No. 20-cv-099-TCF

In The
UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

Liberte Chen

Plaintiff-Appellant

v.

New York Mail, New York Mail 401(k) Plan, 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-Respondent

On Appeal from the United States District Court
for the District of Columbia
Civil Action No: 20-cv-099-TCF

The Honorable Thomas C. Farnam

BRIEF OF THE PLAINTIFF-APPELLANT, Liberte Chen

Oral Argument Requested

/s/ Team 1
[Address]
[Phone Number]

Table of Contents

Statement of Jurisdiction **1**

Issues Presented **1**

Statement of the Facts **3**

Summary of the Argument **8**

Argument **9**

I. Standard of Review 9

II. Statute of Limitations 10

A. Cause of Action and Limitations Under ERISA 10

1. As Chen's Trade was Never Executed, the Injury Began Before she was Properly Noticed of the SOL, Therefore the Statute of Limitations Provision is Inapplicable to This Case. 11

a. The Harm Occurred Before the Six-Month SOL was Effective and Therefore it is Inapplicable in This Case. 11

b. Mail's Reply was Inadequate to Satisfy Department of Labor Guidelines and Therefore Cannot be a Sufficient Conclusion of Internal Appeal. 12

2. In the Alternative, Six Months is Unreasonable, Rendering the Limitations Provision Unenforceable. 14

a. ERISA was Enacted to Provide Efficient Relief and Access to the Courts Following Internal Reviews and a Six-Month SOL Offends These Policy Goals. 14

b. A SOL is Unreasonable When Substantial Obstacles in a Particular Case Prevent Timely Relief. 15

III. Mail Defendants and AIC Defendants are Plan Fiduciaries Pursuant to ERISA and the Plan. 17

A. Fiduciary Status Under ERISA 17

1. Mail Defendants are Plan Fiduciaries Because They Take Unilateral Action Respecting Plan Management. 19

2. AIC Defendants are Plan Fiduciaries Because of Their Actual Control Over the Disposition of Plan Assets. 21

B. ERISA Fiduciary Duties Owed to Plan Beneficiaries 23

1. Mail Defendants Breached Their Fiduciary Duties by Failing to Monitor the AIC Defendants Disposition of Plan Assets..25

2. AIC Defendants Breached Their Fiduciary Duties by Failing to Resolve Communication and Staffing Issues Affecting the Administration of the Plan. 28

Conclusion...30

Table of Authorities

Cases

**Adamson v. Armco, Inc.*,
44 F.3d 650 (8th Cir. 1995) 14

Aldana v. Del Monte Fresh Produce, N.A., Inc.,
416 F.3d 1242 (11th Cir. 2005) 22

Amato v. W. Union Int'l, Inc.,
773 F.2d 1402 (2d. Cir. 1985) 18

Assocs. in Adolescent Psychiatry, S.C. v. Home Life Ins. Co.,
941 F.2d 561 (7th Cir.1991) 18

Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.,
552 U.S. 192 (1997) 11

**Blatt v. Marshall & Lassman*,
812 F.2d 810 (2d. Cir. 1987) 18, 22, 23

Conn. Gen. Life Ins. Co. v. Biohealth Labs., Inc., No.
20-2312-cv, 2021 U.S. App. LEXIS 3667 (2d Cir. Feb. 10, 2021) 9, 10

Dannix Painting, LLC v. Sherwin Williams Co.,
732 F.3d 902 (8th Cir. 2013) 9

Ed Miniat, Inc. v. Globe Life Ins. Grp., Inc.,
805 F.2d 732 (7th Cir. 1986) 20

**Guyan Int'l, Inc. v. Prof'l Benefits Adm'rs, Inc.*,
689 F.3d 793 (6th Cir. 2012).......... 21, 22

Healthcare Strategies, Inc. v. ING Life Ins. & Annuity Co.,
961 F. Supp. 2d 393 (D. Conn. 2013) 18

**Heimeshoff v. Hartford Life & Accident Ins. Co.*,
571 U.S. 99 (2013) 11, 15, 16

Howard v. Shay,
100 F.3d 1484, 1488 (9th Cir. 1996).......... 24

*Authorities upon which Appellant chiefly relied are marked with asterisks.

Leigh v. Engle,
727 F.2d 113 (7th Cir.1984) 18

LoPresti v. Terwilliger,

126 F.3d 34 (2d. Cir. 1997)……………………………………………………18

**Marshall v. Northrop Grumman Corp., No. CV 16-06794 AB*,
2017 WL 2930839 (C.D. Cal. Jan. 30, 2017) 25

Martin v. Feilen,
965 F.2d 660 (8th Cir. 1992) 18, 19

Murphy v. Hemppenstall Co.,
4635 F.2d 233 (3d Cir. 1980) 10

Order of Commercial Travelers v. Wolfe,
331 U.S. 586 (1947) 14

**Pelgram v. Herdrich*,
530 U.S. 211 (2000) 19

**Phillips v. Alaska Hotel & Rest. Emps. Pension Fund*,
944 F.2d 509 (9th Cir. 1991) 11

Reece v. Bank of N.Y. Mellon,
760 F.3d 771 (8th Cir. 2014) 9

**Rozo v. Principal Life Ins. Co.*,
949 F.3d 1071 (8th Cir. 2020) 20

Teets v. Great-West Life & Annuity Ins. Co.,
921 F.3d 1200 (10th Cir. 2019)………………………………………….20

**Tibble v. Edison Int'l*,
729 F.3d 1110 (9th Cir. 2013) 24

Tibble v. Edison Int'l,
843 F.3d 1187 (9th Cir. 2016) 11

Variety Children's Hosp. v. Century Med. Health Plan,
57 F.3d 1040 (11th Cir. 1995) 10, 15

