THE FOURTH ANNUAL
ELLEN A. (NELL) HENNESSY EMPLOYEE BENEFITS
MOOT COURT COMPETITION

UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH DISTRICT

NEW YORK MAIL, NEW YORK MAIL 401(K) PLAN ADMINISTRATIVE COMMITTEE, KING WESTLEY, SAMANTHA ORTIZ, AND LABRON HASTINGS, ANDREWS RECORD-KEEPING, INC., ANDREWS INVESTMENT COMPANY, AND ALINA OXMIX COMEY

Defendant-Appellees,

v.

LIBERTE CHEN,

Plaintiff-Appellant.

On Appeal from the United States District Court
For the District of Columbia
20-cv-099-TCF
(The Honorable Thomas C. Farnam)

BRIEF OF APPELLEES

Original Brief - TEAM #4

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JURISDICTIONAL STATEMENT

The district court has jurisdiction over the parties and the subject matter of this case pursuant to 29 U.S.C. § 1132 (e)(2) and (f) of the Employee Retirement Income Security Act of 1974 ("ERISA"). The district court's decision is appealable under 28 U.S.C. § 1291.

ISSUES PRESENTED

The first issue is whether the Plan's time limitation in Section 12 of the New York Mail 401(k) Plan is enforceable requiring Appellant's lawsuit be dismissed as untimely.

The second issue is whether the District Court properly found that Appellant's complaint failed to plead with sufficient particularity that Mail Defendants breached fiduciary responsibilities and that the AIC Defendants were fiduciaries under ERISA.

STATEMENT OF THE CASE

Defendant-Appellee New York Mail ("Mail") is a newspaper conglomerate headquartered and published in New York City.[1] Mail is the plan sponsor and named fiduciary of Defendant-Appellee New York Mail 401(k) Plan (the "Plan") which Mail offers to certain employees. As plan sponsor and named fiduciary of the Plan,

[1] Opinion & Judgment, No. 20-cv-099-TCF, 1 (D.D.C. Jan. 18, 2021) (the "Opinion").

Mail appoints the Defendant-Appellee New York Mail 401(k) Plan Administrative Committee ("Administrative Committee").[2] The Administrative Committee is made up of the following individuals, also Defendant-Appellees: King Westley ("Westley"), Samantha Ortiz ("Ortiz"), and LaBron Hastings ("Hastings," and collectively with Mail, the Plan, Administrative Committee, Westley, and Ortiz, the "Mail Defendants").[3]

Defendant-Appellee Andrews Investment Company ("AIC") is a large mutual fund company headquartered in New York.[4] Defendant Andrews Record-Keeping, Inc. ("ARK") is a wholly owned subsidiary of AIC and provides recordkeeping services to 401(k) plans.[5] Alina Oxmix Comey ("AOC," and collectively with AIC and ARK, "AIC Defendants") is an employee at an ARK call center.[6]

In 2001, Mail went through a review of its Plan's record keeping services by soliciting bids.[7] The Administrative Committee ultimately hired ARK as the Plan's record keeper and entered into an Administrative Services Agreement with AIC and ARK (the "Agreement").[8]

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[2] *Id*.
[3] *Id*.
[4] *Id*.
[5] *Id*.
[6] *Id*. at 5.
[7] *Id*. at 1.
[8] *Id*. at 2.

Plaintiff-Appellant Liberte Chen ("Chen") is a reporter living in Washington D.C., is employed by Mail, and is a participant in the Plan.[9]

In March 2020, the hourly paid employees of ARK went on strike and ARK was forced to hire a series of replacement staff, including AOC, to handle the call center.[10] On March 15, 2020, Chen attempted to move her 401(k)'s account balance through ARK's online platform and through the ARK call center.[11] Ultimately, Chen's money was never moved.[12]

On December 15, 2020, Chen filed a civil action against Mail, the Plan, the Administrative Committee, the Administrative Committee's individual members, AIC, ARK, and AOC in the United States District Court for the District of Columbia.[13] Chen seeks relief under ERISA 502(a)(1)(B)[14] for a claim for benefits to collect $537,191.06 and seeks injunctive relief under ERISA 502(a)(3)[15] to replace AIC and ARK as record-keeper and investment custodian for the plan.[16] In her complaint, Chen alleges that: (i) she was denied benefits owed under the plan, (ii) each defendant is a fiduciaries under ERISA, (iii) Mail Defendants had an

[9] *Id*.
[10] *Id*. at 4-5.
[11] *Id*. at 5.
[12] *Id*.
[13] 2021 Problem and Stipulated Facts at 5 ("Record" or "R").
[14] 29 U.S.C. § 1132(a)(1)(b).
[15] 29 U.S.C. § 1132(a)(3).
[16] R. at 5; Opinion at 9.

