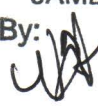


IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FILED IN CHAMBERS
U.S.D.C. Atlanta

JUL 16 2019

JAMES N. HATTEN, Clerk

By:  Deputy Clerk

BARBARA J. FULLER; MARIAH C.
WILLIAMS; NATALIE BROWN; ELAINE
JEFFERSON; BARBARA A. KENNEDY;
SELETHIA PRUITT,

Plaintiffs,

v.

CIVIL ACTION NO.
1:11-CV-784-ODE

SUNTRUST BANKS, INC.; MIMI
BREEDEN; MARK CHANCY; ALSTON D.
CORRELL; DAVID DIERKER; KEN
HOUGHTON; THOMAS KUNTZ; DONNA
LANGE; JEROME LIENHARD; THOMAS
PANTHER; LARRY L. PRINCE;
WILLIAM H. ROGERS, JR.;
CHRISTOPHER SHULTS; MARY
STEELE; GREGORY MILLER; ALEEM
GILLANI; PAUL BURDISS; BEAU
CUMMINS; AL KELOSAR; REBECCA
LYNN-CROCKFORD; TIM SULLIVAN;
SUNTRUST BENEFITS PLAN
COMMITTEE; SUNTRUST BENEFITS
FINANCE COMMITTEE,

Defendants.

ORDER

This Employee Retirement Income Security Act of 1974 ("ERISA") class action is currently before the Court on Defendants' Motion for Summary Judgment on Count VIII of the Second Amended Consolidated Class Action Complaint (the "Complaint") [Doc. 233]. For the reasons provided below, Defendants' motion [Id.] is GRANTED.

This case arises out of Defendants' alleged violations of ERISA's fiduciary duty provisions as to the SunTrust Banks, Inc. 401(k) Plan (the "Plan") [Doc. 194 ¶ 1]. Generally, Plaintiffs allege Defendants improperly furthered SunTrust Banks, Inc.'s corporate interests--in lieu of interests of the Plan's participants

--by favoring investment options that were affiliated with and enriched SunTrust Banks, Inc. [Id. ¶ 3]. Count VIII of Plaintiffs' Complaint, the subject of the instant motion, alleges certain Defendants "were aware that their predecessor fiduciaries had breached their duties" in selecting funds and thus breached their own duties "by failing to take adequate steps to remedy, within the Class Period, their predecessors' breaches in selecting" the funds at issue [Id. ¶¶ 138-39].

Defendants filed their Motion for Summary Judgment on Count VIII of Plaintiffs' Second Amended Consolidated Class Action Complaint on October 5, 2018 [Doc. 233]. Plaintiffs responded in opposition on November 20, 2018 [Doc. 244]. Defendants filed a reply brief on December 4, 2018 [Doc. 247]. Defendants' motion [Doc. 233] is now before the Court.

I. UNDISPUTED FACTS

The following facts are undisputed unless otherwise stated. Plaintiffs brought Count VIII against the following Defendants: the SunTrust Benefits Finance Committee, Mimi Breeden, Paul Burdiss, Mark Chancy, Beau Cummins, David Dierker, Aleem Gillani, Al Kolesar, Thomas Kuntz, Donna Lange, Jerome Lienhard, Rebecca Lynn-Crockford, Thomas Panther, William H. Rogers, Jr., Christopher Shults, Mary Steele, and Tim Sullivan (collectively, "Successor Fiduciary Defendants") [Docs. 194 at 67; 224 at 11 n.4].¹ These Successor

¹Defendants Lange and Steele are not alleged to be successor fiduciaries with respect to the selection of the STI Classic Mid-Cap Equity Fund and STI Classic Growth and Income Fund because they were committee members when the fund was selected [Docs. 233-2 ¶¶ 29,33; 194 ¶ 137]. Defendants Chancy, Rogers, Jr., Lange, and Steele are not alleged to be successor fiduciaries with respect to the selection

Fiduciary Defendants were members of the Benefits Plan Committee and/or the later Benefits Finance Committee during the March 11, 2005, to December 31, 2012, Class Period. As such, they were responsible for choosing the investment options offered to Plan participants [Docs. 194 ¶ 41; 236 ¶ 41]. Count VIII alleges that the Successor Fiduciary Defendants' predecessors imprudently selected seven proprietary SunTrust mutual funds² ("Affiliated Funds")³ for the Plan and that the Successor Fiduciary Defendants breached their fiduciary duties by failing to remedy these breaches by their predecessors [Doc. 194 ¶¶ 135-39].

A. Affiliated Fund Selection by Predecessor Fiduciaries

Plaintiffs allege that the predecessor fiduciaries who selected the Affiliated Funds breached their fiduciary duties via an imprudent selection process [Doc. 194 ¶ 136]. The seven Affiliated Funds at issue were offered in the Plan during the Class Period. However, the Affiliated Funds were originally added to the Plan before the Class Period began--that is, prior to March 11, 2005. Specifically, the

of the STI Classic International Equity Index Fund because they were committee members when the fund was selected [Doc. 244 at 5-6 n.5]. Count VIII is thus not against them as to those funds.

