IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BISHNU C. BORAH, M.D., P.C., and BISHNU BORAH, M.D., Plaintiffs,	:	**CIVIL ACTION**
v.	:	
MONUMENTAL LIFE INSURANCE COMPANY, et al., Defendants.	:	**NO. 04-3617**

MEMORANDUM AND ORDER

Schiller, J. **April 2, 2007**

Plaintiffs Bishnu Borah ("Dr. Borah") and his professional corporation, Bishnu Borah, M.D., P.C. (together "Plaintiffs"), bring the current action against Defendants Barry Cohen and BCo Financial alleging federal RICO violations and violations of state law fiduciary duty requirements.[1] Plaintiffs' claims arise out of the issuance of a life insurance policy through a voluntary employee benefit association ("VEBA"), the legitimacy of which has been the subject of protracted litigation. *See Neonatology Assocs. v. Comm'r*, 115 T.C. 43, *aff'd* 299 F.3d 221 (3d Cir. 2002); *Cetel v. Kirwan Fin. Group*, 460 F.3d 494 (3d Cir. 2006). On November 10, 2005, this action was placed in civil suspense while the Third Circuit reviewed similar claims in the *Cetel* case. Following the Third Circuit's ruling, the case was returned to the active docket and Defendants filed for summary judgment. For the reasons set forth below, the Court grants Defendants' motion.

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[1] BCo Financial is also referred to as BCo Planning, but for purposes of this Memorandum, the Court will use only BCo Financial. (*See* Defs.' Mem. of Law in Support of its Mot. for Summ. J. [hereinafter Defs.' Mem.] at 1.)

I. BACKGROUND

Plaintiffs commenced this action, which concerns the design, marketing, and sale of Continuous Group, or "C-Group" life insurance policies, on July 30, 2004. In their initial fourteen-count Complaint brought against twenty defendants, Plaintiffs alleged federal RICO violations, violations of the New Jersey Racketeering Act and the New Jersey Consumer Fraud Act, and various state common law claims. Both the number of claims and defendants have winnowed down, leaving only federal RICO and state law breach of fiduciary duty claims against Defendants Barry Cohen and BCo Financial. (*See* Compl.)

The C-Group life insurance product was purchased through VEBAs in order to reap certain tax benefits under the Tax Reform Act of 1986. (*Id.* ¶¶ 47-48); *Cetel*, 460 F.3d at 501. The product consisted of two related policies: the first was a group term life insurance policy which, upon termination, converted into universal life insurance for individual employees. (Compl. ¶ 50.) As discussed in *Neonatology Associates*, the premiums on the C-Group product was typically four to six times greater than premiums for a conventional life insurance group term policy. 115 T.C. at 54. Nonetheless, the C-Group product purchased through the VEBA was attractive because of the extraordinary tax benefits – professional corporations could make unlimited tax deductible contributions, and after the group policies were converted into individual policies, any payments over the cost for the term life insurance would be converted into tax-free conversion credits for the individual holders.[2] *Cetel*, 460 F.3d at 501; *Neonatology Assocs.*, 115 T.C. at 49-56.

[2] The C-Group insurance product purchased by Plaintiffs has been described as a product "masquerad[ing] as a policy that provides only term life insurance benefits in order to make the product marketable to targeted investors . . . ." *Cetel*, 460 F.3d at 502 n.2 (citing *Neonatology Assocs.*, 115 T.C. at 53). In fact, the C-Group policy was a universal life insurance product with the two aforementioned policy characteristics. *Id.* The Tax Court described the VEBA plans as