obligation to prudently select a record-keeper and to monitor its performance and address deficiencies in its performance, (iv) Mail Defendants failed in their duty to prudently select a record-keeper by focusing on ARK's low costs rather than quality of its services, (v) Mail Defendants failed to prudently monitor ARK during the strike when it was using replacement employees, (vi) Mail Defendants failed to create adequate procedures and policies under which ARK performed its contractual obligations, and (vii) ARK's use of inadequately trained employees during the strike to maintain the online interface and to staff the Call Center was a violation of its duty of prudence and put its own interests ahead of those of the participants.[17]

The AIC Defendants filed a Motion to Dismiss for Failure to State a Claim on December 16, 2020 (ECF No. 3) arguing they were not ERISA fiduciaries and their roles were merely ministerial and that they performed all duties in accordance with valid instruments and instructions from authorized agents.[18] The Mail Defendants filed a Motion to Dismiss on December 17, 2020 (ECF No. 4) arguing that the Plaintiff's motion was filed untimely and bared by the terms of the plan, and in the alternative, that they prudently selected AIC and ARK and prudently monitored ARK.[19] Plaintiff-Appellant filed Responses in Opposition to both AIC Defendants' Motion and Mail Defendants' Motion on January 2, 2021 (ECF No. 5). On January

[17] Opinion at 5-6.
[18] *Id.* at 1, 5.
[19] *Id.* at 1, 5.

18, 2021, the District Court granted both Motions to Dismiss and thereby dismissed the Complaint.[20] Plaintiff-Appellant brings the instant appeal before this Honorable Court and as such the Defendants-Appellees respond.

STATEMENT OF THE FACTS

In 2001, Mail had employed Infidelity Investment Third-Party Administration for 15 years as their 401(k)-record keeper.[21] Due to concerns over increasing fees, the Administrative Committee asked for bids from other record-keepers.[22] ARK submitted a bid and was one of the lower bidders.[23] The Administrative Committee hired a financial advisor to review ARK's bid, and the financial advisor confirmed that ARK provided competent services.[24]

Every year the Administrative Committee and ARK meet on the first business day of December to review the Plan, the services it provides the Plan, and the fees paid for such services.[25] The contract renewal begins again each January 1.[26] Additionally, Mail performs checks on ARK's services by sending a questionnaire to Plan participants on October 31 each year asking if the participants are happy with

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[20] *Id*. at 1.
[21] *Id*. at 2.
[22] *Id*.
[23] *Id*.
[24] *Id*.
[25] *Id*.
[26] *Id*.

ARK's performance.[27] The response rate each year is around 10% or lower and the number of complaints about ARK is always less than 1% of the responses that it receives.[28] The Administrative Committee keeps a record from complaints over the 19 years it has utilized ARK and found that the complaints were no greater than those made against the prior third-party administrator, Infidelity.[29]

The Agreement between AIC, ARK, and the Plan contains the following relevant provisions:

(1) Section 1 states that ARK will provide (i) maintenance of records for the Plan, (ii) an interface that Plan participants can use to designate and change investment vehicles, and (iii) a phone-in service center in which Plan participants can request information concerning account balances and can provide instructions to ARK on designating and changing investment vehicles.[30]

(2) Section 4.1 states that "in accordance with Section 404(c) of ERISA, AIC will arrange for the provision to the Plan and its participants the investment options that are specified in the Plan document…"[31]

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[27] *Id.*
[28] *Id.*
[29] *Id.* at 2.
[30] *Id.* at 3.
[31] *Id.*

(3) Section 4.2 states that AIC is entitled to all float, 12b-1, and other investment fees with respect to amounts invested under the Plan. These fees have been disclosed to the Plan's fiduciaries and all such amounts are applied as an offset against Per Capita Fee specified in Section 4.3 of the Agreement.[32]

(4) Section 5 states that AIC will provide "Best Execution" and further states, "AIC intends to provide best execution reasonably practicable under the circumstances for all Plan investment transactions, including but not limited to transmitting any investment instructions to the appropriate investment manager(s) in a timely manner."[33]

(5) Section 8 states that "ARK and AIC are not and shall not be regarded as a fiduciary for purposes of ERISA."[34]

(6) Section 9 states that any lawsuit related to the Agreement must be filed in accordance with provisions of the Plan. [35]

The Plan document governing the terms of the Plan contain the following relevant provisions:

(1) Section 6 which specified that it complied with Section 404(c) of ERISA and states the Plan must offer the following investments: (i) a stock index fund

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[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] R. at 3.

managed by Infidelity Investments LLC, (ii) a long-term bond fund managed by AIC, (iii) a stable value fund managed by AIC, (iv) a life-cycle fund based on age and project retirement date managed by AIC, (v) a real estate fund managed by Infidelity Investments LLC, (vi) a foreign investment fund managed by AIC, (vii) a fund invested in technology stock managed by Infidelity Investments LLC, and (viii) a money-market fund managed by AIC.[36]

(2) Section 10 which names the Administrative Committee as the Plan Administrator and named fiduciary.[37]

(3) Section 12 stating, "Any lawsuit seeking Plan benefits of challenging the management and administration of the Plan must be filed within six (6) months of the date the Plan issues a determination regarding such claim."[38]

