiss clearly argued: (1) even statutes of repose are waivable, Dkt. 10 at 3, 7-8; (2) legislative intent determines the question of whether section 1113(1) is waivable, id. at 8-10; and (3) section 1113(1) is not jurisdictional and only provides an affirmative defense, id. at 9-10, 12. In addition to raising those same issues, the motion for reconsideration argued the district court's resolution of those issues was contrary to binding case-law. Dkt. 20-1 at 5-18. Because the Secretary originally argued that section 1113(1) is subject to waiver in response to Defendants' motion to dismiss and raised the same issues discussed in the motion for reconsideration, both motions considered an identical question, which is now the question on appeal: whether the

limitation of actions contained in ERISA section 413(1), 29 U.S.C. § 1113(1) is subject to express waiver. Dkt. 29 at 3. Accordingly, this Court reviews the issue de novo.[1]

II. The Analytical Framework Established by *Pugh* Applies to this Case.

The Secretary's opening brief laid out the analytical framework for addressing the issue on appeal, which was set forth by this Court in In re Pugh, 158 F.3d 530 (11th Cir. 1998). Pugh rejects the argument, advanced by Defendants, that a limitations period can only be waived if it is construed to be a "statute of limitations" instead of a "statute of repose." Id. at 533-34. Pugh and its progeny instead instruct courts to consider whether the limitations period deprives the courts of subject matter jurisdiction, which is determined by whether Congress clearly expresses the intent to do so. Id.; In re Trusted Net Media Holdings, LLC, 550 F.3d 1035, 1042-44 (11th Cir. 2008) (en banc).

Defendants do not acknowledge that federal limitations provisions are presumptively not jurisdictional, and that they carry a heavy burden in "clear[ing

[1] In any event, Defendants may be arguing for a distinction without a difference given that a pure legal issue has been certified and an abuse of discretion occurs if a court "applies an incorrect legal standard" or "appl[ies] the law in an unreasonable or incorrect manner," Klay v. United Healthgroup, Inc., 376 F.3d 1092, 1096 (11th Cir. 2004), and that there is no discretion accorded to a decision "influenced by any mistake of law," see Betty K Agencies, Ltd. v. M/V MONADA, 432 F.3d 1333, 1337 (11th Cir. 2005).

the] high bar" to establish that section 1113(1) is jurisdictional. See United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1632 (2015); Trusted Net Media, 550 F.3d at 1042 (citing Arbaugh v. Y&H Corp., 546 U.S. 500, 515-16 (2006)); accord Pugh, 158 F.3d at 534-38; see Sec'y of Labor's Opening Br. at 18-19, 36-37 ("Sec'y's Br."). Instead, Defendants assert that Pugh is distinguishable and does not apply to this case because Pugh "involved the issue of procedural waiver" under the Bankruptcy Code and "says nothing about the validity of a purported contractual waiver of the protections of a statute of repose." Defs.' Br. at 16.[2] Defendants are wrong because the principles adopted in Pugh are not limited to either the Bankruptcy Code or "procedural" waivers, involving a failure to timely assert certain defenses in litigation. First, as the Secretary previously explained, the reasoning of Pugh is not confined to the Bankruptcy Code context; Pugh itself cited cases involving other federal non-bankruptcy statutes, and this Court has cited Pugh in examining non-bankruptcy statutes. Sec'y's Br. at 17.

[2] Defendants mischaracterize certain events as occurring "after the deadline" established by three of the waiver and tolling agreements. Defs.' Br. at 5-6. As detailed in the Secretary's opening brief, each agreement contained two pertinent dates: the date after which the Secretary may sue the Defendants, and the end date of the agreed-upon waiver. Sec'y's Br. at 5-6 (citing Dkt. 10-1 at ¶¶ 1-2). Defendants mislabel the "may sue" date as a "deadline," which it plainly isn't, and there is no dispute that each new agreement was executed – and the complaint was filed – before the end date of any agreed-upon waiver. See, e.g., Defs.' Br. at 9-10 (not contesting agreements' validity based on timing of execution); Dkt. 17 at 2-4 (discussing agreements); Dkt. 29 at 2 (same).