Defendant Barry Cohen is an insurance agent and investment advisor who owns and operates BCo Financial. (Compl. ¶¶ 33, 35.) Cohen, through former defendant Kirwan Financial Advisory, Inc., sold Plaintiffs a C-Group insurance policy through a VEBA plan and acted as Plaintiffs' financial advisor throughout the life of the plan. (Comp. ¶¶ 40, 96; Defs.' Mot. for Summ. J. [hereinafter Defs.' Mot.] Ex. C (Borah Dep.) at 49, 52, 57, 89.) Dr. Borah purchased the plan through Cohen in 1990. (Defs.' Mot. Ex. C (Borah Dep.) at 89.) As presented to Dr. Borah, the plan provided a way for him to save for retirement while his professional corporation made tax deductible contributions to the VEBA plan. (Compl. ¶ 1.) In 1995, the Internal Revenue Service ("IRS") issued Notice 95-54, a statement of the IRS's position that the VEBA plans were unlawful tax avoidance schemes and that all deductions taken under such plans were disallowed. (Suppl. Verification of Steven J. Fram Ex. A (Notice 95-24).) In 2000, the IRS's position was vindicated by the Tax Court in *Neonatology Associates*, where the VEBAs were deemed a means to "distribute surplus cash surreptitiously." 115 T.C. at 89. Despite the IRS's position, Plaintiffs continued to participate in the VEBA until 2000, when Dr. Borah stopped receiving financial statements from Cohen. (Defs.' Mot. Ex. C (Borah Dep.) at 120-21.) From 1990 through 2000, Plaintiffs contributed more than $100,000 to the VEBA. (Compl. ¶¶ 96-97.)

In 2004, Plaintiffs commenced this action, alleging that Defendants, through deceptive practices, false statements, and material omissions, fraudulently persuaded Plaintiffs to purchase the VEBA plan by misrepresenting that it had legitimate tax benefits. (*Id.* ¶¶ 90-94.) According to Plaintiffs, Defendants deceived employers by stating that the IRS had ruled that contributions to the

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"speciously" and "deviously" designed, as well as a "novel tax avoidance scheme." *Neonatology Assocs.*, 115 T.C. at 49.

VEBA plans were tax deductible, although, at the time of purchase, the IRS took no express position on the issue. (*Id.* ¶ 48); *see also Borah v. Monumental Life Ins.*, Civ. A. No. 04-3617, 2005 WL 351040 (E.D. Pa. Feb. 14, 2005); *Borah v. Monumental Life Ins.*, Civ A. No. 04-3617, 2005 WL 83261 (E.D. Pa. Jan. 14, 2005). Defendants' motion for summary judgment asserts that Plaintiffs' claims are time-barred.

II. STANDARD OF REVIEW

Summary judgment is appropriate when the evidence fails to demonstrate a dispute of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c) (2007); *Anderson v. Liberty Lobby*, *Inc.*, 477 U.S. 242, 247-48 (1986). When the moving party does not bear the burden of persuasion at trial, that party may meet its burden on summary judgment by showing that the nonmoving party's evidence is insufficient to carry its burden of persuasion at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Thereafter, the nonmoving party demonstrates a genuine issue of material fact if sufficient evidence is provided to allow a reasonable jury to find for him at trial. *Anderson*, 477 U.S. at 248. In order to meet this burden, the opposing party must point to specific, affirmative evidence in the record and not simply rely on mere allegations, conclusory or vague statements, or general denials in the pleadings. *Celotex*, 477 U.S. at 324; *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 252 (3d Cir. 1999) (noting that bare assertions or suspicions will not withstand motion for summary judgment). In reviewing the record, "a court must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor." *Armbruster v. Unisys Corp*., 32 F.3d 768, 777 (3d Cir. 1994). Furthermore, a court may not make credibility determinations or weigh the evidence in making its

determination. *See Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150 (2000); *see also Goodman v. Pa. Tpk. Comm'n*, 293 F.3d 655, 665 (3d Cir. 2002).

III. DISCUSSION

A. Defendants are Entitled to Summary Judgment on Plaintiffs' RICO Claims

Defendants argue that Plaintiffs' RICO claims are barred by the statute of limitations. Plaintiffs disagree. Both parties rely on *Cetel* as their benchmark.