The Plan was amended in 2018 to add Section 12 and the contents of Section 12 were communicated to Plan participants in a Summary Plan Description that was issued on April 30, 2020.[39]

In March 2020, the hourly-paid employees of ARK went on strike.[40] ARK hired replacement staff and utilized executives and salaried employees to staff the phone

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[36] Opinion at 3-4.
[37] *Id*. at 4.
[38] *Id*.
[39] *Id*.
[40] *Id*.

centers and keep the online platform operational.[41] During this time, the online platform was experiencing technical issues and often not working.[42] This led to increased call volume on the ARK phone center.[43] Due to the replacement workers and the high call volume, ARK had issues in processing investment instructions from participants which led to occasional mistakes.[44]

On March 15, 2020, Chen decided to move her Plan account balance from the money market fund to the stock index and technology stock fund.[45] Chen was unable to use the online platform because of the technical issues and ended up calling the ARK Call Center.[46] Chen spoke with replacement staff member AOC. Chen instructed AOC to move her entire plan balance to be equally split between the stock index and technology stock fund.[47] AOC repeated back Chen's instructions as trained and Chen confirmed.[48] Unfortunately due to the high call volume, AOC failed to forward Chen's instructions to AIC.[49]

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[41] *Id*. at 4-5.
[42] *Id*. at 4-5.
[43] *Id*.
[44] *Id*.
[45] *Id*. at 5.
[46] *Id*.
[47] *Id*.
[48] *Id*.
[49] *Id*.

AOC stated that Chen would receive written confirmation of the trade within seven business days, but Chen did not receive confirmation.[50] Additionally, Chen received benefit statements dated March 31, 2020 and April 30, 2020, which she received on April 10, 2020 and May 14, 2020, respectively, that did not show the change.[51] Chen called the Call Center but due to her busy schedule was unable to wait for the longer call wait times and never reached a representative.[52]

Between March 16, 2020 and May 31, 2020, the stock index and technology stock funds increased in value from 20% and 40% respectively while the money market fund earned Chen $692.60.[53] Chen would have earned $537,201.54.[54]

On May 15, 2020, Chen sent a letter to the plan to "make this right" and to recognize her March 15, 2020 instructions.[55] The Plan replied on May 31, 2020 and stated, "apologies if errors were made, but there is nothing the plan can do at this time because the matter was not brought to the Administrative Committee's attention in a timely manner."[56]

Consequently, Chen filed civil suit in the United States District Court for the District of Columbia on December 15, 2020, six and a half months after she received

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[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.* at 4.

the denial from the Administrative Committee.[57] The Mail Defendants and the AIC Defendants each filed motions to dismiss the lawsuit and ultimately on January 18, 2021, the District Court dismissed the case.[58] Chen timely appealed the Opinion and Judgement and brings this instant appeal before this Honorable court.

SUMMARY OF THE ARGUMENT

ERISA was handed down to protect people and their retirement savings from mismanagement and abuse. It was designed to hold individuals and entities in charge of those savings to high standards. Fiduciaries must act in the sole interests of plan participants. However, ERISA was not designed to stop all bad luck. It was designed to establish procedures and standards of conduct for plan mangers and fiduciaries. The Defendant-Appellees here acted reasonably in establishing a reasonable claim period and performed its duties in a reasonable manner in the sole interests of the participants. Unfortunately, the Plaintiff-Appellant missed out on a "once in lifetime" investment opportunity, but the evidence here does not establish that the Defendant-Appellees should be held liable under ERISA.

When it comes to appeal periods, the Supreme Court holds that a plan may agree by contract to a limitations period so long as that period is reasonable.[59]

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[57] *Id.* at 5.
[58] *Id*. at 12.
[59] *Heimeshoff v. Hartford Life & Acc. Ind. Co.*, 571 U.S. 99, 106 (2013).

Courts have interpreted contracted periods related to ERISA claims as short as 45 days to be reasonable.[60] Chen was put on notice of the claim period when she directly received the Summary Plan Description ("SPD") on April 30, 2020. The six-month limitation period outline in the SPD is clearly defined and reasonable. When Chen initiated her lawsuit after this claim period, the District Court correctly dismissed the lawsuit as untimely.

As an alternative, the district court correctly identified that the Mail Defendants acted with the "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character with like aims"[61] when initially hiring and then regularly evaluating their service providers. Additionally, there is no evidence in the record that identifies AIC Defendants as ERISA fiduciaries. AIC Defendants acted in accordance with the terms of the Agreement and the Plan Document and never utilized any discretionary authority or control.

Accordingly, Appellees respectfully request this Honorable Court to affirm the District Court's Motions to Dismiss.

ARGUMENT

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[60] *See Davidson v. Wal-Mart Associates Health and Welfare Plan*, 305 F.Supp.2d 1059.
[61] 29 U.S.C. § 1104 (b).

I. The Court Should Dismiss This Appeal Because the Statute of Limitations Was Communicated to Plan Participants in a Summary Plan Description and the Plan's Time Limitation in Section 12 is Reasonable.