Second, Pugh did not limit its reasoning to "procedural" waivers and the logic of the decision does not dictate such a limitation. Instead, the Pugh Court specifically relied on Midstate Horticultural Co. v. Pennsylvania R.R. Co., 320 U.S. 356, 360 (1943), which Defendants acknowledge concerned express waivers, not procedural waivers, Defs.' Br. at 36-37 (citing Midstate Horticultural, 320 U.S. at 357-58 & n.3). Pugh additionally cites Midstate Horticultural for the fact 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." Pugh, 158 F.3d at 537. Pugh also relied on Brandt v. Gelardi (In re Shape, Inc.), 138 B.R. 334, 337 (Bankr. D.Me.1992), another case concerning express waivers, for its "holding that section 546(a) is a true statute of limitations that can be extended by agreement of the parties." Pugh, 158 F.3d at 536. Subsequent cases involving express waivers have also relied on Pugh. See, e.g., Davenport Recycling Assocs. v. C.I.R., 220 F.3d 1255, 1257 (11th Cir. 2000) (noting the consent to extend the limitations period in a tax case); United States v. Hitachi Am., Ltd., 172 F.3d 1319, 1333–34 (Fed. Cir. 1999) (citing Pugh, 158 F.3d at 532, 538, in its discussion of written waiver agreements with respect to customs violations). In short, the distinction between express versus procedural waivers did not, as Defendants seem to suggest, dictate the Pugh Court's analytical framework. Rather, Pugh establishes the proper framework for resolving the waiver question

presented in this appeal by requiring an in-depth examination into whether the provision is jurisdictional. 158 F.3d at 532-38.

III. Defendants Improperly Contend That "Magic Words" Can Create Jurisdictional Status.

Defendants further assert that section 1113(1) is jurisidictional because it contains the words "no action may be commenced" and because "numerous courts" – specifically, three district courts outside of this Circuit – "have held that language that '[n]o action may be commenced' after some specified date clearly indicates, and gives rise to, a jurisdictional bar to suit." Defs.' Br. at 19. Defendants' contention that section 1113(1) is jurisdictional because other statutes with the words "no action may be commenced" have been found jurisdictional is wholly inconsistent with Pugh, which rejected a waiver analysis that rested solely on such "semantic analog[ies]," 158 F.3d at 534, and the Supreme Court's decision in Henderson v. Shinseki, which held that jurisdictional analysis does not turn on Congress's use of "magic words." 562 U.S. 428, 436 (2011). To overcome the presumption that a federal time limit is non-jurisdictional, there must be specific evidence that Congress clearly intended to make the time limit jurisdictional, based on a close examination of the text, its context, the statutory scheme, the statute's purpose, and legislative history. See Kwai Fun Wong, 135 S. Ct. at 1632; Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 164-65 (2010); Pugh, 158 F.3d at 538. Defendants have not pointed to such evidence.

As the Supreme Court has explained, "in applying that clear statement rule, we have made plain that most time bars are nonjurisdictional. Time and again, we have described filing deadlines as 'quintessential claim-processing rules,' which 'seek to promote the orderly progress of litigation,' but do not deprive a court of authority to hear a case." Kwai Fun Wong, 135 S. Ct. at 1632 (citations omitted). Contrary to Defendants' position, "[t]hat is so . . . even when the time limit is important (most are) and even when it is framed in mandatory terms (again, most are); indeed, that is so 'however emphatic[ally]' expressed those terms may be. Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it." Id. (citations omitted).