²Black's Law Dictionary defines a mutual fund as an investment company--or a share of stock in such a company--"that invests its shareholders' money in a . . . diversified selection of securities." *Mutual fund*, Black's Law Dictionary (11th ed. 2019).

³Plaintiffs created the denomination "Affiliated Funds" to describe eight "proprietary SunTrust mutual funds," seven of which are at issue in Count VIII [see Docs. 244 at 7; 194 ¶ 6]. Plaintiffs labeled them "Affiliated Funds" because the fees associated with these investment options were paid to their investment advisor, RidgeWorth Capital Management, Inc.--a wholly-owned SunTrust subsidiary during the Class Period [Docs. 194 ¶ 34; 236 ¶ 34].

Benefits Plan Committee selected the Affiliated Funds for addition to the Plan as follows: four of the funds at issue--the Capital Growth Fund, Investment Grade Bond Fund, Short Term Bond Fund, and Prime Quality Money Market Fund--were selected on July 10, 1996; the Growth and Income fund was approved on April 15, 1999; the Small Cap Growth Fund was selected in December of 1999; the Mid Cap Equity Fund was selected on August 13, 2001; and the International Equity Index Fund was selected on or close to October 4, 2004.

On July 10, 1996, the Benefits Plan Committee unanimously approved the selection of four Affiliated Funds: the STI Classic Capital Growth Fund, the STI Classic Investment Grade Bond Fund, the STI Classic Short-Term Bond Fund, and the STI Classic Prime Quality Money Market Fund [Docs. 248 ¶ 32; 244-36 at 4]. According to the testimony of then-chairman John Spiegel, the Benefits Plan Committee selected the four Affiliated Funds that day without considering unaffiliated funds, without comparing the affiliated funds to non-proprietary fund performance, and without analyzing fees to participants [Doc. 248 ¶ 34]. None of the Successor Fiduciary Defendants are listed in the meeting minutes as attendees [Doc. 233-13].

On April 15, 1999, the Benefits Plan Committee voted unanimously to include the CrestFunds Value Fund under a new name, STI Classic Growth and Income Fund, in the Plan [Doc. 244-26 at 3]. According to an exhibit from the Benefits Plan Committee's April 15, 1999 meeting, the "CrestFunds Value Fund [was] renamed and [became] a new STI Classic mutual fund" [Doc. 244-27 at 2]. Meeting minutes for April 15, 1999, do not reveal any consideration of alternative or non-proprietary funds, performance comparisons, or fee analysis

[Docs. 248 ¶ 37; 244-26]. Donna Lange, then-member of the Benefits Plan Committee, acknowledged in her deposition that the meeting minutes do not reflect any discussion regarding the STI Classic Growth and Income Fund or assessment of its inclusion in the Plan [Docs. 248 ¶ 39; 244-11 at 14-15].

According to Rule 30(b)(6) witness Tom Panther, in December of 1999, the assets in one fund--the Sunbelt Equity Fund--were "mapped to the STI Classic Small Cap Growth Fund" [Doc. 244-16 at 11-12]. Panther stated in his deposition that he did not understand the Small Cap Growth Fund to be an addition to the Plan, but rather that it was "just . . . a name transfer from one fund to the other. Not a different fund" [Id. at 12].⁴

At the August 13, 2001, Benefits Plan Committee meeting, the members unanimously approved the addition of the STI Classic Mid Cap Equity Fund to the Plan [Docs. 233-17; 244-30]. Meeting minutes do not reflect any consideration of alternative or non-proprietary funds, performance comparisons, or fee analysis [Id.]. Then-Benefits Plan Committee members John Spiegel, Gregory Miller, and Ted Hoepner stated in their depositions that they have no recollection of other funds being considered at the August 13, 2001, meeting during which the STI Classic Mid-Cap Equity Fund was selected and added to the Plan [Docs. 244-19 at 26; 244-13 at 6; 244-8 at 7]. Doug Phillips, who served as CEO and President of RidgeWorth at the time, was at the August 13, 2001, meeting and confirmed in his deposition that he did

⁴It is not clear from the record whether the Classic Small Cap Growth Fund was, in fact, merely a renaming of a preexisting fund in the Plan [See Docs. 244-9 at 8; 244-28; 244-29].

not provide the Benefits Plan Committee with alternatives to the STI Classic Mid Cap Equity Fund [Doc. 244-21 at 10].