**White v. Jabobs Eng'g Group Long Term Disability Benefit Plan*,
896 F.2d 344 (9th Cir. 1989) 12, 13

Statutes

19 U.S.C. § 1001 1
28 U.S.C. § 1291 1
28 U.S.C. § 1331 1
29 U.S.C. § 1001 14
*29 U.S.C. § 1002 .... 17, 18, 20, 23, 24
29 U.S.C. § 1103 24
*29 U.S.C. § 1104 .... 5, 22, 23, 24
*29 U.S.C. § 1105 .... 17, 19, 21
29 U.S.C. § 1113 .... 10, 14
29 U.S.C. § 1132 10
Fed. R. Civ. P. 12 9

Regulations

29 C.F.R. § 2509.75-8 20
29 C.F.R. § 2560.503-1 12

Statement of Jurisdiction

The District Court had original jurisdiction under 28 U.S.C. § 1331 and subject matter jurisdiction on the basis of Plaintiff-Appellant's Employee Retirement Income Security Act of 1974 ("ERISA"), 19 U.S.C. § 1001 et seq., claim. This Court has jurisdiction under 28 U.S.C. § 1291 as Plaintiff-Appellant Liberte Chen filed a timely appeal on February 26, 2021, from the final order and judgment of the District Court dated January 18, 2021.

Issues Presented

Under the ERISA, is a 401(k) Plan's six-month statute of limitations for filing lawsuits seeking Plan benefits and challenging Plan actions enforceable, thus requiring dismissal of an untimely claim, when ERISA maintains a six-year statute of limitations for the same?

Under ERISA, did the District Court err in finding the Complaint failed to sufficiently plead that the employer and the Plan's Administrative Committee breached any fiduciary duties and the Plan recordkeeper, its employee, and its parent company were not fiduciaries, when the former failed to act prudently in the management of the Plan and the latter failed to prudently administer the Plan?

Statement of the Case

On December 15, 2020, Liberte Chen ("Chen") brought this action in the United States District Court for the District of Columbia against Defendants New York Mail ("Mail"), the Mail 401(k) Administrative Plan Committee ("Committee"), and its members, King Westley, Samantha Ortiz, and LaBron Hastings (collectively the "Mail Defendants"), against Defendant Andrews Investment Company ("AIC"), Andrews Record-Keeping ("ARK"), and Alina Oxmix Comey ("AOC") (collectively the "AIC Defendants"), and against the New York Mail 401(k) Plan ("Plan"). *Chen v. New York Mail et al.*, No. 20-cv-099-TCF, at 5 (D.D.C. Jan. 18, 2021) [hereinafter Op.]. Chen brought this action under the Plan and ERISA alleging breach of fiduciary duties in the administration and management of the Plan against all defendants and a denial of her benefits under the Plan. Op. at 5–6. Specifically, Chen alleges the Mail Defendants breached their duty to prudently select a record-keeper and monitor ARK in the administration of the Plan. *Id.* Further, Chen alleges ARK violated its duty of prudence when it used untrained employees to administer the Plan services. *Id.* at 6. As a result, Chen claims $537,191.06 in lost benefits and seeks the replacement of AIC and ARK as record-keeper and investment custodians. *Id.*

The Mail Defendants and AIC Defendants each filed motions to dismiss Chen's claims on December 16, 2020, and December 17, 2020, respectively. *Id.* at 1. These motions alleged the suit was untimely under the Plan and Chen failed to

show each Defendant was an ERISA fiduciary. *Id.* at 6. Alteratively, the Mail Defendants argued that if they are fiduciaries, they prudently selected AIC and ARK and prudently monitored ARK. *Id.* Chen filed responses in opposition to each of these motions on January 2, 2021. *Id.* at 1.

The lower court agreed with the defendants and granted both motions to dismiss reasoning that Chen filed her suit after the six-month statute of limitations had lapsed, and therefore dismissed her claims as untimely. *Id.* at 9. The lower court also held that the Mail Defendants did not breach any fiduciary duty because they "followed a system of annual evaluations of all of Plan service providers." *Id.* at 10–11. Further, the court found that AIC was not a fiduciary because it never implemented Chen's investment instructions and ARK was not a fiduciary because it played a "ministerial, non-discretionary role." *Id.* at 11. Chen timely appealed to this Court seeking the same recovery as her initial action.

Statement of the Facts

Defendant-Appellee, New York Mail ("Mail"), is a New York-based newspaper publisher.[1] Op. at 2. Mail employees can invest in a 401(k) retirement

[1] Mail also has offices in Washington, D.C and San Francisco, CA. Op. at 2.

account (the "Plan"). *Id*. Mail is a named fiduciary of the Plan, which is administered by a committee of Mail employees.[2] *Id.*

Andrews Investment Company ("AIC"), a mutual fund headquartered in New York,[3] manages Plan investments. *Id.* Plan record keeping is conducted by Andrews Record Keeping, Inc. ("ARK"), a wholly-owned subsidiary of AIC. *Id.* Because it was the lowest bidder and a financial advisor determined it provided competent customer service, ARK was hired in 2001. *Id.* at 2–3. Mail and ARK's contract renews annually on January 1.[4] *Id.* at 3.

Mail, AIC, and ARK's relationship is governed by a single contract (the "Contract"). *See id.* Contract Section 1 provides that Mail will pay a per capita fee[5] in exchanges for ARK supplying:

> (i) maintenance of [Plan] records . . . , (ii) an interface that Plan participants can use to . . . change investments . . . and (iii) *a phone-in service center* in which Plan participants can request information . . .

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[2] The Committee consists of King Westley, Samantha Ortiz, and LaBron Hastings. Op. at 2.