Section 1113(1)'s text plainly does not speak to jurisdiction. In fact, similar statutory phrasing – "no action shall be brought" – has been described as "boilerplate language," Jones v. Bock, 549 U.S. 199, 220 (2007), and considered non-jurisdictional, see American Canoe Ass'n, Inc. v. City of Attalla, 363 F.3d 1085, 1088 (11th Cir. 2004). Moreover, other courts have held that similar, and perhaps even stronger, language in other federal time limits does not create a jurisdictional bar.[3] Defendants need to point to more than the mere fact that the

[3] In Kwai Fun Wong, for instance, the Supreme Court held that the time limit in the Federal Tort Claims Act was non-jurisdictional. That statute provides that a "tort

six-year limitation period in section 1113(1) says "no action may be commenced" to prove that it is jurisdictional. See Sec'y's Br. at 37-38 (discussing Musacchio v. United States, 136 S. Ct. 709 (2016)).

Defendants nonetheless cite three district court decisions that they say support a finding that the phrase "no action may be commenced" in section 1113(1) alone makes the limitations period unwaivable. See Defs.' Br. at 19.[4] Two of the cases concern the same limitations provision in the Resource

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claim against the United States 'shall be forever barred'" unless it is presented to the "appropriate Federal agency within two years after such claim accrues" and is then brought to federal court "within six months" after the agency acts on the claim. 135 S. Ct. at 1629 (citing 28 U.S.C. § 2401(b)) (emphasis added). And in Pugh, the Court held that the time limit in Section 549 of Title 11 of the Bankruptcy Code, 11 U.S.C. § 549(d), which provides that "[a]n action or proceeding . . . may not be commenced after the earlier of two years after the date of the transfer sought to be avoided or the time the case is closed or dismissed," was non-jurisdictional. 158 F.3d at 538.

[4] Defendants separately rely on Harris v. Bruister, 2013 WL 6805155, *5-*6 (S.D. Miss. Dec. 20, 2013), an unpublished district court decision holding that section 1113(1) is jurisdictional. Defs.' Br. at 7, 32-34. As the Secretary explained in his opening brief, Bruister is not persuasive because the district court considered itself bound by circuit precedent that was dicta and that did not engage in the rigorous jurisdictional analysis called for by this Court and the Supreme Court. Sec'y's Br. at 35 n.7. The Fifth Circuit has never ruled on whether ERISA section 1113(1) is jurisdictional. Id. Moreover, contrary to Defendants' suggestions, see, e.g., Br. at 7, Bruister "'is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case,'" Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011) (citation omitted), and the decision not to appeal the limitations issue as to certain claims in Bruister did not impinge on the significant recovery in that case for the remaining claims. Cf. Perez v. Bruister, 823 F.3d 250 (5th Cir. 2016) (affirming $6.5 million judgment).

Conservation and Recovery Act. Id. at 19 (citing Sisters of Notre Dame de Namur v. Fremont Corners, 2011 WL 744645 (N.D. Cal. Feb. 24, 2011); K.C. 1986 Ltd. P'ship v. Reading Mfg., 33 F. Supp. 2d 1143 (W.D. Mo. 1998)). These two cases held that the limitations provision in 42 U.S.C. § 6972(b) is jurisdictional, relying on the Supreme Court's earlier decision in Hallstrom v. TillaMook County, 493 U.S. 20 (1989). But Hallstrom expressly did not address the jurisdictional question, stating that "the parties have framed the question presented in this case as whether the notice provision is jurisdictional or procedural[, but based on] our literal interpretation of the stautory requirement, we need not determine whether § 6792(b) is jurisdictional in the strict sense of the term." Id. at 31. Thus, Sisters of Notre Dame and K.C. 1986 do nothing more than engage in the type of unreasoned "drive-by jurisdictional rulings" that the Supreme Court has criticized. See Arbaugh, 546 U.S. at 511 (courts "have been less than meticulous" in stating that actions are dismissed for lack of jurisdiction, "sometimes erronously conflat[ing]" lack of jurisdiction with a failure to state a claim). In fact, the Supreme Court has subsequently treated Hallstrom as addressing a non-jurisdictional time limit. See Reed Elsevier, 559 U.S. at 171 (labelling an argument based on Hallstrom as an "alternative" argument to the jurisdictional argument and grouping the requirement in Hallstrom with a waivable "res judicata" defense at issue in Arizona v. California, 530 U.S. 392, 412–413 (2000)).