Lastly, on October 4, 2004, the Benefits Plan Committee voted to add the STI Classic International Equity Index Fund to the Plan [Doc. 244-31]. Meeting minutes do not reflect any consideration of alternative or non-proprietary funds, performance comparisons, or fee analysis [*Id.*]. Exhibit A to the meeting minutes lists only the STI Classic International Equity Index Fund as a passive international equity "[r]ecomended [f]und" [*Id.* at 10]. Where Exhibit A would include "[o]ther [f]unds [c]onsidered," it states only "N/A" [*Id.*]. According to then-member Ken Houghton, to his knowledge the Benefits Plan Committee did not consider any alternatives to the STI Classic International Equity Index Fund [Doc. 244-9 at 11-12].

B. Successor Fiduciary Defendants' Knowledge of Predecessors' Affiliated Fund Selection

1. Committee Meetings

An undated document titled "History of Plan Committee Actions Related to 401(k) Fund Selection" summarizes "key past committee decisions, including initial selection decisions for five of the Affiliated Funds" [Docs. 244-36; 248 ¶ 70].⁵ Prior Benefits Plan

⁵According to Plaintiffs, the "History of Plan Committee Actions Related to 401(k) Fund Selection" document was prepared "[s]ome time after November 2000" [Doc. 248 ¶ 70]. As Defendants point out, however, the document is not dated. Plaintiffs further state that the document was "prepared for, and presented to, the [Benefits] Plan Committee" [*Id.*]. Defendant objects to this characterization as not supported by the document. The first page of the document lists "Benefits Plan Committee" under the document title, and for purposes of this motion, the Court will assume that the document was prepared for the Benefits Plan Committee [Doc. 244-36 at 2]. Nonetheless, it is not clear to the Court why Plaintiffs believe this document is helpful. Although the document does mention the Benefit Plan Committee's initial fund selection for five Affiliated Funds, it

Committee member Ken Houghton, upon being shown the document, stated in his deposition that it "look[ed] to [him] like a recap of the history of committee actions related to the 401(k) Plan" and that, because it is labeled Benefits Plan Committee, "it must have been done at the request of our committee" [Doc. 244-9 at 9]. He further stated that because the document is not dated, he is not sure when it was prepared [Id.].

During the May 14, 2001, Benefits Plan Committee meeting--at which Defendant Mary Steele was present--Defendant Donna Lange reported that "employees continue to inquire about why SunTrust does not offer non-proprietary fund [sic] in the SunTrust 401(k) Plan" [Doc. 244-37 at 2].

At a meeting on February 27, 2006, SunTrust attorney Steve Castle presented to the Benefits Plan Committee regarding "SunTrust Banks Retirement Plan/401(k) Plan Governance Issues" [Doc. 244-38 at 2]. Castle's presentation document included a review of fiduciary standards and stated the following under the heading "Prudence Standard--Selection and Monitoring of Investments": "[d]iligent investigation of investment selection" and "[d]ecision reasonable based on investigation?" [Doc. 244-39 at 12]. The presentation

frames that selection in a positive light [Id. at 4-5 (noting that the Benefits Plan Committee "selected funds that provided continuity . . . and offered further diversification . . . based on the expected risk level and expected rate of return, fund objectives and investment performance history"). Thus, the document cannot be expected to have alerted the Successor Fiduciary Defendants of their predecessors' purported breach. The document reflects that the Benefits Plan Committee "discussed employees' interest in index funds for the 401(k) Plan," later considering and ultimately deciding against a non-proprietary index fund. Thus, although the document indicates the selection of proprietary funds, it does not suggest that those selections were imprudent.

document also listed as a "[f]iduciary consideration[] for [the] 401(k) Plan Committee" to "[c]onsider expansion of non-proprietary funds offered for participant selection" [Id. at 23]. According to Castle's deposition testimony, this statement meant that "the committee should always look at the availability of funds, both proprietary and nonproprietary, and determine which funds are best suited for a particular 401(k) plan based on facts and circumstances" [Doc. 244-40 at 4].

At the February 25, 2008, Benefits Plan Committee meeting, SunTrust attorney Steve Castle spoke again, this time regarding potential litigation for alleged fiduciary breaches related to the Plan [Doc. 244-42 at 5].⁶ Afterward, Defendant Mark Chancy "provided an overview of the steps taken by the Committee to ensure that employees have been given ample opportunity to diversify out of Company stock" [Id.]. Meeting minutes reflect that Defendants Mark Chancy, Mimi Breeden, Dave Dierker, Donna Lange, Bill Rogers, Tom Panther, and Christopher Shults all attended the meeting [Id. at 2].

At the first meeting of the Benefits Finance Committee on November 1, 2011, SunTrust attorney Steve Castle gave a presentation titled "Fiduciary Boot Camp," which provided a "review of ERISA rules for [f]iduciary conduct to the Committee" [Doc. 244-44 at 2-3]. Castle made a PowerPoint presentation that included a slide addressing "401(K) Plan Litigation"; the slide listed "[s]elf-dealing from using proprietary funds" under "[t]ypes of claims alleged

⁶Steve Castle also mentioned law firm "investigations" of the Plan and spoke regarding "several recent incidents where 401(k) Plans were under investigation based on alleged breaches of fiduciary responsibility" [Doc. 244-42 at 5].

against plan sponsors" [Doc. 244-45 at 24].⁷ Meeting minutes list Defendants Aleem Gillani, Tom Panther, Al Kolesar, Paul Burdiss, Rebecca Lynn-Crockford, and Chris Shults as attendees [Doc. 144-44 at 2].