In *Cetel*, multiple physicians and their professional corporations sued many of the same defendants originally parties to this action, including Cohen, asserting claims arising from the same VEBA plans at issue here. The Third Circuit found that the *Cetel* plaintiffs' claims were time-barred under RICO's four year statute of limitations. 460 F.3d at 506. In so holding, the court focused on when and if the plaintiffs had "inquiry notice" of their injuries under the discovery rule developed in *Matthews v. Kidder Peabody & Co.*, 260 F.3d 239 (3d Cir. 2001). *Id.* at 507. This test provides that "'a RICO claim accrues when plaintiffs knew or should have known of their injury.'" *Id.* (*quoting Matthews*, 260 F.3d at 252). A plaintiff should have known of his injuries where: (1) "there was sufficient information . . . to excite 'storm warnings' of culpable activity," *see Benak ex rel. Alliance Premier Growth Fund v. Alliance Capital Mgmt. L.P*, 435 F.3d 396, 400 (3d Cir. 2006); and (2) a reasonable investor of ordinary intelligence, through reasonable diligence, would have discovered those injuries, *see Matthews*, 260 F.3d at 252. If a defendant can successfully show the existence of "storm warnings," the burden shifts to the plaintiff to show that, "heeding the storm warnings, they exercised reasonable diligence but were unable to find and avoid the storm." *Cetel*, 460 F.3d 507.

1. Plaintiffs received storm warnings

The existence *vel non* of storm warnings is determined by an objective inquiry. *Matthews*, 250 F.3d at 252 ("Plaintiffs need not be aware of the suspicious circumstances [comprising the storm warnings] or understand their importance.") The standard only requires that "a reasonable investor of ordinary intelligence would have discovered the information and recognized it as a storm warning"; information provides a storm warning if it holds a "probability that misleading statements or significant omissions had been made." *Matthews*, 260 F.3d at 252. The reasonable investor of ordinary intelligence is presumed to have "read prospectuses, quarterly reports, and other information relating to their investments," *Matthews*, 260 F.3d at 252, and has "knowledge of 'publicly available news articles and analyst's reports.'" *Cetel*, 460 F.3d at 502 (*quoting Benak*, 435 F.3d at 400). Requiring an objective inquiry "comports with the general purpose of civil RICO [which is] to encourage plaintiffs to actively investigate potential criminal activity"; civil RICO plaintiffs become "'private attorneys general,' dedicated to eliminating racketeering activity." *Matthews*, 260 F.3d at 252 (internal citations omitted).

In *Cetel*, the court found sufficient storm warnings by August 1995 to make plaintiffs aware of their injuries:

> By August 1995, the IRS had circulated Notice 95-34, which informed plaintiffs that the IRS had not approved the deduction contributions to VEBA plans and, in fact, had actually disallowed these deductions. The Notice made clear that the VEBA plans were inconsistent with the tax code. Additionally, in 1995 the Medical Society [of New Jersey] stopped endorsing the VEBA plans and the IRS undertook audits of some of the plaintiffs, amassing even more troubling storm clouds. All this information, taken together, establishes with enough objective certainty thatstorm warnings did exist concerning the lawfulness of the VEBA plans, thus satisfying the first step.

Cetel, 460 F.3d at 507. Notably, the court found that storm warnings existed even for a plaintiff who, like Dr. Borah, had not been personally subject to an IRS audit. *Id.* at 507 n.8.

Plaintiffs assert that the facts underlying their claim are materially different from those in *Cetel*. (*See* Pls.' Resp. at 10.) Specifically, Plaintiffs note that, unlike the *Cetel* plaintiffs, Dr. Borah did not rely on an express representation by Cohen that the IRS had approved the VEBA plan. (*Id.* at 11-13.) Second, Dr. Borah's VEBA policies were never the subject of an IRS audit. (*Id.* 14-20.) Finally, Dr. Borah was not a member of the Medical Society of New Jersey and therefore was not aware that it had rescinded its endorsement of the VEBA program. (*Id.* at 11-13.)

Despite Plaintiffs' assertions, the Court finds that, even absent the benefit of Doppler radar, storm warnings existed in mid-1995. On June 5th of that year the IRS circulated Notice 95-34, which, as already stated, addressed the validity of the VEBA arrangements. It concluded: "Taxpayers and their representatives should be aware that the IRS has disallowed deductions for contributions to [the VEBA] arrangements and is asserting th[is] position[] . . . in litigation."

As in *Cetel*, Dr. Borah received a letter dated July 31, 1995 from Cohen concerning IRS Notice 95-34. That letter stated, "In anticipation of any potential problems concerning your plan, we have already discussed this mater with our tax attorney . . . ." Attached was an opinion letter from Neil Prupris, Cohen's tax attorney, which warned:

> Recently, the Internal Revenue Service has focused its scrutiny on the deductibility of contributions made to VEBA plans. The Internal Revenue Service has begun *actively auditing* VEBA plans and has issued a formal notice, Notice 95-34 . . . dated May 18, 1995, to alert taxpayers and their representatives that it is the Internal Revenue Service's position that contributions to certain VEBA arrangements *will not be deductible*.

(Defs.' Mot. Ex. B (July 12, 1995 Letter) (emphasis added).) Prupris's letter notified Plaintiff that

the IRS would be asserting its position in litigation. *Id.* Nonetheless, Prupris discredited the IRS's position and urged participants to continue their contributions. *Id.*

The IRS Notice, along with the Prupris letter, created storm warnings in 1995. Plaintiffs were warned that: (1) the IRS found their VEBA, a plan which afforded significant tax benefits, to be "inconsistent with the tax code;" (2) many participants would be audited; and (3) the IRS planned on enforcing its position in court. A reasonably prudent investor would have been warned that suspicious activity was afoot.[3]

Moreover, Plaintiffs' attempts to distinguish themselves from the *Cetel* plaintiffs do not persuade the Court to reach a different conclusion. Plaintiffs first argue that the *Cetel* plaintiffs were expressly told that the VEBA plan was approved by the IRS, whereas Cohen made no such representations to Dr. Borah. This position is untenable given representations by Dr. Borah that Cohen *had* represented to him that the IRS approved the VEBA plan.[4] Nonetheless, even assuming

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[3] Not only would a reasonably prudent person have investigated their own injuries after receiving a letter such as this, it also appears that Dr. Borah would have stopped contributing if he had read the letter sent to him by Cohen.

> Q: If Barry Cohen told you in 1995 that several other participants in the same VEBA program that you were paying into have been audited by the IRS, but that in his opinion, he felt that there was no merit to the IRS's position and that you should continue paying into the VEBA, would you have continued paying into the VEBA?
>
> A: Probably not.

(Defs.' Mot. Ex. C (Borah Dep.) at 53.)

[4] In his deposition, Dr. Borah testified regarding Cohen: "I remember that he told me that the IRS approved it," referring to the VEBA. (Defs.' Mot. Ex. C (Borah Dep.) at 92); (*see also id.* at 101 ("I remember what Barry told me. He told me [the VEBA was] tax deductible"); 103 ("Q: Barry told you that the IRS had approved the deduction of contribution for the VEBA, is that correct? A: Yes"); 105 ("Barry [sent me a] letter saying that [the VEBA has] been approved by the IRS").)

that Cohen did not affirmatively misrepresent the IRS's approval of Plaintiffs' VEBA plan, the Prupris letter alone makes clear that the IRS did not sanction the VEBA plan, that audits and litigation were forthcoming, and, therefore, this was a significantly riskier investment than Cohen had initially maintained. In other words, the Prupris letter established that, even if Cohen had not made "material misstatements" when selling and advising Plaintiffs regarding the VEBA product, Cohen probably made "significant omissions." *Matthews*, 260 F.3d at 252 (Storm warnings include information that "would alert a reasonable person to the probability that misleading statements or *significant omissions* had been made.") (emphasis added). This information was sufficient to establish storm warnings.[5]

Additionally, the fact that Plaintiffs' contributions were not audited is not dispositive. Prupris's letter put Plaintiffs on notice that the IRS had "begun actively auditing VEBA plans." Furthermore, as noted above, the Third Circuit held a plaintiff who was never audited nevertheless had adequate storm warnings of his injuries.

In an affidavit submitted to the Court, dated October 11, 2006, Dr. Borah made the following completely contradictory statements:

> I do not recall being advised by Mr. Cohen or Mr. Kirwan that the IRS had approved the VEBA or contributions to it at the time my medical practice began to contribute to the VEBA. As a consequence, I never suspected that Mr. Cohen or Mr. Kirwan had misled me when I became aware, in the late 1990s, that the IRS was questioning certain multiple employer trust arrangements and that certain participants in the VEBA programs had been audited.

(Pls.' Suppl. Verification ¶ 8.)

[5] If, consistent with Dr. Borah's deposition testimony, Cohen actually represented that the IRS approved the VEBA, then the 1995 letter presented Dr. Borah with information in direct contradiction to that representation. This would also have been sufficient to establish storm warnings.

Finally, the fact that Plaintiffs did not *know* that the Medical Society of New Jersey rescinded its endorsement of the VEBA plan is irrelevant to the objective storm warnings analysis. The reasonably prudent investor of ordinary intelligence is presumed to be aware of relevant and publicly available knowledge. The fact that the medical society withdrew its endorsement of the VEBA plan was relevant and publicly available knowledge. *See Cetel*, 460 F.3d at 507. Indeed, because Dr. Borah knew that Cohen was an authorized representative of the Medical Society of New Jersey and that the Society specifically endorsed the VEBA, with little extra work he could have discovered the Society's position after the 1995 letter. *See Matthews*, 260 F.3d at 252 ("Plaintiff need not be aware of the suspicious circumstances . . . ."); *In re Initial Public Offering Sec. Litig.*, 341 F. Supp. 2d 328, 345 (S.D.N.Y. 2004) (public news information attributed to plaintiffs for the purpose of objective storm warnings analysis); (Defs.' Mot. Ex C (Borah Dep.) At 77-78.)

In light of the above analysis, the Court concludes that storm warnings existed in mid-1995. However, even if the 1995 communications were insufficient to put Plaintiffs on inquiry notice of their injuries, additional communications made prior to 2000 (the latest date at which the statute could begin to run to make Plaintiffs' RICO claims timely) definitively established storm warnings. In a July 17, 1996 letter addressed to Dr. Borah, Cohen urged all VEBA plan participants to take their full deductions because it "serves the interest of our group." (Defs.' Mot. Ex. D (July 17, 1996 Letter).) The letter reiterated the warning first made in 1995: "We do not believe that the I.R.S.'s case has sufficient basis or merit for the actions they have taken." *Id.* In response, Dr. Borah's accountant, Stephen Cooper, acknowledged in a letter to Cohen, "It appears from your letter that there has been action taken by the Internal Revenue Service that is adverse to the VEBA plan participants. Consequently I would appreciate your assistance in letting me know what Dr. Borah's

potential problems might be in this matter." (*Id.* Ex. D. (July 19, 1996 Letter).) Clearly, Cooper saw the skies darkening. Moreover, in another letter dated January 20, 1997, Cohen discusses Plaintiffs' benefits in light of "the case with the IRS," another reminder of the IRS's adverse position. (Defs.' Mot. Ex. F (Jan. 20, 1997 Letter).) Finally, in 1997, Dr. Borah received information that other VEBA participants were being audited. (Pls.' Brief in Opposition to Defs.' Mot. for Summ. J. [hereinafter Pls.' Resp.] at 21.) This information, in conjunction with the 1995 letter, establishes that at the latest, sufficient storm warnings existed by 1997 to have led a reasonable investor to investigate whether he had suffered any injuries.

2. Plaintiffs did not exercise due diligence to discover their injuries

If a defendant can show the presence of storm warnings, the burden shifts to the plaintiff to show that he acted diligently to discover his injuries but, despite his efforts, the injuries remained hidden. *Matthews*, 260 F.3d at 252. This analysis is both subjective and objective; a plaintiff must first show that he was unable to detect his injuries despite exercising reasonable due diligence, and then the court must determine whether the plaintiffs' actions did in fact reflect the due diligence expected of a reasonable investor of ordinary intelligence. *Id.* Unsophisticated investors are not held to a lower standard of due diligence. *Id.*

In *Cetel*, the plaintiffs did not exercise reasonable diligence in investigating their injuries by relying "solely on defendants' assurances of "victory" over the IRS in Tax Court." 460 F.3d at 508. ("Asking the defendants whether the plans were legal does not constitute reasonable due diligence.")

Despite *Cetel*, Plaintiffs argue that they exercised due diligence by going to their accountant once Dr. Borah became aware that others were being audited. (Pls.' Resp. at 20-24.) Plaintiffs' accountant, however, did not perform an independent investigation; he merely relied on Cohen's

statements. (Defs.' Mot. Ex. E (Cooper Dep.) at 27-30, 80.) Further, Dr. Borah testified that he understood as much. (Defs.' Mot. Ex. C (Borah Dep.) at 101.) Dr. Borah is not required to, in Plaintiffs' words, "plumb into the complexity of the Tax Code." However, even the unsophisticated investor, which Dr. Borah claims to be, is not held to a lower level of due diligence. *Matthews*, 260 F.3d at 525; (Suppl. Verification of Dr. Borah ¶ 2.) As in *Cetel*, it was insufficient for Dr. Borah, along with his accountant, to rely solely on "defendants' assurances of 'victory' over the IRS in Tax Court" without even a modicum of independent review.[6] *Cetel*, 460 F.3d at 508; (Defs.' Mot. Ex. C (Borah Dep.) at 26, 50-51.)

Accordingly, the Court finds that Plaintiffs were on inquiry notice of their injuries in August 1995, and as such, their claims accrued at that time. *See Cetel*, 460 F.3d at 508. Under the four year statute of limitations established in *Agency Holding Corporation v. Malley-Duff & Associates*, 483 U.S. 143 (1987), Plaintiffs' RICO claims are time-barred.

B. Defendants are Entitled to Summary Judgment on Plaintiffs' Breach of Fiduciary Duty Claim

Plaintiffs' sole remaining claim is breach of fiduciary duty. Defendants argue that this claim is preempted by ERISA and that any surviving ERISA claim is barred by the statute of limitations. Plaintiffs respond that their state law claim is not preempted and was brought within the limitations period. The Court does not reach the preemption issue because it finds that Plaintiffs' breach of fiduciary duty claim, characterized as either a Pennsylvania state law claim or a federal ERISA claim, is time-barred.

[6] Cooper testified at his deposition that he did not recall performing any independent investigation regarding the IRS's adverse position outside of reviewing that position with Cohen. (Def. Mot. Ex. E (Cooper Dep.) at 27.)

1. Plaintiffs' state law breach of fiduciary duty claim is time-barred

Under Pennsylvania law, claims for breach of fiduciary duty are subject to a two year statute of limitations. 42 PA. CONST. STAT. § 5524 (2007); *Weis-Buy Servs., Inc. v. Paglia*, 411 F.3d 415, 422 (3d Cir. 2005); *Wise v. Mortg. Lenders Network USA, Inc.*, 420 F. Supp. 2d 389, 395 (E.D. Pa. 2006). Plaintiffs seek to apply Pennsylvania's "discovery rule exception" to the statute of limitations. Under such exception, the limitations period is suspended until "the plaintiffs knew, or through the exercise of reasonable diligence should have known, of the injury and its cause." *Beauty Time, Inc. v. VU Skin Sys., Inc.*, 118 F.3d 140, 144 (3d Cir. 1997). When the events underlying a plaintiff's cause of action sound in fraud or deceit, "that, without more, will toll the statute of limitations until such time as the fraud has been revealed, or should have been revealed by the exercise of due diligence by the plaintiff." *Id.* Reasonable diligence is the care or attention which would be expected from a man of ordinary prudence and activity. *Id.* (internal citations omitted). "There are a few facts that diligence cannot discover, but there must be some reason to awaken inquiry and suggest investigation." *Id.* (*citing Urland v. Merrell-Dow Pharms.*, 822 F.2d 1268, 1271 (3d Cir. 1987).

In accordance with the discussion above, the Court holds that, if Dr. Borah had exercised reasonable diligence in 1995 he should have known that Cohen misrepresented the benefits affiliated with the VEBA plan. Once Dr. Borah received notice of the IRS's position and plan of action, Plaintiffs' claim accrued, notwithstanding Cohen's optimistic statements to the contrary. As such, the two year statute of limitations ran from 1995, rendering this action untimely.

2. *An ERISA breach of fiduciary duty claim would also be time-barred*[7]

Even if Plaintiffs' claim was recast as an ERISA breach of fiduciary duty claim, it would still be time-barred.[8] The statute of limitations for breach of fiduciary duty claims brought under ERISA is the earlier of: (1) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation; or (2) six years after the date of the last action which constituted a part of the breach 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 (2007). If the breach was the subject of fraud or concealment,

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[7] Plaintiffs do not characterize their claim as an ERISA claim. (*See* Pls.' Resp. at 28, 35 n.5.) Defendants argue that Plaintiffs' claim is preempted, and suggest from their analysis that the complete preemption applies, thereby converting Plaintiffs' state law claim into a federal ERISA claim. (Defs.' Mem. at 5-6.)

There are two types of ERISA preemption: "complete preemption," which converts state claims that are "necessarily federal in character" into ERISA claims, and "express preemption," an affirmative defense requiring dismissal of state law claims that "relate to" an employee benefit plan. *In Re. U.S. Healthcare, Inc.*, 193 F.3d 151, 160 (3d Cir. 1999) (*citing Joyce v. RJR Nabisco Holdings Corp.*, 126 F.3d 166, 171-72 (3d Cir. 1997). The doctrine of complete preemption, as discussed above, applies when "certain federal laws so thoroughly occupy a field of regulatory interest that any claim brought within the field, however stated in the complaint, constitutes a federal claim . . . ." *Wirth v. Aetna U.S. Healthcare*, 469 F.3d 305, 307 (3d Cir. 2007) (citing *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987)). The effect of complete preemption is "to convert complaints purportedly based on the preempted state law into complaints stating federal claims from their inception." *In re Comm. Bank of Northern Virginia*, 418 F.3d 277, 290 (3d Cir. 2005) (internal citations omitted).

[8] ERISA's Section 502(a)(3), a civil enforcement catch-all provision which provides for equitable relief to redress any ERISA violation, supports a claim for breach of fiduciary duty. *Bixler v. Central Pa. Teamsters Health and Welfare Fund*, 12 F.3d 1292, 1298-1300 (3d Cir. 1993). To state an ERISA breach of fiduciary duty claim based on a material misrepresentation, a plaintiff must establish: "(1) the defendant's status as an ERISA fiduciary acting as a fiduciary; (2) a misrepresentation on the part of the defendant; (3) the materiality of that misrepresentation; and (4) detrimental reliance by the plaintiff on that misrepresentation." *Burstein v. Retirement Account Plan for Employees of Allegheny Health Educ. & Research Found.*, 334 F.3d 365, 384 (3d Cir. 2003) (internal citations omitted); *see also Horvath v. Keystone Health Plan East, Inc.*, 333 F.3d 450, 461 (3d Cir. 2003) (Regarding omissions, "[A] fiduciary has a legal duty to disclose to the beneficiary those material facts, known to the fiduciary but unknown to the beneficiary, which the beneficiary must know for its own protection.")

then the statute runs six years from the date of discovery of such breach or violation. *Id.* Thus, the limitations period varies depending on whether the plaintiff had "actual knowledge" of the breach or violation. *Cetel*, 460 F.3d at 511 (internal citations omitted).

a. Plaintiffs had actual knowledge of their claim in 1997

Actual knowledge, for the purpose of the statute of limitations, requires that a plaintiff knows of "all material facts necessary to understand that some claim exists, which facts could include necessary opinions of experts, knowledge of a transaction's harmful consequences or even actual harm." *Cetel*, 460 F.3d at 511 (internal citations omitted). In the context of a breach of fiduciary duty, actual knowledge requires "knowledge of all relevant facts at least sufficient to give the plaintiff knowledge that a fiduciary duty has been breached or ERISA provision violated." *Id.* (internal citations omitted). Despite the "high standard" required for actual knowledge, the Court holds that, by 1997, Plaintiff had actual knowledge of his breach of fiduciary duty claim.

The gravamen of Plaintiffs' claim is that Cohen misrepresented, through statements and omissions, the legitimacy of the tax benefits associated with the VEBA plan. (*See* Compl. ¶ 1; Defs.' Mot. Ex. C. (Borah Dep.) at 101, 92, 103, 105.) Cohen never told Plaintiff that there were tax-risks associated with participation in the VEBA. (*Id.* at 251-52.) Based on Defendants' representations about the benefits of the VEBA, Plaintiffs enrolled. (*Id.* at 78.)

By 1997, Plaintiff possessed ample information revealing Cohen's misrepresentations. As discussed above, in mid-1995, Dr. Borah received a letter from Cohen's attorney warning that "[t]he IRS has issued a formal notice, Notice 95-34 . . . to alert taxpayers and their representatives that it is the Internal Revenue Service's position that contributions to certain VEBA arrangements will not be deductible." (Defs.' Mot Ex. B (July 12, 1995 Letter).) That letter further made clear that the IRS

would be "actively auditing VEBA plans" and "asserting its position in litigation." (*Id.*) Subsequent to 1995, Dr. Borah received two additional letters from Cohen which discussed the "IRS case," referring to the Tax Court litigation. (Defs.' Mot. Ex. B (July 17, 1996 Letter) & Ex. F (Jan. 20, 1997 Letter).) Finally, by 1997, Dr. Borah became aware that other VEBA participants were being audited. (Pls.' Resp. at 21.)

Accordingly, because Plaintiffs had actual knowledge of the breach or violation in 1997, the three-year limitations period ended in 2000, and any ERISA breach of fiduciary duty claim asserted by Plaintiffs would be time-barred.

IV. CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment is granted. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BISHNU C. BORAH, M.D., P.C.,	:	
and BISHNU BORAH, M.D.,	:	
Plaintiffs,	:	**CIVIL ACTION**
	:	
v.	:	
	:	
MONUMENTAL LIFE INSURANCE	:	
COMPANY, et al.,	:	**NO. 04-3617**
Defendants.	:	

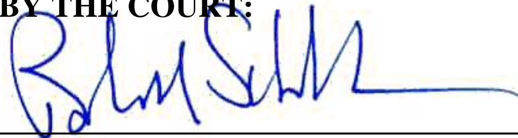
ORDER

AND NOW, this **2nd** day of **April**, **2007**, upon consideration of Defendants' motion for summary judgement, Plaintiffs' response thereto, and for the foregoing reasons, it is hereby **ORDERED** that:

1. Defendants' Motion for Summary Judgment (Document No. 73) is **GRANTED.**

2. The Clerk of Court is directed to close this case for statistical purposes.

BY THE COURT:



Berle M. Schiller, J.