Defendants' other cited authority, Hinton v. Solomon, 475 F. Supp. 105, 107-08 (D.D.C. 1979), concerning the time limit in 29 U.S.C. § 633a, follows earlier decisions from the same district court that engaged in "unrefined dispositions" of the jurisdictional question that the Supreme Court has held are due "no precedential effect" – and that this Court has rejected. See Arbaugh, 546 U.S. at 511; Pugh, 158 F.3d at 538; Trusted Net Media, 550 F.3d at 1042-44. In fact, this Court has stated that the same time limit is "not an absolute jurisdictional requirement, but is subject to modification or excuse for equitable reasons." Ray v. Nimmo, 704 F.2d 1480, 1483 (11th Cir. 1983). Likewise, the Ninth Circuit subsequently applied the correct analysis to 29 U.S.C. § 633a and held that its "time prescriptions . . . , including the 30–day waiting period, are not jurisdictional and may be forfeited, waived, or equitably modified." Forester v. Chertoff, 500 F.3d 920, 929 (9th Cir. 2007).[5]

[5] Defendants' assertion that the Secretary wants to make section 1113(1) toothless, Br. at 22-23, is unfounded given that a potential defendant (not the Secretary) decides whether to execute an express waiver and that this would apparently mean that the Supreme Court has rendered all federal limitations periods presumptively toothless. See, e.g., Sec'y's Br. at 18-19, 36 (discussing Supreme Court cases holding that federal statutes are non-jurisdictional and waivable absent Congress's clear statement to the contrary).

IV. Defendants Rely on Inapposite Cases Concerning Equitable Tolling that Do Not Alter this Court's Analysis of Section 1113(1).

Defendants also rely on language from various cases addressing limitations periods, none of which engage in the type of jurisdictional analysis that might bear on section 1113(1). For example, Defendants cite language from CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2182-83 (2014), and Rogers v. Nacchio, 241 F. App'x 602, 605 (11th Cir. 2007), stating that statutes of repose cannot be tolled. See Defs.' Br. at 12, 16. Neither CTS nor Rogers engaged in a jurisdictional analysis or made any determination on the issue. Moreover, the two cases state only that statutes of repose may not be equitably tolled, a proposition that is not at issue here, and they offer no insight into whether those provisions are subject to express waiver. See Hugler v. First Bankers Trust Servs., 2017 WL 1194692, at *8-*9 (S.D.N.Y. Mar. 30 2017) (distinguishing equitable tolling and waivers); see also Sec'y's Br. at 32-33, 40 (discussing CTS and Rogers).[6]

[6] As CTS explained, the purpose of a statute of repose is to "provide [a defendant with] a fresh start or freedom from liability" after a legislatively determined period of time. 134 S. Ct. at 2182-83. This goal is potentially in tension with judicially-created equitable tolling, see id., but it is not undermined in a case where, as here, Defendants expressly agreed to waive the limitations period. See Sec'y's Br. at 29-30; Hugler, 2007 WL 1194692, at *8. Under any consideration of the equities, Defendants cannot avoid the fact that they reneged on their promises. Sec'y's Br. at 27-28. Thus, while Defendants argue that the equities tilt in their favor, Defs.' Br. 24-25, their waiver was an "intentional relinquishment or abandonment of a known right" for their own benefit, namely an opportunity for settlement negotiations. Wood v. Milyard, 132 S. Ct. 1826, 1835 (2012). Defendants'