2. Deposition Statements of Successor Fiduciaries

Defendant Jerome Lienhard stated in his deposition that he received binders describing the funds in the Plan and "presumably" containing documents describing fiduciary standards [Doc. 244-6 at 14]. He further stated that he spoke with Defendants Donna Lange and Ken Houghton about being a Benefits Plan Committee member and, upon becoming a member of the Benefits Plan Committee in August of 2006, familiarized himself with the Plan document [Id. at 7-8, 10-11]. Defendant Lienhard said he did not recall taking action to determine whether previous breaches of fiduciary responsibility had been committed [Id. at 12-13].

Defendant Christopher Shults stated in his deposition that he received training regarding the funds in the Plan when he became a Benefits Plan Committee member [Doc. 244-18 at 3-4]. Shults was directed at the February 25, 2008, Benefits Plan Committee meeting to meet with an investment consultant representative "to become more educated about the investment decisions made by the Benefits Plan Committee," but Shults stated in his deposition testimony that he

⁷Castle's presentation at the November 1, 2011, meeting occurred after Plaintiffs had filed their initial complaint in March of 2011 [Doc. 1] but well before Plaintiffs' current Second Amended Consolidated Class Action Complaint of December 19, 2017 [Doc. 194]. Count VIII, at issue here, was added in an intervening complaint--Plaintiffs' First Amended Complaint, filed May 19, 2016 [Doc. 105].

does not "remember any of the details of specificity around what we discussed" and that he does not recall discussing previous investment decisions by the Benefits Plan Committee with the representative [Docs. 244-42; 244-18 at 14-17]. Defendant Shults further confirmed he did not recall learning about selection decisions made by the Benefits Plan Committee prior to his becoming a member [Doc. 244-18 at 18].

Defendant Mimi Breeden stated in her deposition that she "would have talked to subject matter experts and [her] staff and others to come up to speed on what the committee's work was" and "what key priorities were" [Doc. 244-4 at 10, 12]. Defendant Breeden further stated that she "probably" had knowledge of the history of the Plan before 1997 but could not recall it or any information about the 1996 selection of Affiliated Funds [Id. at 16]. Breeden also said she could not recall whether she ever knew about the initial selection of Plan funds in 1996 [Id.].

Defendant Mary Steele stated in her deposition that she was sure she had read the Plan document at some point while a member of the Benefits Plan Committee and that Defendant Donna Lange briefed her regarding her fiduciary responsibilities as a Benefits Plan Committee member and "the most important things that [she] need[ed] to know about the committee" [Doc. 144-20 at 9-10]. Defendant Steele also stated that she did not remember how the SunTrust proprietary funds first came to be offered in the Plan, but that the 1996 change in the Plan from common trust funds to mutual funds "sound[ed] familiar" [Doc. 244-20 at 10, 12].

Defendant Thomas Kuntz stated in his deposition that he did not recall whether he received any training regarding his duties as a

Benefits Plan Committee member or whether he reviewed prior meeting minutes [Doc. 244-10 at 12]. He further stated that the Benefits Plan Committee, "[a]s a matter of course," "reviewed all the funds in the plan . . . for appropriateness" [Id. at 13]. Defendant Kuntz went on to explain that he believed the proprietary funds in the Plan were appropriately included because "[t]hey looked to be reasonable choices . . . based on assessments that [he] might have had at the time" [Id.]. He did not recall what those assessments were [Id.].

Defendant Donna Lange stated in her deposition that she was not aware of the process used in initially selecting the Affiliated Funds in 1996, just that "the approved funds were in place when [she] arrived" [Doc. 244-11 at 10-11]. Regarding the 1996 fund selection, Lange went on to say that she did not "recall studying this other than being aware "this is the plan, this is what we started with" [Id. at 11-12]. She did state, however, that she knew the Plan was only using proprietary funds when she arrived [Id. at 12].

Defendant Aleem Gillani stated in his deposition that he does not recall ever being briefed or "brought up to speed" on the Benefits Plan Committee's decisions prior to becoming a member, and that he had no knowledge of them when appointed to the Benefits Plan Committee [Doc. 244-7 at 9-10].

Finally, Defendant William H. Rogers, Jr. stated in his deposition that he has no knowledge of the initial Affiliated Funds selection in 1996, 1999, and 2001 [Doc. 244-17 at 10-11, 15-16].