A. Plaintiff had Actual Notice of the Statute of Limitations

The United States Supreme Court has held that the focus on the written terms of a plan is necessary to develop a system that is not "so complex that administrative costs, or litigation expenses, unduly discourage employers from offering plans in the first place."[62] It is well held that the explicit language of the plan is "the center of ERISA" and therefore ought to control in any dispute.[63] In detailing the specifics of a plan, ERISA requires that every employee benefit plan establish and maintain reasonable procedures governing the filing of benefits claims, notification of benefit determinations, and appeal of adverse benefit determination.[64] Furthermore, in adverse benefit determinations ERISA regulations require the plan administrator to provide "a description of the plan's review procedures and the time limits applicable to such procedures, including a statement of the claimant's right to bring a civil action under section 502(a) of the Act following an adverse benefit determination on review."[65]

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[62] *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996).
[63] *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 101 (2013).
[64] 29 C.F.R. § 2560.503-1(b).
[65] 29 C.F.R. § 2560.503-1(g)(iv).

The circuit courts have split on the interpretation of this provision and whether notice of the Plan's contractual limitations period must be disclosed in the denial notice or whether actual notice of the limitation is required.

The Second, Ninth, and Eleventh Circuits have held that notice of a Plan's contractual limitations is either not required to be disclosed to the claimant in a denial notice or that equitable tolling is not available when the claimant had actual notice of the statute of limitations.[66] The First, Third, and Sixth Circuits have held that notice of the time limitation is required in an adverse benefit determination.[67]

Here, the Mail Defendants explicitly provided notice of the statute of limitations when they issued the SPD. Chen, a diligent and conservator investor who frequently checked her plan documents in the months of March, April, and May 2020, was effectively on notice of this statute when it was directly sent to her on

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[66] *See, e.g., Wilson v. Standard Ins. Co.*, 613 Fed.Appx. 841 (11th Cir. 2015) (holding that notice provided in the Plan was sufficient when claimant did not exercise minimal diligence in discovering the terms of the policy); *Scharff v. Raytheon Co. Short Term Disability Plan*, 581 F.3d 899, 902 (9th Cir. 2009) (holding that notice provided in the Summary Plan Document was sufficient when the final denial notice did not expressly mention the time limit); *Heimeshoff v. Hartford Life & Accident Ins. Co.*, No. 3:10cv1813 (JBA), 2012 U.S. Dist. LEXIS 6882, at *1, 4-2 (D. Conn. Jan. 16, 2012), *aff'd,* 496 F. App'x 129 (2d Cir. 2012), *aff'd*, 134 S. Ct. 604 (2013) (equitable tolling not appropriate when claimant received actual notice of the limitations period in the Plan Document).

[67] *See Mirza v. Insurance Adm'r of America, Inc.*, 800 F.3d 129 (3rd Cir. 2015); *Santana-Díaz v. Metro. Life Ins. Co.*, 816 F.3d 172, 175 (1st Cir. 2016); *Moyer v. Metro. Life Ins. Co.,* 762 F.3d 503, 504 (6th Cir. 2014).

April 30, 2020. The facts of the case at hand are distinguishable from the interpretation of the notice requirement found in each of the First, Third, and Sixth Circuits. In *Mirza*, the Third Circuit held that a one-year time limit provided in the previous plan description "buried on page seventy-three" of a ninety-one-page document was not sufficient notice.[68] Here, Plan Administrators communicated the statute of limitations period to Plan participants in an SPD, not a dense, impossible to interpret full plan. Since a "key function of the SPD is conveying plan information in an understandable summary to participants", Chen was on notice of the statute of limitation when received.[69] Plaintiff was diligent in monitoring the documents received from the Plan and has made no claim that the content of the SPD was not clear. In *Santana-Diaz v. Metro. Life Ins. Co.*, the First Circuit held that equitable tolling of the statute of limitations should be allowed when the Plan administrator does not mention the start date of when the statute of limitations begins to run.[70] Although the denial of the claim issued by the Plan on May 31, 2020 does not explicitly refer to the statute of limitations, the case at hand is distinguishable from *Santana-Diaz*. Here, the date the statute of limitations begins is clearly laid out in

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[68] *Mirza v. Insurance Adm'r of America, Inc.*, 800 F.3d at 135.
[69] EBIA Staff, *What's the Difference Between a Plan Document and an SPD*, Thomson Reuters Tax & Accounting (May 31, 2018), https://tax.thomsonreuters.com/blog/whats-the-difference-between-a-plan-document-and-an-spd/.
[70] *Santana-Díaz v. Metro. Life Ins. Co.*, 816 F.3d at 176.

the SPD as "within six (6) months of the date the Plan issues a determination regarding such claim."[71] The Plan clearly issued this determination on May 31, 2020 and clearly issued notice regarding the statute of limitations on April 30. In *Santana-Diaz*, there was ambiguity as to when the limitations period began.[72] In *Moyer v. Metro. Life Ins. Co.*, the Sixth Circuit held the SPD "failed to provide notice of either Moyer's right to judicial review or the applicable time limit for initiating judicial review."[73] Here, again the case at hand is distinguishable as the applicable time limit was specifically noted in the SPD issued on April 30. This Court should apply the rulings of the Second, Ninth, and Eleventh Circuits that notice of the statute of limitations period is not required in the denial notice because Chen was on actual notice, the statute of limitations was clearly conveyed, and there was no ambiguity to the timing.

We would be remiss to not address the fact that the distinguishable cases above were decided on a statutory interpretation of the language found in 29 C.F.R. § 2560.503-1(b)(iv) and not the facts presented. However, considering the present circuit split and absent a controlling statutory interpretation of 29 C.F.R. § 2560.503-1(b)(iv), we believe all facts must be addressed to determine whether the statute of

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[71] Opinion at 9.
[72] *Santana- Díaz v. Metro. Life Ins. Co.*, 816 F.3d at 177.
[73] *Moyer v. Metro. Life Ins. Co.,* 762 F.3d 503, 504 (6th Cir. 2014).

limitations period must be provided in the final denial letter. Given the present facts, we believe it does not.

B. Reasonable Statute of Limitations Contained in the Plan Must Be Enforced.

In furtherance of the well settled notion that the language of the ERISA plan controls, the statute of limitations like other language explicitly defined in a plan must be interpreted as written.[74] In analyzing this specific issue, the United States Supreme Court held that where a plan document specifically details a statute of limitations periods for claims, the federal courts will enforce that statute of limitations so long as the period is reasonable.[75]

In determining a reasonable statute of limitations, various courts have held that limitations of 180 days or six months are reasonable.[76] In fact, various Courts have held that ERISA contractual limitation periods as short as 90 or even 45 days were reasonable even when state statute of limitations for written contracts far exceed these limitations.[77]

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[74] *See generally US Airways, Inc. v. McCutchen*, 569 U.S. 88 (2013).
[75] *See Heimeshoff v. Hartford Life & Accident Ins. Co.*, 571 U.S. 99 (2013).
[76] *See, e.g., Ausler v. Aetna Life Insurance Co.*, 2019 WL 1015004 (holding that a claim brought after 180 days was not valid); *Caimi v. Daimlerchrsyler Corp.*, 2008 WL 619220 (holding that a six-month time limitation is not unreasonable);
[77] *See*, *e.g., Northlake Regional Medical Center v. Waffle House System Employee Benefit Plan*, 160 F.3d 1301, 1303 (affirming a 90-day contractual limitation to ERISA claims as reasonable); *Davidson v. Wal-Mart Associates Health and Welfare Plan*, 305 F.Supp.2d 1059 (affirming a 45-day contractual limitation to ERISA claims as reasonable).

Here, the District Court was correct in holding that Plaintiff's lawsuit is untimely and therefore must be dismissed. Section 12 of the Plan states that any lawsuit "seeking Plan benefits or challenging the management and administration of the Plan must be filed within six (6) months of the date the Plan issues a determination regarding such claim."[78] The Plan issued a written determination of the claim on May 31, 2020 denying the claim seeking relief brought by Plaintiff on May 15, 2020. Despite being fully aware of the six-month time limitation, Plaintiff did not bring her suit until December 15, 2020. The six-month statute of limitations had expired on December 1, 2020. The suit was clearly outside the contractually agreed statute of limitations. The six-month limitation period is well within reasonable time period, so the Court should dismiss this appeal and issue a judgment in favor of Defendants.

II. In the Alternative, Should This Court Hold the Statute of Limitations to Not be Enforceable, It Should Affirm the District Court's Conclusion that the Mail Defendants Did Not Breach Any ERISA Fiduciary Duty.

A. The Mail Defendants Prudently Selected AIC to Provide Services to the Plan and Its Participants.

ERISA requires that a fiduciary act with the "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of

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[78] Opinion at 9.

a like character with like aims."[79] In evaluating this duty of prudence, the court ought to apply the standard in a flexible manner looking at the circumstances at the time the decision is made and not "from the vantage point of hindsight".[80] The results of a fiduciary's decision should not be evaluated but rather the process that was used by the fiduciary in that decision.[81] The fact that the fiduciary's decision ultimately resulted in an undesirable outcome for the plan or its participants does not establish that a breach of the duty of prudence occurred.[82] The general standard the courts have espoused is that a fiduciary must undertake a careful investigation before embarking on a specific course of action and all facts must be taken into account in making this determination.[83]

Here, Mail solicited multiple bids when deciding to switch from the current record-keeper, Infidelity, due to high fees. ARK was *among* the low bidders for these services. Mail, however, did not look strictly at the fees charged. Mail hired an independent financial advisor to conduct due diligence and determine whether ARK provided competent services. The determination was that the complaints were no greater than those made against Infidelity, a company that charged much higher fees.

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[79] 29 U.S.C. § 1104 (b)
[80] *See Katsaros v. Cody*, 744 F.2d 270 (2d Cir. 1984).
[81] *See Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915 (8th Cir. 1994).
[82] COLLEEN E. MEDILL, INTRODUCTION TO EMPLOYEE BENEFITS LAW: POLICY AND PRACTICE 471 (5th ed. 2018).
[83] *Id.*

Ultimately, Mail reasonably determined ARK could provide competent service and hired ARK to be its record keeper.

It is important to distinguish the case at hand from the holding of the Fifth Circuit in *Bussian v. RJR Nabisco*. In *Bussian*, the Court held that a reasonable trier of fact could conclude that the selection of the lowest bidder was imprudent based on the company's risky investment strategy.[84] However, in *Bussian* the fiduciary was aware of multiple facts that would indicate it was a risky decision.[85] Here, not only was Mail not aware of any negative facts about ARK, but they conducted independent analysis of the company to determine if there would be any negative facts. Also, ARK was only *among* the low bidders. Mail was not looking strictly at price to maximize its own interest but was evaluating many different factors. The fact that ultimately there ended up being an unfavorable result for some of the participants should not be considered a breach due to the diligence exerted on the front-end by Mail.[86]

B. <u>The Mail Defendants Prudently Monitored AIC.</u>

The duty to monitor, a subset of the larger duty of prudence mentioned above, requires the fiduciary to exercise care when selecting and overseeing persons who

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[84] *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286 (5th Cir. 2000).
[85] *Id.* at 291.
[86] *See Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915.

provide services to the plan and its participants.[87] The Department of Labor issued regulations to clarify this duty:

> At reasonable intervals the performance of trustees and other fiduciaries should be reviewed by the appointing fiduciary in such manner as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan. No single procedure will be appropriate in all cases; the procedure adopted may vary in accordance with the nature of the plan and other facts and circumstances relevant to the choice of the procedure.[88]

The Supreme Court has held that fiduciaries have a continuing duty to monitor.[89] However, Congress has made it clear that fiduciaries may appoint a qualified investment manager to manage all or part of the plan asset so long as the fiduciary acts prudently in choosing the investment manager and in continuing to use the investment manager.[90] This duty to monitor then extends to selecting and overseeing of persons who provide services to the plan.[91]

Here, applying the prudent person standard, Mail satisfied its duty to monitor by continually performing surveys related to the ARK's performance. The contract renewal period began on January 1 of each year and was for a term of one year. Two months before each renewal period, Mail conducted

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[87] MEDILL at 472.
[88] 29 C.F.R. § 2509.75-8, FR-17.
[89] *Tibble v Edison Intern.*, 135 S. Ct. 1823, 1828 (2015).
[90] *See* H.R. Rep. No. 93–1280 (1974).
[91] MEDILL at 472.

performance surveys. ARK never received complaints greater than .1% of the total Plan participants. With a complaint level this low, Mail had no reason to believe the investment manager would not perform its duties in a reasonable manner. The decision to continue to allow ARK to serve as the investment manager must be viewed at the time the decision was made not with the vantage of hindsight.[92] It is clear that at the time the decision was made, Mail was acting reasonably and did not breach its duty to monitor.

III. The AIC Defendants are Not Fiduciaries under ERISA

A person or entity is a fiduciary under ERISA §3(21)(A):

> To the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.[93]

A. ARK Is Providing Services as a Record Keeper and Is Consequently Not a Fiduciary.

Maintaining records, compiling data and preparing reports are not fiduciary acts in themselves. Professionals, including 401(k) administrative consultants, are

[92] *See Katsaros v. Cody*, 744 F.2d 270 (2d Cir. 1984).
[93] 29 U.S.C. § 1002(21)(A).

not fiduciaries unless they "do more" than provide regular professional services.[94] In *DeLaurentis*, the court held that a 401(k) administrative consultant was not a fiduciary when it drafted the Plan and prepared quarterly statements sent to participants because it did not exercise discretion or control.[95] Similarly, other courts have found that service providers were not fiduciaries when they prepared year end reports, established and maintained balance sheets and record books, recorded and reconciled trust transactions, prepared financial statements and tax returns balancing fund accounts, posting participants' contributions, or reconciled books.[96]

In instances where administrative consultants were found to be fiduciaries, the entities have all "done more."[97] In *Greenberg*, the entity was designing the system and was holding the cash reserve. In *NARDA*, the consultant was participating in the

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[94] *DeLaurentis v. Job Shop Tech. Servs., Inc.*, 912 F. Supp. 57, 61-62 (E.D.N.Y. 1996).
[95] *Id.*
[96] *See Mitnick v. Cannon*, 784 F. Supp. 1190, 1193 (E.D. Pa. 1992), judgment aff'd without officially published op, 989 F.2d 488 (3d Cir. 1993); *Bd. of Trustees of W. Lake Superior Piping Indus. Pension Fund v. Am. Benefit Plan Adm'rs, Inc.*, 925 F. Supp. 1424, 1193 (D. Minn. 1996).
[97] *See Greenblatt v. Prescription Plan Services Corp.*, 783 F. Supp. 814, 821 (S.D.N.Y. 1992) (designing and implementing the claims processing system and exercising control over the plan's cash reserve made the administrative consultant a fiduciary); *NARDA, Inc. v. Rhode Island Hosp. Trust Nat. Bank*, 744 F. Supp. 685, 694-95 (D. Md. 1990) (Court felt that there was a factual dispute as to whether an administrative consultant was a fiduciary when they processed claims, maintained files, settled claims and participated in the determination of which claims would be paid first).

claim process. These actions are doing more than maintaining records, compiling data into reports, and following the instructions of the participants.

ARK's actions fit squarely within the conduct by the service providers in *DeLaurentis*, *Mitnick* and *Am. Benefit Plan Adm'rs*. In the Agreement between AIC, ARK, and the Plan, ARK is limited to the following duties: (1) maintenance of the records for the Plan, (2) providing the interface that plan participants use to designate and change investment vehicles, and (3) providing a phone service center where plan participants call to request information and order ARK representatives to designate and change investment vehicles.[98] ARK is maintaining data, providing data to participants and maintaining records. It is not sitting at the table determining which claims get paid in what order like in *NARDA* or designing the claim process and holding cash reserves like in *Greenblatt*. As the District Court correctly points out, ARK was "merely providing services in accordance with the Agreement and Plan document."[99] Despite any allegations of mistakes on the part of ARK or its employees in the call center or with its online platform, the conduct the ARK was contracted to do does not rise to the level of fiduciary.

B. <u>AOC as Employee of the Record Keeper Is Not a Fiduciary.</u>

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[98] Opinion at 3.
[99] *Id.*at 11.

When an individual employee was found to be an ERISA fiduciary, the individual employee held discretionary authority or control over the plan, the plan assets, or plan management.[100] All of these cases show that an officer, a director, or a shareholder of a service provider could have the requisite authority or control to be a ERISA fiduciary. Here, AOC is a rank-and-file employee as she was a call center employee tasked to provide information and follow participant orders.

AOC's conduct is more analogous to the conduct in *Int'l Bhd. of Painters & Allied Trades Union & Indus. Pension Fund v. Duval* where an employee of an investment management company was not held to be a fiduciary even though he received information about the plan, had discussion with the portfolio managers regarding the account and their meeting with the plan trustees, and communicated with the plan administrators regarding the plan.[101] There is no evidence in the record

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[100] *Margaret Hall Found., Inc. v. Atl. Fin. Mgmt., Inc.*, 572 F. Supp. 1475, 1479 (D. Mass. 1983) (a question of fact existed as to whether an officer, director and large shareholder of an investment advisor was an ERISA fiduciary); *Greenblatt* 783 F. Supp at 821 (court held that the individuals who had dominion and control over a prescription drug program and dental program were ERISA fiduciaries); *Muller v. M.D. Sass Assocs., Inc.*, No. CIV. A. 91-3762, 1992 WL 80938, at *1 (D.N.J. Apr. 22, 1992) (the president, director and principal shareholder of a company that managed and supervised the plan was an ERISA fiduciary); *Bell v. Exec. Comm. of United Food & Commercial Workers Pension Plan For Employees*, 191 F. Supp. 2d 10, 15 (D.D.C. 2002) (court held that there was a factual question as to whether individual officers of an investment consulting firm who allegedly exercised control over a plan could be fiduciaries).

[101] *See Int'l Bhd. of Painters & Allied Trades Union & Indus. Pension Fund v. Duval*, 925 F. Supp. 815, 828-29 (D.D.C. 1996).

to suggest AOC had any authority or control over plan assets beyond following the directive of participants. There is no evidence in the record to suggest that AOC had influence over a fiduciary or even the plaintiff's decisions. This is not enough to constitute discretionary control triggering ERISA liability. Even with AOC's failure to move the funds properly, AOC never held the actual control or discretion required to become a fiduciary.

C. AIC Does Not Hold Any Discretionary Authority or Control Relating to the Management of the Plan, the Management or Disposition of Plan Assets, or the Administration of the Plan.

i. Providing a Platform for the Investments Is Not a Fiduciary Act

Companies do not become ERISA fiduciaries by providing an investment platform for a 401(k), even if the company includes funds that it manages in the platform and makes changes to that platform over time.[102]

In *John Hancock*, plaintiffs were a class of participants enrolled in employer sponsored 401(k) plans.[103] The trustees of the plans contracted with the defendant

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[102] *See Hecker v. Deere & Co.*, 556 F.3d 575, 583 (7th Cir. 2009) (Fidelity as 401(k) record keeper and investment advisor was not a fiduciary because the plan sponsor decided the options to offer plan participants even though Fidelity limited the scope of funds available under its platform); *Renfro v. Unisys Corp.*, 671 F.3d 314, 322 (3d Cir. 2001) (Fidelity as 401(k) manager was not a fiduciary because it did not have contractual authority to control the mix and range of investment options, veto the sponsor's selections, or prevent the sponsor from offering competing investments); *Santomenno ex rel. John Hancock Tr. v. John Hancock Life Ins. Co. (U.S.A)*, 768 F.3d 284, 293-94 (3d Cir. 2014).

[103] *John Hancock*, 768 F.3d at 288.

John Hancock to administer the 401(k).[104] John Hancock assembled a “big menu” of investment options which included John Hancock investment funds as well as additional independent funds offered by other companies.[105] The Plan trustees selected which investment options to offer to the participants. John Hancock monitored the performance of all the investments and retained the authority to add, delete, or substitute the investment options it offered.[106] Ultimately the court found that John Hancock did not become a fiduciary because the trustees ultimately had the final responsibility in selecting the funds that would be included in the options for the 401(k) participants.[107] Additionally, the court held that a service provider will not be a fiduciary when the service provider and a plan trustee negotiate at arm’s length over terms of an agreement because the plan trustee decides to agree to the service provider’s terms and ultimately maintains discretionary control of the plan management with this decision.[108]

Here, in the Agreement between AIC, ARK and the Plan, section 4.1 states “In accordance with Section 404(c) or ERISA, AIC will arrange for the provision to the Plan and its participants the investment options that are **specified in the Plan**

[104] *Id*.
[105] *Id*. at 289.
[106] *Id*.
[107] *Id.* at 293-94.
[108] *Id.* at 293-94.

Document…"[109] Section 6 of the Plan document the specifies that it complies with Section 404(c) of ERISA and states that the following investments need to be included.[110] It is clear from the Agreement that the investment options have already been selected and are included in the Plan document.[111] AIC is not selecting the investment options but is bound by the dictates of the Plan document. AIC reads the plan document to determine the investment options that are included in the 401(k) platform.

Similar to *Hecker*, the Plan is choosing the options to offer plan participants from Section 6 of the Plan document. Similar to *Renfro*, AIC does not have the contractual authority to control the mix and range of investment options and cannot veto the sponsor's selections and is including funds managed by competitor Infidelity. Similar to *John Hancock*, the Plan has the final responsibility to select the funds that would be included in the mix and the terms of the contract were negotiated at arm's length which the plan sponsor agreed to the terms. In those three cases the 401(k) record keepers and investment advisors were not considered fiduciaries. Neither is AIC.

Contrast this with *Haddock v. Nationwide Fin. Servs.*, 419 F. Supp. 2d 156 (D. Conn. 2006). In this case, the contract gave the service providers unilateral

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[109] Opinion at 3 (emphasis added).
[110] *Id*. at 3-4.
[111] *Id*.

authority to add and delete funds from the menu of investment options under the plans. That authority has never been granted to AIC. They are strictly limited to Section 6.

ii. The Fee Structure Does Not Make AIC a Fiduciary

A revenue sharing provision does not implicate fiduciary status.[112] In *Leimkuehler*, the 401(k)-service provider, American United Life Insurance Co. ("AUL"), engaged in revenue sharing, where it received a portion of the fees charged by the underlying mutual funds to plan participants.[113] AUL designed a big menu of funds that it offered to the plan participants, and additionally AUL chose the share class that would be offered which affected the expense ratio paid by plan participants and consequently the amount of AUL's revenue sharing.[114] The Seventh Circuit said that AUL was not a fiduciary because it was open in its product design, i.e. AUL crafted its menu of investment options with the specific funds to include and consequently the expense ratio for each fund.[115] The Seventh Circuit determined that the plan sponsor in *Leimkuehler* could seek a deal with a different service provider.[116] The court in *John Hancock* ultimately came to this conclusion as well.[117]

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[112] *Leimkuehler v. American United Life Insurance Co.*, 713 F.3d 905, 914 (7th Cir. 2013).
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *John Hancock*, 768 F.3d at 294-95.

Here, Section 4.2 of the Agreement stated that AIC was "entitled to all float, 12b-1 and other investment feeds with respect to amount invested under the plan as offsets against the per capita fee specified in section 4.3 of the agreement."[118] Similar to *Leimkuehler* and *John Hancock*, this is AIC's product design. AIC was not hiding the ball and was upfront about its payment schedule. Following in the steps of *Leimkuehler* and *John Hancock*, AIC cannot be considered a fiduciary because of its product design.[119]

CONCLUSION

Appellees respectfully request this Court to affirm the district court's holding that Appellant's claim is barred by the statute of limitations. In the alternative, should this Court hold that the claim was filed timely, Appellees respectfully request that the Court affirm the district court's holding that the Mail Defendants did not breach any ERISA fiduciary duty and that none of the AIC Defendants were functioning as ERISA fiduciaries with respect to the allegations in the claim.

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[118] Opinion at 3.

[119] The court in *Leimkuehler* did state that "control over a separate account can support a finding of fiduciary status only if claims for breach of fiduciary duty arise from handling the separate account." 713 F.3d at 913. However, the Plaintiff here pled claims for benefits under 502(a)(1)(B) and injunctive relief under 502(a)(3) to replace the 01(k) service providers. Plaintiff did not make a claim for breach of fiduciary duty and consequently the dicta in *Leimkuehler* is inapplicable.