Defendants cite three Eleventh Circuit cases in support of their continued position that labeling section 1113(1) a "statute of repose" is conclusive, again falling into the "magic words" trap. First, Defendants cite the same language three times from Fuller v. SunTrust Banks, Inc., 744 F.3d 685 (11th Cir. 2014), that the "value of repose will trump" plaintiff's rights. Defs.' Br. 11, 22, 40. But Fuller does not address whether section 1113(1) is subject to waiver, and contrary to Defendants' suggestion, it calls section 1113(1) a "statute of limitations" or "limitations period" over twenty times. Fuller, 744 F.3d at 691-702; cf. Defs.' Br. at 19 (omitting reference to section 1113(1) as a "statute of limitations" from Fuller quote). Defendants also quote the "Appendix" to Simmons v. United States, 421 F.3d 1199, 1201 (11th Cir. 2005) (per curiam), which consists of the Georgia Supreme Court's opinion related to a state time limit and equitable tolling (again, not at issue here). Defs.' Br. at 12. Neither this Court nor the state court said anything about whether the Georgia code provision is jurisdictional; even so, the appended state court opinion analyzed the code's history, structure and context, and legislative intent before concluding that the repose provision could not be equitably tolled. Simmons, 421 F.3d at 1201-02. Defendants also cite language from May v. Ill. Nat'l Ins. Co., 190 F.3d 1200, 1206 (11th Cir. 1999), without

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argument that the equities compel the Court to disregard their own intentional act is "a notable bit of 'chutzpah'" and "is not just wrong, it is 'ridiculous.'" Lehman Bros. Sec., 2012 WL 6584524, at *2 (S.D.N.Y. Dec. 18, 2012).

explaining that this Court distinguished between a "jurisdictional statute of nonclaim" and a "statute of repose" under Florida law, which is completely irrelevant here. Defs.' Br. at 34. The decision did not address express waiver and determined that resolving the appeal turned on certifying a question to the state court concerning the jurisdictional issue. May, 190 F.3d at 1207-08. Defendants' reliance (Defs.' Br. at 40) on the Sixth Circuit's decision in Montgomery v. Wyeth, 580 F.3d 455 (2009), is similarly misplaced, because the case turned on inapposite Tennessee law and an interpretation of the specific provision at issue. Moreover, this Court in Pugh specifically acknowledged the existence of state "statutes of repose" like the ones described above, but the Court still applied the jurisdictional framework based on federal case-law. 158 F.3d at 533-34 (citing case about Georgia statute).

V. The Secretary's Arguments Have Not Been Waived.

In their opposition brief, Defendants incorrectly assert that the Secretary waived certain arguments. E.g., Defs. Br. at 39-40. Defendants' position that the Secretary waived various arguments reflects a misunderstanding of how and when waiver applies. In general, "an issue not raised in the district court and raised for the first time in an appeal will not be considered by this court" because it was waived. Walker v. Jones, 10 F.3d 1569, 1572 (11th Cir. 1994) (emphasis added). But Defendants do not argue that the Secretary waived the issue on appeal

(because he clearly did not, supra, at 5); rather, they argue that he waived certain arguments and authorities in support of his position on the issue. Simply offering new authority for a position advanced in the district court "is distinguishable from cases in which a litigant attempts to raise an entirely new claim or new issue on appeal." United States v. Rapone, 131 F.3d 188, 196 (D.C. Cir. 1997); Metavante Corp. v. Emigrant Sav. Bank, 619 F.3d 748, 773 (7th Cir. 2010) ("A litigant may cite new authority on appeal."); cf. United States v. Nealy, 232 F.3d 825, 830 (11th Cir. 2000) (parties may raise new authorities but may not raise new issues in context of supplemental briefing).

As the Supreme Court explained in Elder v. Holloway, when an appellate court reviews a question of law de novo, the court must use its "full knowledge of its own [and other relevant] precedents." 510 U.S. 510, 516 (1994). Ignoring relevant precedents could "occasion appellate affirmation of incorrect legal results" based on overlooking pertinent legal authority. Id. at 512. Thus, appellate review must be conducted "in light of all relevant precedents, not simply those cited to, or discovered by, the district court." Id. at 512; see Gonzalez v. Lee County Housing Authority, 161 F.3d 1290, 1303 n.39 (11th Cir. 1998).