II. SUMMARY JUDGMENT STANDARD

The Court will grant summary judgment when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (citation omitted). Once the movant has met this initial burden, the opposing party must present evidence establishing a material issue of fact. Id. at 325. The non-moving party must go "beyond the pleadings" and present evidence designating "specific facts showing that there is a genuine issue for trial." Id. at 324 (internal quotation marks and citation omitted).

To be material, a fact must be identified by the controlling substantive law as an essential element of the non-moving party's case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "Genuine disputes are those in which the evidence is such that a reasonable jury could return a verdict for the non-movant. For factual issues to be considered genuine, they must have a real basis in the record." Mize v. Jefferson City Bd. of Educ., 93 F.3d 739, 742 (11th Cir. 1996) (internal quotation marks and citation omitted). "[M]ere conclusions and unsupported factual allegations are legally insufficient to defeat a summary judgment motion." Ellis v. England, 432 F.3d 1321, 1326 (11th Cir. 2005). Moreover, the Local Rules specify that a respondent to a summary judgment motion must directly refute the movant's facts with *specific* citations to the evidence. Unless the respondent "specifically informs the court to the contrary," the court will "deem the movant's citations supportive of its facts." LR 56.1B(2)(a)(3), NDGa.

In so reviewing the record, the Court must construe the facts and make all reasonable inferences in favor of the non-moving party. Anderson, 477 U.S. at 255; Reese v. Herbert, 527 F.3d 1253, 1271 (11th Cir. 2008).

III. DISCUSSION

To begin, the Court notes that the issue on this motion for summary judgment is a narrow one. This motion concerns the predecessor fiduciaries' initial selection process for the Affiliated Funds and whether the Successor Fiduciary Defendants may be held liable for failing to remedy those allegedly imprudent selections. To make this determination, the Court first considers whether the Successor Fiduciary Defendants needed actual knowledge of their predecessors' imprudent selections for liability to attach, or whether constructive knowledge is sufficient. Then, the Court determines whether Plaintiffs have sufficiently demonstrated the Successor Fiduciary Defendants had the requisite state of mind regarding their predecessors' selection process.⁸

⁸Defendants contend Count VIII is duplicative of Plaintiffs' failure-to-monitor claims. However, Plaintiffs' response brief suggests Count VIII is based on Defendants' alleged failure to properly educate themselves regarding the Plan and investigate the inclusion of the Affiliated Funds therein, not Defendants' failure to remove the Affiliated Funds in the face of poor performance [see Doc. 244 at 19-20 (listing Plaintiffs' arguments as to why Defendants allegedly knew or should have known their predecessors imprudently selected the Affiliated Funds)]. Nonetheless, the Court finds that, to the extent Plaintiffs' Count VIII alleges Defendants knew or should have known the Affiliated Funds were imprudently selected due to their poor performance, Count VIII is duplicative of Plaintiffs' failure-to-monitor claims.

A. What Is the Requisite State of Mind for Count VIII?

As previously mentioned, Plaintiffs allege in their Complaint that the Successor Fiduciary Defendants "were aware that their predecessor fiduciaries had breached their duties in selecting the Affiliated Funds" and that they "breached their duties by failing to take adequate steps to remedy, within the Class Period, their predecessors' breaches in selecting the Affiliated Funds" [Doc. 194 ¶¶ 138-39]. Plaintiffs did not specify in their Complaint what provision of ERISA Count VIII is based upon.

Defendants argue that, for them to be held liable for breaches by the predecessor fiduciaries, they need to have had *actual knowledge* of the predecessor fiduciaries' breaches. Defendants further argue Plaintiffs produced no evidence of actual knowledge by the successor fiduciaries; thus, Count VIII must fail. In response, Plaintiffs contend they need only produce evidence that the Successor Fiduciary Defendants had *constructive knowledge* of or were *willfully blind* to their predecessors' breaches, which they argue they have done [Doc. 244 at 8]. Plaintiffs further submit that summary judgment is generally inappropriate where a party's state of mind is at issue, as is the case here, because of the critical role of the factfinder in assessing and weighing such evidence [*Id.* at 7].

As a threshold matter, the parties disagree regarding what section of ERISA provides the basis for Plaintiffs' Count VIII. Defendants contend Count VIII alleges co-fiduciary liability and as such is governed by 29 U.S.C. § 1105, titled "Liability for breach of a co-fiduciary" [Doc. 247 at 7]. Section 1105(a)(3) provides that a fiduciary is liable "for a breach of fiduciary responsibility of another fiduciary with respect to the same plan . . . if he has

knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach." Plaintiffs, on the other hand, contend Count VIII involves successor fiduciary liability, which they argue is separate and distinct from co-fiduciary liability; thus, Count VIII arises under "ERISA's general fiduciary duty provisions, 29 U.S.C. § 1104, as applied through 29 U.S.C. § 1109" [Doc. 244 at 17]. Specifically, Plaintiffs argue Section 1105 cannot apply because "[p]redecessor and successor fiduciaries are not 'co-fiduciaries' because they are not fiduciaries at the same time and do not act jointly to manage the plan" [*Id.*].