[3] AIC also has offices in Washington, D.C. and Los Angeles, CA. Op. at 1.

[4] In anticipation of this renewal period Mail sends a questionnaire to Plan participants annually on October 31 asking, among other things, if they are happy with the ARK's performance. Op. at 3. This questionnaire has never had greater than a 10% response rate, and complaints against ARK have always been less than 1%. Op. at 3.

[5] The fee is specified later in the contract. Op. at 3.

> and *can provide instructions to ARK on designating and changing investment vehicles.*

Id. (emphasis added). Per section 5, AIC's stated intent is to "provide [the] best execution reasonably practicable under the circumstances for all Plan investment transactions, including . . . any investment instructions . . . in a timely manner." *Id.* Per section 8, "ARK and AIC are not and shall not be regarded as a fiduciary for purposes of ERISA" while section 9 stipulates the Contract controls all litigation. *Id.* at 2–3.

Additionally, sections 4.1 and 6 require compliance with 29 U.S.C. § 1104(c) (also referred to as ERISA 404(c)) investment options.[6] *Id.* at 3–4. Under section 10 Mail must appoint the Committee to serve as Plan Administrator and name fiduciary. *Id.* at 4. Finally, since 2018, the Contract has had a six-month statute of limitations since 2018. *Id.* Plan

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[6] AIC provides the following investment options:

> a stock index fund which is managed by Infidelity Investments LLC; a long–term bond fund which is managed by AIC; a stable value fund which is managed by AIC; a life–cycle fund based on age and projected retirement date which is managed by AIC; a real estate fund which is managed by Infidelity Investments LLC; a foreign investment fund which is managed by AIC; a fund that is invested in technology stock which is managed by Infidelity Investments LLC, and; a money–market fund, which is managed by AIC.

Op. at 3–4.

participants were notified of the statute of limitations provision on April 30, 2020. *Id.*

In March 2020 ARK's hourly employees striked. *Id.* To keep phone and online interfaces operational ARK staffed these services with executives and salaried employees. *Id.* March 2020 also saw an unusually high number of calls into the ARK phone center due in part to online interface problems. *Id*. Most callers sought to move funds to lower risk investments. *Id.* Increased phone traffic coupled with temporary staff resulted in mistakes and delays in processing investment instructions. *Id.*

Plaintiff-Appellant, Liberte Chen, is a Washington, D.C. based reporter employed by Mail for at least the last three years. *Id*. at 2. As an employee Chen participates in the Plan. *Id.* Chen had all of her Plan investments in a low risk money market account on January 1, 2020. *Id.* at 4. In March 2020 she sought to move all investments into stock index funds to take advantage of COVID-19's market impacts. *Id.* 4–5.

Chen attempted to move her funds via the online portal on March 15, 2020 but the system was down. *Id.* Chen immediately called ARK and spoke with Alina Oxmix Comey ("AOC"). *Id.* at 5. Chen instructed AOC to split her investments equally between stock index and technology stock funds. *Id.* On a recorded line Chen repeated her order, AOC wrote it down,

and read it back. *Id.* AOC informed Chen she would receive written confirmation within seven business days. *Id.* AOC never entered the trade, and Chen never received confirmation. *Id.*

Chen's March 2020 benefit statement showed no changes.[7] *Id.* She unsuccessfully attempted to call ARK several times between April and May.[8] *Id.* Chen's April 2020 benefit statement also showed no changes.[9] *Id.* On May 15, 2020 Chen wrote the Plan demanding they "make it right" and recognize the March 15 trade. *Id.* On May 31, 2020 they apologized but disclaimed responsibility as the Committee was not timely informed. *Id.* at 5. The trade would have earned $537,201.54; ARK's failure to place the trade resulted in only $692.60 in earnings. *Id.* at 4.

Chen filed this action on December 15, 2020 in the U.S. District Court for the District of Columbia against Mail and the Committee,[10] as well as AIC, ARK, and AOC,[11] seeking $537,191.06 in damages. *Id.* at 5. Chen alleges defendants denied her Plan benefits and violated their fiduciary duties. *Id.* She further alleges Mail Defendants failed to prudently select

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[7] This statement was received April 10, 2020. Op. at 5.
[8] Chen's busy schedule prevented her from remaining on the phone for ARK's extended hold times. Op. at 5.
[9] This statement was received May 14, 2020. Op. at 5.
[10] Collectively "Mail Defendants." Op. at 5.
[11] Collectively "AIC Defendants." Op. at 5.

record keepers by selecting ARK based on price, not quality of service. *Id.* She next alleges Mail Defendants failed to establish proper oversight regulations and prudently monitor ARK's operations during the strike. *Id.* at 6. Against AIC Defendants, Chen alleges Contract violations for failure to maintain operational online resources and adequately trained call center staff. *Id.* She finally alleges AIC violated its fiduciary duties by placing its own interests ahead of the Plans. *Id.*

The Defendants moved to dismiss, arguing Chen's claims were untimely, the Defendants were not fiduciaries, and ARK's selection was prudent. *Id*. The court dismissed the case; Chen now appeals. *Id*.

Summary of the Argument

Due to defendants' severe mishandling of Chen's benefits plan, Chen brought suit for lost benefits of more than $500,000. Contrary to the district court's decision, Chen's suit was timely filed because she was notified of the Plan's newly established six-month statute of limitations after the injury giving rise to this suit occurred. Without knowledge of the Plan's limitations period, Chen cannot be bound by them. Alternatively, if this Court finds the Plan's limitations period is applicable to Chen, this Court should nevertheless strike the limitations period as unreasonably short.

Because Chen's claim was timely, this Court should find all Defendants liable for fiduciary breach. Mail Defendants are Plan fiduciaries due to their role in the Plan's management, whereas AIC Defendants are Plan fiduciaries due to their discretionary administration of the Plan. Mail Defendants breached their fiduciary duties by failing to properly monitor AIC Defendants and take corrective action when necessary. AIC Defendants breached their fiduciary duties by failing to employ trained workers with the experience to properly convey Chen's investment changes. Chen should not be denied relief for the defendants' lack of prudence, causing her to lose out on a small fortune. For all these reasons, this Court should reverse the lower court's decision and remand.

Argument

I. Standard of Review

This Court reviews a district court's 12(b)(6) dismissal *de novo*. *Reece v. Bank of N.Y. Mellon*, 760 F.3d 771, 779 (8th Cir. 2014) ("Fed. R. Civ. P. 12(b)(6) concerns failure to state a claim upon which relief can be granted. A court of appeals reviews de novo a Rule 12(b)(6) dismissal."); accord *Dannix Painting, LLC v. Sherwin Williams Co.*, 732 F.3d 902, 905 (8th Cir. 2013) (reviewing a 12(b)(6) dismissal *de novo*). This Court must further accept all factual allegations as true and view them in the light most favorable to the non-moving party. *Conn.*

Gen. Life Ins. Co. v. Biohealth Labs., Inc., No. 20-2312-cv, 2021 U.S. App. LEXIS 3667 (2d Cir. Feb. 10, 2021). When all evidence is viewed in the light most favorable to Chen it is apparent the district court applied an impermissible statute of limitations and erroneously held defendants are not fiduciaries. This Court should reverse and remand the instant case for consideration on the merits.

II. Statute of Limitations

A. Cause of Action and Limitations Under ERISA

Employee retirement plans covered by ERISA permit plan beneficiaries to bring a "civil action . . . to recover benefits due to [the beneficiary] under the terms of [the] plan." 29 U.S.C. § 1132(a)(1)(B); *see Murphy v. Hemppenstall Co.*, 4635 F.2d 233, 237 (3d Cir. 1980) (finding ERISA controls non-exempt plans and confers a cause of action in federal court). A beneficiary, however, must exhaust administrative options prior to bringing suit and any such action must commence within six years of the last fiduciary breach. 29 U.S.C. § 1113 (requiring an action for fiduciary breach to commence no later than "six years after the date of the last . . . breach"); *see Variety Children's Hosp. v. Century Med. Health Plan*, 57 F.3d 1040, 1042 (11th Cir. 1995) ("plaintiffs must exhaust their administrative remedies . . . prior to bringing an ERISA claim in federal court."). Chen was not properly noticed of the Plan's statute of limitations ("SOL") clause rendering it inoperable in this case. In the alternative, if the clause is operable, its application is both

facially and as applied unreasonable. For these reasons Chen's suit should be found to have been timely filed.

1. As Chen's Trade was Never Executed, the Injury Began Before she was Properly Noticed of the SOL, Therefore the Statute of Limitations Provision is Inapplicable to This Case.

a. The Harm Occurred Before the Six-Month SOL was Effective and Therefore it is Inapplicable in This Case.

"The duration of a limitation period can only be measured by reference to its start date." *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 571 U.S. 99, 108 (2013). In ERISA cases, this start date is the earliest date a plaintiff has actual knowledge of a breach. *Phillips v. Alaska Hotel & Rest. Emps. Pension Fund*, 944 F.2d 509, 520 (9th Cir. 1991); *see also Tibble v. Edison Int'l*, 843 F.3d 1187, 1196 (9th Cir. 2016) (finding a SOL period begins once plaintiff has actual knowledge of a harm); *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 552 U.S. 192, 201 (1997) (SOL begins when there is a complete and present cause of action). In *Phillips v. Alaska Hotel & Rest. Emps. Pension Fund* the court found that because beneficiaries knew of fiduciary breaches and the SOL provision, the SOL period did not reset, rather it began to run as soon as a beneficiary had actual knowledge of the breach. *Phillips*, 944 F.2d at 520-21.

Just as the *Phillips* beneficiaries' actual knowledge of the fiduciary breach began their SOL period, Chen had knowledge of the Plan's fiduciary breach in late

March 2020. Chen placed her order with AOC on March 15, 2020 and was told she would receive written confirmation in seven days; no such confirmation was ever received. Having not received this confirmation, Chen had actual knowledge of the fiduciary breach by March 23, 2020. Plan participants were not noticed of the six-month SOL clause until April 30, 2020. As the harm occurred, and Chen was aware of the harm, before Chen knew of the six-month SOL, the six-month SOL should not apply.

b. Mail's Reply was Inadequate to Satisfy Department of Labor Guidelines and Therefore Cannot be a Sufficient Conclusion of Internal Appeal.

A SOL period cannot commence unless a plan beneficiary has proper notice of the SOL and the appeals process. *See White v. Jabobs Eng'g Group Long Term Disability Benefit Plan*, 896 F.2d 344 351-53 (9th Cir. 1989). Under Department of Labor ("DOL") Regulations, plan administrators must, when denying benefits, provide "(1) [t]he specific reason or reasons for the denial; (2) [s]pecific reference to pertinent plan provisions on which the denial is based; (3) [a] description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary; and (4) [a]ppropriate information as to the steps to be taken if the participant or beneficiary wishes to submit his or her claim for review." 29 C.F.R. § 2560.503-1(f). In

White v. Jabobs Eng'g Group Long Term Disability Benefit Plan, the court reversed and remanded an employment benefit denial because an employee was insufficiently noticed of her appeal rights, no SOL had run. *White*, 896 F.2d at 352.

The *White* employee did not have notice of her appeal rights and thus could not be bound by a SOL. Chen was not noticed of the SOL until April 2020 and ARK's reply letter from May 31, 2020 complied with none of the DOL regulations. Since the *White* employee could not be bound to a SOL due to improper notice, Chen should not be bound by a SOL since she was not properly noticed.

A SOL begins to run as soon as the harm occurs. Similarly, under DOL regulations, plan beneficiaries are entitled to specific guidance and explanation when benefits are denied. In this case, the harm occurred before Chen was noticed of the revised SOL and therefore it should not apply to her claims. Further, ERISA requires all internal avenues of relief be exhausted before litigation can begin and the DOL clearly indicates what notice a beneficiary is to receive to end internal avenues; Chen received no such notice. As the SOL in this instant case is inapplicable, and the Plan failed to give proper notice of internal proceedings, this Court should reverse and remand this case for consideration on the merits.

2. In the Alternative, Six Months is Unreasonable, Rendering the Limitations Provision Unenforceable.

In the alternative, ERISA plainly provides a six-year SOL for causes of action related to fiduciary breach. 29 U.S.C. § 1113. Despite this legislative limitation, parties may "validly limit . . . the time for bringing an action . . . provided that the shorter period itself shall be a *reasonable* period." *Order of Commercial Travelers v. Wolfe*, 331 U.S. 586, 608 (1947) (emphasis added).

a. ERISA was Enacted to Provide Efficient Relief and Access to the Courts Following Internal Reviews and a Six-Month SOL Offends These Policy Goals.

In *Adamson v. Armco, Inc*,. the court found a two-year contractual SOL reasonable as it did not oppose federal policy. *Adamson v. Armco, Inc.*, 44 F.3d 650, 653-54 (8th Cir. 1995). The *Adamson* considered the policy goals of ERISA, ensuring plan beneficiaries have "appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b).

Unlike the *Adamson* two-year SOL plan that was found to be reasonable because it did not violate federal policy, Mail's six-month SOL plan violates federal policy, and is therefore unreasonable. ERISA was enacted, in part, to provide plan beneficiaries the opportunity to recover otherwise denied benefits in a reasonable manner. Under a plan, such as *Adamson*'s 2-year SOL, there is adequate time for a thorough internal investigation followed by significant time to

retain counsel and pursue litigation, all consistent with ERISA's policy objectives. In Mail's Plan, both an internal review and any subsequent litigation must be filed within six months. As ERISA bars litigation until internal processes are complete,[12] and there is no certainty of how long an internal review may take, Mail's Plan's six-month SOL violates the ERISA's policy goals of allowing beneficiaries to seek appropriate remedies and have ready access to courts by requiring beneficiaries to anticipate litigation while awaiting internal review. As a six-month SOL is contrary to ERISA's policy goals, it is therefore facially unreasonable.

b. A SOL is Unreasonable When Substantial Obstacles in a Particular Case Prevent Timely Relief.

Similarly, in *Heimeshoff v. Hartford Life & Accident Ins. Co.*, the court found a three-year contractual SOL, in which internal investigation could take up to two years, leaving just a single year to file suit, was not facially unreasonable. *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 571 U.S. 99, 109 (2013). The *Heimeshoff* court did, however, recognize that in future cases a plan beneficiary may face substantial obstacles in obtaining relief and in such cases those obstacles may render a facially reasonable SOL unreasonable as applied to said future

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[12] *See Variety Children's Hosp.*, 57 F.3d at 1042 ("plaintiffs must exhaust their administrative remedies . . . prior to bringing an ERISA claim in federal court.").

litigant. *Id.* at 110 (citing *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 369-71 (1977) (finding that a one-year SOL was unreasonable when an EEOC investigation would take 18-24 months to complete)).

Just as the *Heimeshoff* court predicted, Chen faced what may be considered a facially reasonable SOL but substantial obstacles prevented her from obtaining relief. Upon realizing ARK failed to process her order, Chen made repeated attempts to contact them and correct the problem, but all efforts were futile due to the ongoing strike. She next wrote to the Plan requesting the error be corrected, but they merely apologized and disclaimed responsibility for the error. During these many attempts to contact ARK, and the Plan's apology, Chen was noticed about the statute of limitations for the first time in April 2020. The inability to access a fiduciary to rectify a problem only the fiduciary can resolve should rise to the level of a sustainable obstacle. Similarly, a dismissive letter from said fiduciary apologizing, and disclaiming responsibility, should rise to the level of a substantial obstacle. Finally, receiving notice of a SOL for the first time after a harm has occurred and while already actively attempting to rectify the fiduciary's error, should rise to the level of a substantial obstacle. The *Heimeshoff* court anticipated a SOL may be unreasonable when substantial obstacles hinder a beneficiary from obtaining relief. Chen experienced three substantial obstacles while seeking relief, and therefore the Plan's six-month SOL is unreasonable.

The Plan's six-month SOL is facially unreasonable in light of ERISA's policy objectives. Further, substantial obstacles rendered the Plan's six-month SOL unreasonable in this case. As the six-month SOL is unreasonable both facially and as applied this Court should reverse the finding that the claims are time barred and remand the case for proceedings on the merits.

III. Mail Defendants and AIC Defendants are Plan Fiduciaries Pursuant to ERISA and the Plan.

A. Fiduciary Status Under ERISA

Under ERISA, pursuant to 29 U.S.C. § 1002(21)(A),

> a person[13] is a fiduciary with respect to a plan 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 assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any money 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.

Further, any person to which a plan fiduciary delegates to carry out fiduciary responsibilities under the plan is also a plan fiduciary. *See* 29 U.S.C. § 1105(c)(1). In sum, an ERISA fiduciary is one who exercises managerial discretion over plan

[13] Under ERISA, a "'person' means an individual, partnership . . . corporation . . . unincorporated organization, association, or employee organization." 29 U.S.C. § 1002(9). Therefore, Defendants Mail, Committee, AIC, and ARK are all "persons" for purposes of ERISA.

assets, gives paid advice on plan investments, *or* administers the plan with discretion.[14]

Unlike common law fiduciary status, which is "determined by virtue of the position a person holds," fiduciary status under ERISA is "functional." *Healthcare Strategies, Inc. v. ING Life Ins. & Annuity Co.*, 961 F. Supp. 2d 393, 398 (D. Conn. 2013) (citing *LoPresti v. Terwilliger*, 126 F.3d 34, 40 (2d. Cir. 1997)); *see Blatt v. Marshall & Lassman*, 812 F.2d 810, 812 (2d. Cir. 1987) (the focus when identifying ERISA fiduciaries ought to be on the "function performed, rather than on the [formal] title held"). However, an entity "need not have absolute discretion with respect to a benefit plan in order to be considered a fiduciary . . . rather, fiduciary status exists with respect to any activity enumerated in the statute over which the entity exercises discretion or control." *Blatt*, 812 F.2d at 812; *see Amato v. W. Union Int'l, Inc.*, 773 F.2d 1402, 1417 (2d. Cir. 1985) (concluding "ERISA permits employers to wear two hats, and that they assume fiduciary status only

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[14] *See Martin v. Feilen*, 965 F.2d 660, 669 (8th Cir. 1992) ("one who is an ERISA fiduciary only by reason of § 1002(21)(A) is liable only 'to the extent' he exercises discretionary control, renders investment advice, or has discretionary administration responsibility"); *see also Leigh v. Engle*, 727 F.2d 113, 133–35 (7th Cir.1984) (holding that a corporation and its chairman were ERISA fiduciaries because "they performed fiduciary functions in selecting and retaining plan administrators"); *see also Assocs. in Adolescent Psychiatry, S.C. v. Home Life Ins. Co.*, 941 F.2d 561, 569 (7th Cir.1991) (stating a bank was an ERISA fiduciary because it "retained the power to appoint a trust administrator").

when and to the extent that they function in their capacity as plan administrators, not when they conduct business that is not regulated by ERISA") (internal quotations and citations omitted) (abrogated on other grounds). Hence, "[i]n every case charging breach of ERISA fiduciary duties, then, the threshold question is not whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary's interest, but whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." *Pelgram v. Herdrich*, 530 U.S. 211, 226 (2000). Therefore, in determining whether any person is a fiduciary subject to ERISA, "we must examine whether each defendant was responsible as a fiduciary for each of the transactions" for which relief is sought. *Martin*, 965 F.2d at 669.

1. Mail Defendants are Plan Fiduciaries Because They Take Unilateral Action Respecting Plan Management.

Section 10 of the Plan states "the Committee that is named by [Mail] shall be the Plan Administrator and named fiduciary." Not only is the Committee an ERISA fiduciary by virtue of its designation under the Plan, but also by virtue of its authority to exercise unilateral control in the management of the Plan and its assets. Therefore, because Mail has the authority to delegate fiduciary responsibilities under the Plan to the Committee, Mail itself is a plan fiduciary. *See* 29 U.S.C. § 1105(c)(1). In other words, Mail's ability to direct the administration

and management of the plan with discretion and the Committee's authority to administer the Plan necessarily make each a fiduciary within the plain meaning of ERISA. *See* 29 U.S.C. § 1002(21)(A).

In *Rozo v. Principal*, the 8th Circuit stated "that a service provider acts as a fiduciary: if (1) it 'did not merely follow a specific contractual term set in an arm's-length negotiation' and (2) it 'took a unilateral action respecting plan management or assets without the plan or its participants having an opportunity to reject its decision.'" 949 F.3d 1071, 1073 (8th Cir. 2020) (quoting *Teets v. Great-West Life & Annuity Ins. Co.*, 921 F.3d 1200 (10th Cir. 2019)); *see Ed Miniat, Inc. v. Globe Life Ins. Grp., Inc.*, 805 F.2d 732, 737 (7th Cir. 1986) ("No discretion is exercised when an insurer merely adheres to a specific contract term. When a contract, however, grants an insurer discretionary authority, even though the contract itself is the product of an arm's length bargain, the insurer may be a fiduciary."); *see also* 29 C.F.R. § 2509.75–8 ("a person who performs purely ministerial functions" for a benefit plan is not a fiduciary). Notwithstanding Mail Defendants' fiduciary status within the plain meaning of ERISA, under *Rozo*, Mail Defendants also acted as a fiduciary when they took unilateral action in hiring service providers (AIC and ARK) to administer the Plan without affording the Plan participants an opportunity to reject such a decision. The Committee hired ARK as the Plan's record-keeper and utilized a financial advisor to determine whether

ARK provided competent services. Further, the Committee kept a record of plan participants' complaints against ARK's services under the Plan.[15] Additionally, the Committee meets with ARK annually to review the Plan and its services and fees. These actions, along with the fact that Mail or the Committee could find ARK's services unsatisfactory and fire ARK, demonstrate the Committee's (and therefore Mail, since it delegated its own fiduciary duties to the Committee) discretion in administering and managing the plan to the exclusion of any plan participants discretion. The Mail Defendants are therefore fiduciaries under ERISA with respect to Chen's claim resulting from the mismanagement of the Plan.

2. AIC Defendants are Plan Fiduciaries Because of Their Actual Control Over the Disposition of Plan Assets.

AIC and ARK are ERISA fiduciaries because the Committee, the Plan's named fiduciary, delegates fiduciary responsibilities in administering the Plan with discretion to both AIC and ARK.[16] *See* 29 U.S.C. § 1105(c)(1); *see Guyan Int'l,*

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[15] Op. at 2. The Committee had discretion in deciding how much force to give complaints made against ARK.

[16] It is also not dispositive that Section 8 of the Plan provides that "ARK and AIC are not and shall not be regarded as a fiduciary for purposes of ERISA." *Guyan*, 689 F.3d at 798 (holding that a claim administrator for an employee benefit plan was an ERISA fiduciary, even though the administrator's agreement expressly states that it was not a fiduciary, where the administrator exercised authority and control over the plan assets by determining where plan funds were to be deposited).

Inc. v. Prof'l Benefits Adm'rs, Inc., 689 F.3d 793, 798 (6th Cir. 2012) ("the threshold for becoming a fiduciary is lower for entities handling plan assets than for entities managing the plan"). Notwithstanding AIC Defendant's fiduciary status under the plain meaning of ERISA, AIC is a fiduciary for its role in: the discretionary management of the money-market fund, its mismanagement which is has given rise to Chen's claims; and the "best execution reasonably practicable . . . for all Plan investment transactions, including but not limited to transmitting any investment instructions to the appropriate investment manager(s) in a timely manner."[17] ARK is also a statutory fiduciary because it provides online and phone-in interfaces for plan participants to request changes to their investments and information about their accounts.[18]

In *Blatt v. Marshall & Lassman*, the 2nd Circuit held that an accounting firm administering a benefit plan acted as an ERISA fiduciary because it exercised

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[17] This language is drawn from Section 5 of the Plan. The "best execution" draws an uncanny resemblance to the "prudent man standard" required of fiduciaries pursuant to 29 U.S.C. § 1104(a), discussed *infra*. It is the lack of execution of investment transactions that is at issue in Chen's claims. Although Chen's investment transaction instructions were never communicated to AIC, they were communicated to AOC, an ARK employee. Because ARK is a wholly–owned subsidiary of AIC, AIC necessarily received constructive notice of the instruction under the theories of agency and respondeat superior. *See Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1256 (11th Cir. 2005) (holding a parent company to be "vicariously liable under the doctrine of *respondeat superior* for the act or omissions of any subsidiaries…under its ownership and control").

[18] It is the improper administration of such interface from which Chen's claim arises.

"*actual* control over the disposition of plan assets" when it ignored a plan participant's request to change an investment decision until over a years after the plan participant left the firm. 812 F.2d at 812. The court found the firm's delayed execution of the participant's change in plan investment strategy was "within the plain meaning of the statute" because this demonstrated the firm's "actual control respecting disposition of plan assets." *Id.* at 813. Like in *Blatt*, ARK exercised actual control over Chen's plan assets when it failed altogether to act on Chen's request to change an investment option. It is ARK's ability to control the disposition of such assets, evidenced when AOC ignored Chen's investment request, through its interface with plan participants that give it status as a fiduciary. Further, AIC and ARK are ERISA fiduciaries because each provide investment advice and options for a fee to plan participants. *See* 29 U.S.C. § 1002(21)(A). Ultimately, it is AIC and ARK's control over the disposition of Chen's plan assets that render them fiduciaries in the present case.

B. ERISA Fiduciary Duties Owed to Plan Beneficiaries

Pursuant to 29 U.S.C. § 1104(a)(1)(A), a plan fiduciary must act in the sole interest of the plan participants and beneficiaries "for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan." A plan fiduciary shall discharge such duties "with the care, skill, prudence, and diligence under the circumstances

then prevailing that a prudent man acting in a like capacity familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(b) (prudent man standard). In accordance with the prudent man standard, a plan fiduciary shall diversify plan investments "so as to minimize the risk of large losse." 29 U.S.C. § 1104(a)(1)(C)–(D). The duty of prudence is measured under the circumstances "not of a lay person, but of one experienced and knowledgeable with these matters." *Tibble v. Edison Int'l*, 729 F.3d 1110, 1133 (9th Cir. 2013) (vacated on other grounds) (noting that fiduciary obligations under ERISA "are more exacting than those associated with the business judgment rule). In enforcing such a duty of prudence, courts must "consider the merits of the transaction and the 'thoroughness of the *investigation* into the merits of the transaction.'" *Id.* at 1134 (quoting *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996)). The foundation of a fiduciary's duty is the requirement that plan assets shall never benefit the employer[19] and shall only benefit the plan participants and beneficiaries.[20] 29 U.S.C. § 1103(c)(1).

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[19] Pursuant to 29 U.S.C. § 1002(5), an "'employer' means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employees benefit plan; and includes a group or association of employers acting for an employer in such capacity." This definition includes all Defendants in this action.

[20] Importantly to this case, the exception to the prudent man standard — that fiduciaries are not liable for losses that are within the control of the plan holder — does not apply. 29 U.S.C. § 1104(c)(1)(a)(ii). The exception is inapplicable for any period exceeding three consecutive business days during which the plan

1. Mail Defendants Breached Their Fiduciary Duties by Failing to Monitor the AIC Defendants Disposition of Plan Assets.

Mail Defendant breached the fiduciary duties owed to Chen by failing to properly monitor the actions of ARK and AIC during the strike. To allege that defendants have breached their duty to monitor, the plaintiff must allege facts demonstrating that the defendants: "failed to evaluate their appointees' performance, or to have a system in place for doing so," failed to "ensure that the monitored fiduciaries had a prudent process in place for evaluating the Plan's administrative fees," and failed to "remove appointees whose performance was inadequate." *Marshall v. Northrop Grumman Corp.*, No. CV 16-06794 AB, 2017 WL 2930839, at *11 (C.D. Cal. Jan. 30, 2017) (internal quotations omitted).

First, Mail Defendants failed to properly evaluate ARK's performance. Although the Committee had a system of collecting participant complaints and conducted annual evaluations of all plan service providers, they were not adequate to capture changes requiring corrective action due to unforeseen, sudden, or urgent scenarios. For example, Mail Defendants failed to provide for a system for evaluating ARK's performance during the strike when untrained employees were

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beneficiaries are restricted from directing or diversifying assets in their accounts by a plan fiduciary. *Id.* ARK had a multi–week period during which Chen was unable to contact a representative through the ARK phone–in service while the online interface was down. During this period, Chen was not able to communicate her investment corrections to ARK.

hired out of necessity, not skill; during the failure of the online interface for participants to change their investment plans; and during the understaffing of the phone-in service, all of which caused the miscommunication and failure to change Chen's investment choices, which are at issue in this case. The strike alone was reason for concern and investigation by any prudent fiduciary.[21] Further, in March of 2020, Mail wrote a series of stories reporting on the strike, the Committee was therefore on notice of the ARK employee issue and should have provided responsive oversight over ARK's operations.

Second, the Mail Defendants failed to ensure ARK and AIC established a prudent process for evaluating the Plan's administrative fees, because it did not provide needed support to ARK during the strike. Mail Defendants also failed to provide adjustments in fees likely necessary during the economic depression in early 2020 due to the pandemic. Even though a financial advisor analyzed ARK's competence prior to their administration of the Plan, the Committee failed to

[21] In addition to the strike, the Committee should have been alerted and on notice of a potential for a high volume of investment changes — and should have trained and staffed its service providers accordingly — when notice of a looming pandemic was apparent in the United States. At the start of 2020, it was well known that an epidemic in Asia, with the likely potential of becoming a pandemic, was spreading globally and would likely have a devastating effect on the American economy. Any prudent fiduciary would have installed safeguards to protect against any surges in requests due to changes in the economy.

continually monitor ARK's processes when circumstances had drastically changed since the initial 2016 evaluation and even since their December 2019 meeting.

Third, the Mail Defendants breached their fiduciary duties to Chen when they failed to remove ARK when its performance became inadequate. During the strike, which the Committee was on notice of, ARK's ability to keep up with the high level of demands from plan participants trying to change investment options was significantly diminished. Not only was the online interface unusable for months, but the phone-in service was rendered equally unusable by the unconscionably long wait times. No working person at Mail could wait in a cue that long without it negatively affecting their job. Chen called the phone-in service multiple times over months, and was unable to reach a representative to contest the errors in her investment options. Such an inability for plan participants to access and change their own accounts is inadequate performance, and the Committee failed to remove ARK, or take any action for that matter, to remedy the situation.

The Mail Defendants failed altogether to prudently select and monitor ARK during unprecedented times as a result of the employee strike and the glooming possibility of a global pandemic and a resultant economic depression. As a result, Mail Defendants breached their fiduciary duties to the plan participants. A prudent fiduciary could have avoided such an anomalous outcome that has given rise to this

lawsuit by: providing processes for staffing of *trained* employees during strikes; removing ARK as a service provider and replacing it with a properly staffed and trained company; and promptly fixing the online interface for participants to use. For these reasons, this Court should reverse and remand this case.

2. AIC Defendants Breached Their Fiduciary Duties by Failing to Resolve Communication and Staffing Issues Affecting the Administration of the Plan.

The AIC Defendants breached their fiduciary duties owed to Chen by not acting is the sole interest of the Plan's participants. When the regular ARK employees went on strike, ARK failed to fill their spots with trained and competent employees to field the high volume of calls for the call center.[22] The inadequately trained temporary employees and the understaffing in general during the strike resulted in call lines far too long for working plan participants to feasibly use. In light of the online interface failure, the call-in service was the only means of communication between plan participants and ARK. Further, as previously mentioned, the duty of prudence requires a level of skill, care, and competency that is above that of a lay person, but instead is of a person knowledgeable in the subject matter. A temporary untrained employee cannot be said to work with the

[22] AIC also failed in this capacity because, as the parent company, AIC failed to support ARK, which is its wholly owned subsidiary. Under the doctrine of respondeat superior, as discussed *supra*, AIC is liable for ARK's actions and inactions which cause harm.

requisite level of prudence required of an expert in the plan administration. Instead of finding an effective solution to their staffing problem, ARK put its financial interests first and continued to work, to the detriment of its beneficiaries, including Chen, in order to maintain its status as a service provider.

Moreover, because of the untrained staff, AOC, an employee of ARK, failed to transmit the investment change requested by Chen, even after Chen repeated the instructions and AOC transcribed them. AOC's failure to forward Chen's requests to AIC mean AIC never conducted the change. This change was especially crucial because 100% of Chen's Plan assets were in the money market fund managed by AIC. A prudent fiduciary would recognize and act on its duty to diversify plan investments to minimize the risk of large losses. Instead, AIC and ARK did nothing, leaving Chen open to the massive loss that she eventually experienced.

Further, AIC gets paid the investment fees from amounts invested under the Plan. This is a direct fiduciary violation because a fiduciary cannot receive compensation from its fiduciary relationship. This placed their own interests, in their independent business capacity, rather than their fiduciary capacity, over that of the Plan participants it must work in the exclusive benefit for. But for the AIC Defendants' collective and continuous fiduciary violations, Chen would not have

missed out on a fortune of a lifetime. For these reasons, this Court should reverse and remand this case.

Conclusion

For the aforementioned reasons, the Petitioner respectfully asks this Court to reverse the decision of the United States District Court for the District of Columbia and remand for a proceeding on the merits.

Respectfully submitted,

/s/ Team 1

Counsel for Petitioner