In addition, it does not matter if the Secretary first raised an argument on reconsideration so long as the argument relates to a position originally taken in response to Defendants' dismissal motion. See Polo Ralph Lauren v. Tropical

Shipping & Constr. Co., 215 F.3d 1217, 1221-22 (11th Cir. 2000). In Polo Ralph Lauren, the plaintiff originally asserted that it was a third party beneficiary to a contract because it was a named beneficiary to bills of lading. Id. On reconsideration, the plaintiff "raised the alternative argument that [it was the beneficiary because] the terms and conditions in the bills of lading contained numerous references to the 'owner of the goods,'" which was readily identifiable as the plaintiff. Id. This Court rejected the defendant's assertion that the plaintiff had waived the second argument, concluding that the plaintiff's alternative theory was "part and parcel of its original argument." Id.

As previously explained, the Secretary's response to the motion to dismiss and subsequent motion for reconsideration both clearly argued that statutes of repose are waivable, that legislative intent determines the question of whether section 1113(1) is waivable, and that section 1113(1) is not jurisdictional and only provides an affirmative defense. Supra, at 5. Because the Secretary originally argued that section 1113(1) is subject to waiver in response to Defendants' motion to dismiss and raised the same issues in the motion for reconsideration, any alternative theories in support of that argument that were first raised on reconsideration are properly before this Court.

In any event, Defendants are mistaken in asserting that the Secretary waived three arguments. First, Defendants state that the Secretary conceded below that

section 1113(1) is a statute of repose. Defs.' Br. at 12 n.1. But in his response to Defendants' dismissal motion, the Secretary stated that "it makes no difference whether [section 1113(1) is] considered a statute of repose," Dkt. 10 at 8, and referred to section 1113(1) as both a statute of repose and statute of limitations. See, e.g., id. at 11. On appeal, the Secretary again stated that labeling section 1113(1) as a statute of repose does not matter, and provided relevant authorities. Sec'y's Br. at 14 n.4.

Second, Defendants assert that the Secretary waived the argument that statutes of repose are waivable affirmative defenses. Defs.' Br. at 39. To the contrary, Defendants' own brief acknowledges that "[i]n opposition to Appellants' motion to dismiss, the Secretary quoted [authority] for the proposition that 'statutes of repose in particular, and statutes of limitations in general, are 'normally waivable,'" id. at 29; see Dkt. 10 at 8-9 (section 1113(1) "speaks to . . . an affirmative defense"); see also id. at 13-14.

Third, Defendants maintain that the Secretary did not make an argument in the district court related to section 1113(1)'s structure, including its "fraud or concealment" provision or the statute's criminal enforcement regime. Defs.' Br. at 18 n.2 & 22 n.5. In fact, in his response to Defendants' dismissal motion and in his reconsideration motion, the Secretary explained how the statute's structure and operation made section 1113(1) waivable, including with specific reference to the

fraud or concealment provision. Dkt. 10 at 9-10, 14-15 (statute calls for pre-complaint investigation and negotiation and reflects Congress's public policy concerns); Dkt. 20-1 at 11 (discussing fraud or concealment provision); id. at 12-14 (discussing structure of statute). Thus, the Secretary preserved all of the issues and arguments that Defendants contend were waived, and the Secretary's citation of additional authority – case-law and statutes – to support those positions in his reconsideration motion and on appeal are properly before this Court.[7]

CONCLUSION

For the foregoing reasons, the Secretary maintains his request that this Court reverse the district court's decision below, and hold that section 1113(1) is non-jurisdictional and subject to express waiver.

[7] On the other hand, Defendants themselves make numerous statements without any reference to the record, which are therefore not properly before the Court. See, e.g., Defs.' Br. at 4-5 (description of pre-complaint negotiations not in the record); United States v. Bosby, 675 F.3d 1174, 1181 n.9 (11th Cir. 1982) ("Generally, appellate courts will not consider matters outside the record.").

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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2017, a copy of the foregoing was filed electronically using the CM/ECF system which effected service of such filing on the following:

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because: this brief contains 3750 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

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

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May 19, 2017