Plaintiffs are correct that 29 U.S.C. §§ 1104 and 1109 impose ERISA's general fiduciary duties. Moreover, Section 1109(b) makes clear that "[n]o fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary." However, this ban on vicarious liability for fiduciary breaches committed outside one's fiduciary tenure does not prevent a successor fiduciary from being held liable for his independent fiduciary breach in failing to remedy the continuing effect of a predecessor fiduciary's breach. See Fernandez v. K-M Indus. Holding Co., 585 F. Supp. 2d 1177, 1183-84 (N.D. Cal. 2008) (noting that the plaintiffs did "not seek to hold [the defendant] vicariously liable for the acts of [its predecessors], but rather charge [the defendant] *itself with committing an independent breach of fiduciary duty by failing to remedy the earlier breaches, even though it knew of those breaches*" (emphasis added)). Moreover, according to the Department of Labor,

Section 409(b) [29 U.S.C. § 1109(b)] provides that no fiduciary shall be liable with respect to a breach of fiduciary duty under Title I of the Act, if such breach was

committed before he became a fiduciary or after he ceased to be a fiduciary. Section 409(b) [29 U.S.C. § 1109(b)] does not, however, exempt a fiduciary from carrying out his responsibilities to a plan imposed by various provisions of Part 4 of Title I of the Act. *For example, although a fiduciary may not be liable under section 409 [29 U.S.C. § 1109] of the Act for the acts of predecessor fiduciaries, if he knows of a breach of a fiduciary responsibility committed by a predecessor fiduciary he would be obligated to take whatever action is reasonable and appropriate under the circumstances to remedy such breach. Failure to take such action would constitute a separate breach of fiduciary responsibility by the successor fiduciary.* DOL Opinion No. 76-95 (Sept. 30, 1976) (emphasis added).

This language from the Department of Labor regarding successor fiduciaries' potential liability resulting from predecessors' breaches tracks closely with the language of Section 1105(a)(3). 29 U.S.C. § 1105(a) ("[A] fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan . . . if he has knowledge of a breach by such other fiduciary, . . .") (emphasis added). Although the Department of Labor did not explain whether this duty for successor fiduciaries arises by application of ERISA's "general fiduciary provisions," as Plaintiff suggests, or by application of Section 1105(a)(3) for co-fiduciaries, as Defendants suggest, the outcome appears to be the same: predecessor fiduciaries have a duty to remedy the continuing effect of breaches by predecessor fiduciaries' if they know of them. Most courts to address the issue have applied Section 1105(a)(3) in the context of predecessor-successor fiduciaries. See, e.g., Fernandez v. K-M Inds. Holding Co., 585 F. Supp. 2d at 1177, 1184 (N.D. Cal. 2008) (rejecting the argument that Section 1105 applies to "contemporaneous co-fiduciaries only" and instead finding the successor fiduciary could "potentially be liable under § 1105 for its failure to remedy the alleged breaches of fiduciary duty that

took place before it was appointed . . . trustee"); Donovan v. Cunningham, 716 F.2d 1455, 1474-75 (5th Cir. 1983) (applying Section 1105 to determine whether successor fiduciaries were liable for their predecessors' breaches); Conner v. Mid South Ins. Agency, 943 F. Supp. 647, 661 (W.D. La. 1995) (citing U.S.C. § 1105(a)(3) for the proposition that a successor fiduciary may be liable "for failing to make reasonable efforts to remedy [his predecessor's] breaches . . .").⁹ Moreover, courts and the Department of Labor alike have demonstrated that a successor fiduciary must have *actual knowledge* of a predecessor's breach to be liable for failing to remedy said breach. As previously mentioned, the Department of Labor noted in an advisory opinion that a successor fiduciary may be liable for failure to remedy a predecessor's breach if "he *knows of* a breach of fiduciary responsibility committed by a predecessor" Courts have indicated the same. In Fernandez v. K-M Inds. Holding Co., for example, the Court found that a successor fiduciary could potentially be liable for predecessor breaches it allegedly knew about. 585 F. Supp. 2d at 1184. Similarly, in Donovan v. Cunningham, the United States Court of Appeals for the Fifth Circuit found that actual

⁹Even the treatise and case cited by Plaintiffs in support of their argument that Count VIII falls under ERISA's general fiduciary duty provisions suggest that it may fall under Section 1105, as well. Morrissey v. Curran, 567 F.2d 546, 548-50 (2d Cir. 1977); James F. Jordan, et al., Handbook on ERISA Litigation (4th ed.) § 4.04 ("[I]f a successor fiduciary has knowledge of a breach of fiduciary duty committed by a predecessor fiduciary, then the successor fiduciary is obligated to take reasonable action necessary remedy the breach. . . . *This duty may be imposed directly under [Section 1109(a)] and indirectly under [Section 1105(a)].*") (emphasis added). Certainly, the applicable standard and requisite state of mind would not be different depending on what ERISA provision a plaintiff claims to have based his cause of action upon.

knowledge is required for successor fiduciaries to be liable for their predecessors' breaches. 716 F.2d at 1475. The Department of Labor's advisory opinion and case law thus point to a requirement of actual knowledge.

Plaintiffs, however, contend constructive knowledge is the applicable standard in determining whether a successor fiduciary may be held liable for failure to remedy a predecessor fiduciary's breach. Plaintiffs cite the Restatement (Second) of Trusts in support of their position that constructive knowledge is all that is required for a successor fiduciary to be liable for failure to remedy a predecessor's breach. Specifically, Section 223 states that "[a] trustee is liable to the beneficiary for breach of trust, if he . . . knows or should know of a situation constituting a breach of trust committed by his predecessor and he improperly permits it to continue" Restatement (Second) of Trusts, § 223. Plaintiffs allege that, because of trust law's recognized, heavy influence on ERISA, this provision is applicable in the ERISA context. However, even though Plaintiffs allege that "courts have held this principle of trust law applicable in the ERISA context," an examination of the cases cited by Plaintiffs reveals otherwise. First, none of the cases cited by Plaintiffs quote or otherwise use constructive knowledge language Plaintiffs rely on in the Restatement (Second) of Trusts. Moreover, the cases do not appear to otherwise suggest constructive knowledge is the appropriate standard. See, e.g., Feinberg v. T. Rowe Price Grp., Inc., No. CV MJG-17-0427, 2018 WL 3970470, at *9 (D. Md. Aug. 20, 2018) (finding the plaintiffs' nearly-identical allegations sufficient to survive a motion to dismiss because the plaintiffs alleged the successor defendants "were

aware that their predecessor fiduciaries had breached their duties in selecting the in-house funds") (emphasis added); Chao v. Merino, 452 F.3d 174, 182 (2d Cir. 2006) (affirming the defendant fiduciary's liability for failure to act to prevent embezzlement from the plan where she had actual knowledge of three instances of plan embezzlement by an administrator but nonetheless failed to protect the plan from him).¹⁰ Plaintiffs cite one unreported district court case, Martin v. Harline, that suggests constructive knowledge is sufficient under Section 1105. No. Civ.A. 87-NC-115J, 1992 WL 12151224, at *12 (D. Utah Mar. 30, 1992) (finding the defendant liable under Section 1105(a)(3) where he had "actual or constructive knowledge of the facts constituting breaches of fiduciary duty"). However, this cursory approval of constructive knowledge is, to this Court's knowledge, the only of its kind; the Court finds more persuasive the many cases requiring actual knowledge and the Department of Labor's indication that actual knowledge is the appropriate standard.

Thus, in short, the Court agrees with Defendants that Plaintiffs must present evidence creating a genuine issue of material fact that the Successor Fiduciary Defendants had *actual knowledge* of their predecessors' alleged breaches in selecting the Affiliated Funds. Further, even if willful blindness or constructive knowledge were a sufficient basis for predicated successor liability on a

¹⁰Plaintiffs also contend that a successor fiduciary's willful blindness is sufficient to expose the successor to liability [Doc. 244 at 14-16]. Even assuming willful blindness is enough to subject a successor fiduciary to liability for the failure to remedy a predecessor's breach, that theory would not be successful here for reasons explained further below.

predecessor's breach, it would not be enough to save Plaintiff's Count VIII.

B. Does a Genuine Issue of Material Fact Exist As to Whether the Count VIII Defendants Had Actual Knowledge of Their Predecessors' Breaches?

Plaintiffs contend that, if actual knowledge of a predecessor's breach is required, they have presented evidence sufficient to withstand Defendants' motion for summary judgment as to Count VIII. Plaintiffs argue they have this burden by pointing to deposition testimony by some of the Successor Fiduciary Defendants in which they confirm that they "familiarized themselves with Plan affairs upon becoming committee members by being briefed by other committee members and reviewing prepared documents" [Doc. 244-9 at 31]. Plaintiffs also assert that the Benefits Plan Committee "created documents summarizing key [Benefits Plan Committee] decisions, including some of the initial selection events [Id.]. Presumably, Plaintiffs are referring to the History of Plan Committee Actions Related to 401(k) Fund Selection document. The timing of the document is unknown, however, and--as Defendants point out--there is no indication that any of the Successor Fiduciary Defendants ever saw it. Even if they had, the document itself hardly provides knowledge of any breach by predecessor fiduciaries; rather, the document frames the Benefits Plan Committee's actions in a positive light, stating, for example, that the Benefits Plan Committee selected the Affiliated Funds in 1999 to provide continuity and "further diversification" [Doc. 244-36 at 4]. Thus, even if the Successor Fiduciary Defendants saw this document, it could hardly be said to provide them actual knowledge of their predecessors' alleged fund selection breaches. Similarly, the mere fact that some of the Successor Fiduciary

Defendants familiarized themselves with the Plan and spoke with other Plan Committee members upon appointment does not show that they had actual knowledge of the alleged prior breaches. Plaintiffs have failed to produce any evidence such as would create a genuine issue of material fact as to whether Defendants had actual knowledge of their predecessors' alleged breaches in selecting the Affiliated Funds.

Plaintiffs argue a determination regarding whether Defendants possessed actual knowledge is improper at the summary judgment stage. According to Plaintiffs, the general rule at summary judgment is that it is inappropriate to decide issues regarding state of mind because questions of credibility should belong to the factfinder [Doc. 244 at 21-22]. Plaintiffs misunderstand Defendants' argument, however: Defendants do not contend to have evidence negating or disproving Plaintiffs' state of mind evidence; rather, Defendants argue Plaintiffs failed to produce any evidence of actual knowledge. Thus, the Court is not weighing conflicting evidence related to Defendants' state of mind but simply looking to see if, in fact, Plaintiffs failed to present evidence of actual knowledge. This is a proper function of the Court at the summary judgment stage. See Williams v. Obstfeld, 314 F.3d 1270, 1277 (11th Cir. 2002) ("[S]ummary judgment is proper, despite the question of knowledge or intent, if the party opposing summary judgment fails to indicate that he can produce the requisite quantum of evidence to enable him to reach the jury with his claim.") (internal quotation marks and citation omitted). That is the case here; Plaintiffs have failed to adduce any evidence of Defendants' actual knowledge of their predecessors' alleged breaches.

The Court further notes that, even assuming willful blindness to or constructive knowledge of the predecessor fiduciaries' alleged breaches were enough for liability to attach to Defendants, neither is sufficiently shown here. According to Eleventh Circuit Court of Appeals case Williams v. Obstfeld, cited by Plaintiffs, willful blindness imputes knowledge "to a party who knows of a high probability of illegal conduct and purposefully contrives to avoid learning of it." 314 F.3d at 1278. There is, however, no evidence suggesting Defendants knew of a high probability of illegal conduct or that they purposefully attempted to avoid learning of such conduct. Plaintiffs argue, using the same evidence as for actual knowledge, that a material question of fact exists as to willful blindness. Again, however, this is an insufficient showing. There is thus no genuine question of material fact as to whether Defendants were willfully blind to their predecessors' alleged breaches.

Finally, even if constructive knowledge were sufficient to impute liability to Defendants, it would not save Plaintiffs' Count VIII from summary judgment. Plaintiffs contend Defendants should have known about their predecessors' alleged breaches for the following reasons:

- (1) the clear conflict of interest in offering proprietary funds in the Plan;
- (2) a " cursory review " of meeting minutes for those meetings in which the Affiliated Funds were selected would have revealed the improper selection process used;
- (3) Defendants had a "duty to familiarize themselves with the Plan . . . , including reviewing past committee minutes" and

talking with other Benefits Plan Committee members--both of which were "readily available" to Defendants; and

(4) Defendants were aware most of the Plan's options were proprietary funds, and they should have known "no fund company offers the best funds in every asset class" [Doc. 244 at 19-20].

Plaintiffs argue that, viewed collectively, these create a genuine issue of material fact as to whether Defendants should have known of the alleged fund selection breaches. The Court disagrees. First, the Court agrees with Defendants that Plaintiffs' alleged showing of constructive knowledge assumes Defendants had a duty to scour past meeting minutes and interrogate Benefits Plan Committee members for any indication of prior breaches. Plaintiffs fail to cite any case justifying such a stringent obligation for Defendants, however, and the availability of meeting minutes to Defendants does not give them constructive knowledge of everything therein.

Moreover, as Defendants suggest, there is nothing inherently improper about the inclusion of proprietary funds in the Plan. Even if the Affiliated Funds were underperforming during Defendants' tenure, that would not necessarily spur one to view their original selection as inherently suspect. Thus, the mere fact that the Plan included the Affiliated Funds--and Defendants were aware of that fact--is not sufficient to charge them with constructive knowledge of their predecessors' alleged improper selection process. In short, Plaintiffs have failed to adduce evidence that Defendants had actual knowledge of their predecessors' breach; Defendants thus cannot be liable for failing to remedy the allegedly imprudent selection process for the Affiliated Funds. Even if willful blindness or constructive knowledge were enough for liability to attach,

Defendants' motion would still be successful because Plaintiffs did not produce sufficient evidence.

IV. CONCLUSION

For the above reasons, Defendants' Motion for Summary Judgment on Count VIII of the Second Amended Consolidated Class Action Complaint [Doc. 233] is GRANTED.

SO ORDERED, this 15 day of July, 2019.


ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE