ORAL ARGUMENT SCHEDULED ON MARCH 27, 2021

Nos. 20-cv-099-TCF

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LIBERTE CHEN,

Petitioner-Appellant,

v.

NEW YORK MAIL et al.

Respondent-Appellee

On Appeal from the United States District Court
For the District of Columbia

BRIEF FOR RESPONDENT-APPELLEES

Team No. 2

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JURISDICTIONAL STATEMENT

Petitioner brought suit under 29 U.S.C. § 1132(a)(2). The District Court had exclusive subject-matter jurisdiction pursuant to 29 U.S.C. § 1132(e)(1) and 28 U.S.C. § 1331. On January 18, 2021, the District Court entered a final judgment dismissing Appellant's claims with prejudice. Appellant filed a timely notice of appeal. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the District Court erred by dismissing Petitioner's lawsuit as untimely holding that the Plan's time limitation in Section 12 was enforceable.
2. Whether the District Court erred in finding that the complaint failed to plead with sufficient particularity that the Mail Respondents breached any fiduciary responsibilities under ERISA, and that the AIC Respondents were not fiduciaries.

STATEMENT OF THE CASE

Liberte Chen ("Petitioner") is employed and participates in the 401(k) Plan (the "Plan") by New York Mail ("Mail"). (R. at 2.) Mail is the Plan's fiduciary and appointed the New York Mail 401(k) Plan Administrative Committee ("Administrative Committee") to oversee the Plan. (R. at 2.) In 2001, Mail sought to replace the Plan record-keeper of fifteen years. (R. at 2.) The Administrative

Committee considered Andrews Record-Keeping, Inc. ("ARK") for the job. (*Id.*) Prior to hiring ARK, the Administrative Committee hired a financial advisor to determine ARK's competency. (R. at 2.) The Administrative Committee maintained a record of complaints from participants since hiring ARK and found that the complaints were no greater than those made against the previous record-keeper. (R. at 2.) Prior to the contract renewal period, Mail sent an annual questionnaire to Plan participants asking them of their level of satisfaction with ARK's performance. (R. at 3.) The number of complaints had always been fewer than 1% of the responses. (R. at 3.) The Administrative Committee met annually with ARK to review the Plan, including services provided and subsequent fees. (R. at 3.)

The Administrative Services Agreement ("Agreement") is between the Plan, ARK, and Andrew's Investment Company ("AIC"). (R. at 3.) Section 4.3 of the Agreement specifies that ARK's duties are to provide for (i) maintenance of the Plan's records; (ii) an interface that Plan participants can use to designate and change investments vehicles; and (iii) a phone-in-service center in which Plan participants can provide instructions to ARK on designating and changing investment vehicles. (R. at 3.) Section 8 of the Agreement provides that "ARK and AIC are not and shall not be regarded as a fiduciary for purposes of ERISA." (R. at 3.) Section 12 of the Plan provides a statute of limitations provision requiring any

lawsuit to be filed within six months of the date the Plan issued a determination regarding such claim for benefits or challenging management and the Plan's administration. (R. at 4.)

On January 1, 2020, Petitioner had 100% of her Plan account balance in the money market fund managed by AIC, which promised safety. (R. at 4.) On March 15, 2020, Petitioner attempted to move her entire Plan account balance to the stock index fund and the technology stock fund using the on-line platform; however, it was down. (R. at 5.) Petitioner immediately phoned the ARK Phone Center and requested the employee to move her entire Plan account balance from the money market fund to the stock index and technology stock funds equally. (R. at 5.) The phone center was overwhelmed by high call volume on March 15, and the employee failed to forward Petitioner's instructions to AIC. (R. at 5.) Petitioner never received written confirmation of the trade. (R. at 5.) Throughout April and May, Petitioner tried to contact the ARK Call Center but was not able to reach a representative. (R. at 5.) Petitioner claims that if her instructions had been followed, she would have earned $537,201.54. (R. at 5.)

On May 15, 2020 Petitioner sent a letter to the Plan demanding the Plan to recognize the March 15, 2020 trade and "make this right." (R. at 5.) The Plan replied by letter on May 31, 2020 that the matter was not brought to the Administrative Committee's attention in a timely manner. (R. at 5.) On December

15, 2020, Petitioner filed suit in the United States District Court for the District of Columbia against Mail and the Administrative Committee (collectively the "Mail Respondents"); as well as AIC, ARK, and the ARK employee (collectively the "AIC Respondents"). (R. at 5.) Petitioner's complaint alleged she was denied benefits owed to her under the Plan, that each of the Respondents listed were fiduciaries under ERISA, and that Respondents each breached their fiduciary duties to her. (R. at 4-5.) Petitioner sought $537,191.06 in lost benefits and for AIC and ARK to be replaced. (R. at 5.) Mail Respondents and AIC Respondents filed motions to dismiss the lawsuit for failure to state claim under FED. R. CIV. P. 12(b)(6), arguing that the lawsuit was untimely, Mail Respondents did not breach their fiduciary duties, and that AIC Respondents were not fiduciaries under ERISA. (R. at 5.) On January 18, 2021, the District Court granted Respondents' Motions to Dismiss for Failure to State a Claim. (R. at 5.)

Petitioner has timely appealed the Opinion and Judgment to the United States Courts of Appeals for the D.C. Circuit. The issues of appeal are: (1) whether the Plan's time limitation in Section 12 is enforceable and requires that the lawsuit be dismissed as untimely; and (2) whether the District Court erred in finding that the complaint failed to plead with sufficient particularity that the Mail Respondents breached any fiduciary responsibilities under ERISA, and that the AIC Respondents were not fiduciaries.

SUMMARY OF THE ARGUMENT

The Petitioner raised a claim for breach of fiduciary duty pursuant to 29 U.S.C. § 1132(a)(1)(B) ("ERISA § 502(a)(1)(B)") and is therefore, estopped from raising a concurrent 29 U.S.C. § 1132(a)(3) ("ERISA § 502(a)(3)") claim. The Plan requires any lawsuit seeking Plan benefits or challenging its management and administration to be filed within six months of the date the Plan issues a determination regarding such claim. Petitioner failed to file a lawsuit within the six-month timeframe and the lawsuit was rightfully dismissed by the District Court because a court should give effect to the Plan's limitations provisions unless the period is unreasonably short, or a controlling statute prevents the limitations provision from taking effect. The District of Columbia has no such statute, and six months is not unreasonably short.

The District Court did not err in dismissing Petitioner's lawsuit as untimely; however, even if the contractual timing provision were ineffective, the District Court did not err in holding that the Mail Respondents did not breach any of their fiduciary duties under ERISA. While Mail Respondents are ERISA fiduciaries, they acted solely in the interest of the Plan's participants and beneficiaries, and therefore, did not breach any of their fiduciary duties. In addition, AIC Respondents were not fiduciaries under ERISA. Their services were ministerial and contained no actions of discretionary authority. Therefore, because AIC

Respondents were not ERISA fiduciaries, they could not have breached any of their fiduciary duties under ERISA. *Ad fortieri*, the District Court correctly dismissed Appellant's lawsuit for failure to state a claim under FED. R. CIV. P. 12(b)(6).

ARGUMENT

I. STANDARD OF REVIEW

On appeal, an appellate court should review de novo a district court's decision granting a motion to dismiss for failure to state a claim.[1] When reviewing the grant of a motion to dismiss, the court "must treat the complaint's factual allegations as true and must grant [the] plaintiff the benefit of all inferences that can be derived from the facts alleged."[2]

Although the appellate court shall review FED. R. CIV. P. 12(b)(6) determinations using a de novo standard, there may be a more appropriate framework through which to consider an ERISA plan. While ERISA is a "comprehensive and reticulated statute," it does not set out the appropriate standard of review for actions challenging benefit eligibility determinations.[3] ERISA § 502(a)(1)(B) provides that: "A civil action may be brought – (1) by a participant or beneficiary – . . . (B) to recover benefits due to [her] under the terms

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[1] Fed. R. Civ. P. 12(b)(6); *Kim v. United States*, 632 F.3d 713, 715 (D.C. Cir. 2011).
[2] *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000) (citations and internal quotation marks omitted).
[3] *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 108–09 (1989).

of the plan, to enforce [her] rights under the terms of the plan, or to clarify [her] rights to future benefits under the terms of the plan."[4] If a participant or beneficiary believes that benefits promised under the terms of the plan are not provided, she can bring suit seeking provision of those benefits.[5] A participant or beneficiary can also bring suit generally to "enforce [her] rights" under the plan, or to clarify any of her rights to future benefits.[6] The standard of review turns on whether the ERISA benefit plan confers discretionary authority on the plan fiduciary.

A denial of benefits challenged under ERISA § 502(a)(1)(B) is to be "reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan."[7] To determine whether an ERISA benefit plan confers discretion, the court first reviews the plan documents.[8] There is no "magic word or language" required to grant discretionary authority, and the court may read several plan provisions together to identify the requisite empowering language.[9]

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[4] 29 U.S.C. § 1132(a)(1)(B).
[5] *Aetna Health Inc. v. Davila*, 542 U.S. 200, 210 (2004).
[6] *Id.* at 210.
[7] *Firestone Tire*, 489 U.S. at 115.
[8] *Block v. Pitney Bowes, Inc.*, 952 F.2d 1450, 1453-54 (D.C. Cir. 1992); *Moore v. Blue Cross & Blue Shield of the Nat'l Capital Area*, 70 F. Supp. 2d 9, 20 (D.D.C. 1999) (the D.C. Circuit has declared that there are no special words of art required to invoke the deferential standard of review; rather, the Court should focus on the character of the authority exercised by the administrator under the plan. It need only appear on the face of the plan documents that the fiduciary has been given the power to construe disputed or ambiguous terms or to resolve disputes over benefits eligibility. Therefore, language giving the administrator power "to interpret or construe" the plan or "to make final and binding" decisions, triggers deferential review.).
[9] *Wright v. Metro. Life Ins. Co.*, 618 F. Supp. 2d 43, 54 (D.D.C. 2009).

Thus, the court should look for the presence of "[e]mpowering language;"[10] however, the mere authority to deny a claim does not by itself confer discretion to determine eligibility for benefits.[11]

The U.S. District Court for the District of Columbia has interpreted the Supreme Court's decision in *Firestone Tire & Rubber Co. v. Bruch*[12], as establishing *de novo* review as the presumed standard of review, emphasizing that "[a] denial of benefits challenged under ERISA § 502(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority."[13] This interpretation casts the burden on the party asserting the deferential standard of review to come forth with evidence of plan language expressly conferring the necessary discretionary authority.[14] In *James v. International Painters and Allied Trade Industry Pension Plan*, the court held that the language of a pension plan that included a provision stating that "the application and interpretation of [the] Pension Plan . . . shall be final and binding on all parties," clearly granted discretionary authority under the teachings of both

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[10] *Block*, 952 F.2d at 1453; *see Becker v. Weinberg Group, Inc. Pension Trust*, 473 F.Supp.2d 48, 61 (D.D.C.2007).
[11] *Mobley v. Cont'l Cas. Co.*, 383 F. Supp. 2d 80, 85 (D.D.C.), *reconsideration denied*, 405 F. Supp. 2d 42 (D.D.C. 2005).
[12] 489 U.S. 101, 115 (1989).
[13] *Doley v. Prudential Ins. Co. of Am.*, 2008 U.S. Dist. LEXIS 5043, at *3-4 (D.D.C. Jan. 8, 2008) (emphasis added) (quoting *Firestone Tire*, 489 U.S. at 115); *see also Marcin v. Reliance Standard Life Ins. Co.*, 861 F.3d 254, 262 (D.C. Cir. 2017) (de novo review applies *unless* the benefit plan gives the administrator discretionary authority to determine eligibility for benefits or to construe term plans).
[14] *Doley*, 2008 U.S. Dist. LEXIS 5043, at *3-4 (D.D.C. Jan. 8, 2008) ("[W]here the evidence is in equipoise, the burden fails, and the standard of review is de novo.").

Firestone and *Block*.[15] In *Communications Workers of America v. American Tel. and Tel. Co.*, the court held that the de novo standard of review was appropriate because the Benefits Committee never rendered a final determination with a fully reasoned explanation for such a decision.[16]

The Administrative Services Agreement and Plan does not include any provision which speaks about discretionary authority in any party.[17] In addition, Respondents do not argue that the discretionary standard of review should apply. Unlike *James*, the Plan does not contain any empowering language that grants the administrators the power to interpret eligibility for benefits. Therefore, the ERISA plan too should be reviewed under a de novo standard.

II. ISSUE ONE: THE DISTRICT COURT DID NOT ERR IN FINDING THAT PETITIONER'S LAWSUIT WAS UNTIMELY AND MUST BE DISMISSED.

Petitioner's lawsuit was filed more than six months after the Plan had made a final determination regarding her claim, therefore, under the terms of the Plan, Petitioner's lawsuit was filed untimely and was properly dismissed. The Administrative Committee issued a final determination rejecting Petitioner's claim on May 31, 2020 and this civil action was not brought until December 15, 2020, after more than six months had elapsed.[18]

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[15] 710 F.Supp.2d 16, 23-24 (D.D.C. 2010).
[16] 40 F.3d 426, 433 (D.C. Cir. 1994).
[17] R. at 3-4.
[18] R. at 5.

A. Petitioner's lawsuit is a claim for benefits under ERISA § 502(a)(1)(B).

ERISA governs 401(k) plans such as the one Petitioner was a participant.[19] Under ERISA, a participant or beneficiary may bring a civil action "to recover benefits due to her under the terms of the plan."[20] A Plan participant, like Petitioner may properly bring her cause of action under ERISA § 502(a)(1)(B) to recover monetary benefits owed to her. However, Petitioner has also plead a simultaneous claim for equitable relief under ERISA § 502(a)(3). ERISA § 502(a)(3) allows a participant or beneficiary to bring a civil claim "to obtain other appropriate equitable relief to redress such violations or to enforce any provisions of this title or the terms of the plan."[21] Like the "majority of circuits," the U.S. District Court for the District of Columbia has held that a breach of fiduciary duty claim seeking relief under ERISA § 502(a)(3) cannot stand where the claimant has an adequate remedy through an ERISA § 502(a)(1)(B) denial of benefits claim.[22]

Petitioner's claim is classified properly under ERISA § 502(a)(1)(B). In *La Rue v. DeWolff*, the plaintiff sought to recover benefits that would otherwise be due to him if the plan carried out his investment instruction.[23] The Supreme Court

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[19] 29 U.S.C. § 2002(2).
[20] 29 U.S.C. § 1132(a)(1)(B).
[21] 29 U.S.C. § 1132(a)(3).
[22] *Clark v. Feder Semo & Bard, P.C.*, 527 F. Supp. 2d 112, 116 (D.D.C. 2007); *see also Wright*, 618 F. Supp. 2d at 55-56.
[23] *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 257 (2008).

characterized the plaintiff's allegation as a claim for benefits under ERISA § 502 (a)(1)(B), because it turned "on the application and interpretation of the plan terms, specifically those governing investment options and how to exercise them."[24] Analogous to *La Rue*, Petitioner is seeking to recover the money she would have gained had her investment instruction been carried out as requested on March 15, 2020. Therefore, Petitioner's claim should be considered as one that turns on the plan's terms and her remedy should be found to lie only under ERISA § 502(a)(1)(B).

ERISA § 502(a)(3) is a catchall remedial provision that is vague in its authorization of a civil action for "other appropriate equitable relief."[25] The law is settled that "however inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment."[26] The structure of ERISA and its contents was well planned and particularly worded.[27] In *Varity Corp v. Howe*, the Supreme Court stated that ERISA § 502(a)(3) acts "as a safety net, offering appropriate equitable relief for injuries caused that § 502(a)(1)(B) does not elsewhere adequately remedy."[28] In

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[24] *Id.* at 257.
[25] *Crawford v. La Boucherie Bernard Ltd.*, 815 F.2d 117, 119 (D.C. Cir. 1987).
[26] *Fourco v. Transmirra*, 353 U.S. 222, 228 (1957).
[27] *U.S. Airways, Inc. v. McCutchen*, 569 U.S. 88, 99-100 (2013).
[28] *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996); *see also LaRue*, 552 U.S. at 258–59 (Roberts, C.J., concurring) ("The significance of the distinction between a § 502(a)(1)(B) claim and one under § 502(a)(2) is not merely a matter of picking the right provision to cite in the complaint. Allowing a § 502(a)(1)(B) action to be recast as one under § 501(a)(2) might permit plaintiffs to circumvent safeguards for plan administrators that have developed under § 502(a)(1)(B).").

Clark v. Feder Semo & Bard, P.C., the plaintiff asserted a claim for improper denial of benefits under § 502(a)(1)(B) but maintained that "she should also be allowed to proceed under § 502(a)(3).[29] The Court held that the plaintiff could not plead relief under both provisions, and the court found that the plaintiff failed to demonstrate the harm required for her § 502(a)(3) claim when she was able to plead a § 502(a)(1)(B) claim.[30] As in *Varity Corp*, relief in this case is not appropriate under ERISA §502(a)(3) if another provision, such as § 502(a)(1)(B), offers an adequate remedy.[31] The remedy Petitioner seeks is an increase in her account balance of $537,191.06, which she feels is owed to her based on the terms of the Plan.[32] Because Petitioner's claim can be adequately addressed as a claim for benefits under § 502(a)(1)(B), § 502(a)(3) should not apply.

B. Characterized as a 502(a)(1)(B) claim, Petitioner's lawsuit should be dismissed as untimely.

As an ERISA § 502(a)(1)(B) claim, the terms of the Plan should govern Petitioner's remedy. Section 12 of the Plan provides 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

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[29] 808 F. Supp. 2d 219, 225 (D.D.C. 2011).
[30] *Id.* at 226.
[31] *Id.*; *Clark*, 527 F.Supp.2d at 117 (court dismissed a § 502(a)(3) claim when an adequate remedy is available for plaintiff under § 502(a)(1)(B)); *Staley v. George Washington University*, 394 F.Supp.3d 97, 103 (D.D.C. 2019) (the "[S]upreme Court has cautioned that claims properly brought under section 502(a)(1)(B) may not necessarily also be brought under sections 502(a)(2) and (a)(3)."); *see Wright*, 618 F. Supp. 2d at 55-56 (same).
[32] R. at 6.

such claim."[33] The principle that contractual limitations provisions ordinarily should be enforced as written is especially appropriate when enforcing an ERISA plan.[34] However, ERISA does not specify a statute of limitations for filing a claim under ERISA § 502(a)(1)(B).[35] Given the absence of such a statutory provision, contractual limitations periods, such as Section 12, are typically included in ERISA plans.

The Supreme Court mandates that "[w]e must give effect to the Plan's limitations provision unless we determine either that the period is unreasonably short, or that a 'controlling statute' prevents the limitations provision from taking effect."[36] There is a strong policy in favor of enforcing contractual limitations provisions as written, especially when enforcing an ERISA plan."[37] The focus on the written terms of the plan "is the linchpin of a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place."[38] The "statutory language speaks of enforc[ing] the terms of the plan, not of changing them,"[39] because the rights and

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[33] R. at 4.
[34] *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 571 U.S. 99, 107-08 (2013).
[35] *Heimeshoff*, 571 U.S. at 102.
[36] *Order of United Commercial Travelers of America v. Wolfe*, 331 U.S. 586, 608 (1947); *see also Heimeshoff*, 571 U.S. at 102 ("[u]nless the limitations period is unreasonably short or there is a controlling statute to the contrary, the Plan's limitations provision must be given effect.").
[37] *Heimeshoff*, 571 U.S. at 107-08; *CIGNA Corp. v. Amara*, 563 U.S. 421, 437 (2011) ("[w]e have recognized the particular importance of enforcing plan terms as written in § 502(a)(1)(B) claims.").
[38] *Heimeshoff*, 571 U.S. at 107.
[39] *CIGMA Corp.*, 563 U.S. at 437.

duties at issue in § 502(a)(1)(B) claims are no less "built around reliance on the face of the written plan documents,"[40] and we will not presume from statutory silence that Congress intended a different approach here.[41]

What is considered to be unreasonable is a question of first impression in this jurisdiction. In *Heimeshoff*, the Supreme Court held that a period of three years is not unreasonably short, however the lower courts have been left to make their own determinations as to what is reasonable when ERISA cases are presented with a limitations period that is shorter than three years.[42] The Sixth Circuit has held that a six-month limitations period set out in a plan description may be enforceable.[43] In *Claeys v. Aetna Life Ins. Co.,* the plan's limitation required suit to be filed six months after a final decision was enforceable.[44] Furthermore, other courts have held that similar limitation periods were enforceable as part of their plans.[45] Similar to *Claeys*, Petitioner had six months under the Plan to bring her claim and she failed to do so within the provided time. In the case at bar, the six-month limitation provided by Section 12 did not impose an unreasonable burden on the Petitioner and should be upheld.

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[40] *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995).
[41] *Heimeshoff*, 571 U.S. at 108.
[42] *Heimeshoff*, 571 U.S. at 106.
[43] *Claeys v. Aetna Life Ins. Co.,* 548 F. App'x 344, 346 (6th Cir. 2013).
[44] *Claeys,* 548 F. App'x at 346.
[45] *See Pfifer v. Sedgwick Claims Management Services Inc.*, 414 F.Supp.3d 1024, 1034 (S.D. Tex. 2019); *see also Dye v. Accocs. First Capital Corp. Long—Term Disability Plan*, 243 Fed. App'x 808, 809-10 (5th Cir. 2007) (finding a 120-day period was reasonable); *see also RedOak Hosp., LLC v. GAP Inc.*, WL 2936316, at *3 (S.D. Tex. July 10, 2017) (finding 90-day period for claimant to file suit reasonable); *Rusch v. United Health Grp. Inc.*, 2013 WL 3753947, at *4 (S.D. Tex. July 15, 2013) (finding a 180-day period for filing lawsuit reasonable).

Furthermore, in determining that a 90-day limitations period is reasonable, the Eleventh Circuit found three facts to be determinative: "(1) that there was nothing to suggest the limitation was subterfuge to prevent lawsuits; (2) that the limitations period was commensurate with other Plan provisions; and (3) that an internal ERISA process was followed."[46] The same facts are present in Petitioner's case and should be considered by this Court to conclude that the six-month limitation period was reasonable. There is no evidence in the record to suggest that the limitation to suit was offered to prevent lawsuits.

The determination of what is reasonable is an entirely factual and case-by-case determination. In addition to the relevant case law, the Court should also consider the facts specific to Petitioner's case to determine that the six-month limitation is reasonable. The limitations provision was incorporated into Section 12 of the plan in 2018 and was in effect for two years before Petitioner's claim of action arose.[47] In addition, Petitioner received notice of the limitation when it was communicated to Plan participants in a Summary Plan Description that was issued on April 30, 2020.[48] Given that Petitioner was reminded of this limitation just one month before a final determination regarding her claim was issued by the Plan on May 31, 2020, it would not have been unreasonable for her to commence her

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[46] *Northlake Reg'l Med. Ctr. v. Waffle House Sys. Emple. Benefit Plan*, 160 F.3d 1301, 1304 (11th Cir. 1998).
[47] R. at 4.
[48] R. at 4. .

action within the specified time frame. Moreover, the fact that Petitioner was able to commence this action just six months and 15 days after the Plan issued a final determination suggests that the contractual limitations period of six months was not an unreasonable period of time.

The Plan's limitation provision should be enforced unless a "controlling statute" provides otherwise.[49] When there is no federal statute of limitations expressly provided in a body of law, courts do not assume Congress intended that there be no time limit on actions at all.[50] Rather, courts may borrow rules of timeliness from some other source.[51] In *Njang v. Whitestone Grp., Inc.,* the court held that a six-month contractual limitation period in Plaintiff's employment contract was not an inherently unreasonable period of time.[52] While Plaintiff in that case did not bring his claim under ERISA, the fact that a six-month limitations period is established by law in other contexts indicates that six months is not so short a period of time as "to work a practical abrogation of the right of action[.]"[53] Furthermore, the Seventh Circuit has likened a suit under ERISA to the equivalent of a suit to set aside an administrative decision.[54] In such cases, there is ordinarily

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[49] *Wolfe*, 331 U.S. at 608.
[50] *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 158 (1983).
[51] *Id.* at 154.
[52] *Njang v. Whitestone Grp., Inc.*, 187 F. Supp. 3d 172, 179 (D.D.C. 2016).
[53] *Id.* at 179 (quoting *Taylor v. Western and Southern Life Ins. Co.*, 966 F.2d 1188, 1204-05 (7th Cir. 1992)).
[54] *Doe v. Blue Cross & Blue Shield United*, 112 F.3d 869, 875 (7th Cir. 1997) ("[A] suit under ERISA, following as it does upon the completion of an ERISA-required internal appeals process, is the equivalent of a suit to set aside an administrative decision, and ordinarily no more than 30 or 60 days is allowed within which to file such a suit."); *see also* 33 U.S.C. § 921(a); 42 U.S.C. § 7607(b)(1).

no more than 30 or 60 days allowed within which to file suit.[55] Therefore, Petitioner would have had ample time to initiate her lawsuit well within the six-month limitation.

For the reasons stated above, Petitioner's cause of action is best regarded as a claim for benefits under section ERISA § 502(a)(1)(B), and as such, Petitioner was required to bring forth her claim in accordance with the Plan terms and within six months of receiving the rejection of her claim on May 31, 2020. Accordingly, Petitioner's lawsuit was untimely and was correctly dismissed by the District Court.

III. ISSUE TWO: THE DISTRICT COURT DID NOT ERR IN HOLDING THAT THE COMPLAINT FAILED TO PLEAD WITH SUFFICIENT PARTICULARITY THAT THE MAIL RESPONDENTS BREACHED ANY FIDUCIARY RESPONSIBILITIES UNDER ERISA, AND THAT THE AIC RESPONDENTS WERE NOT FIDUCIARIES UNDER ERISA.

While this honorable court should affirm the District Court's decision and dismiss Respondents' claim because it was time-barred; even if this court comes to the opposite conclusion, this Court should affirm that District Court's decision that Mail Respondents did not breach their fiduciary duties and AIC Respondents were not ERISA fiduciaries.

[55] *Id.* at 875.

A. Mail Respondents did not breach their fiduciary duties under ERISA.

A person or entity is a fiduciary under ERISA to the extent he or she "exercises any discretionary authority or discretionary control over the management of a plan *or* exercises authority or control over plan assets."[56] A party can be expressly designated as a fiduciary in the plan instrument (a so-called "named fiduciary").[57] ERISA commands that an employee benefit plan must "provide for" at least one named fiduciary.[58] Commonly, a plan's administrator is the plan's fiduciary.[59]

Applying the law to the facts, according to Section 10 of the Administrative Services Agreement and the Plan, the Administrative Committee, in its role as employer, was designated as the Plan Administrator and named fiduciary.[60] Therefore, while it is without question that Mail Respondents were the ERISA fiduciary; even so, they did not violate any of their fiduciary duties.

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[56] *Chao v. Day*, 436 F.3d 234, 235 (D.C. Cir. 2006) (quoting 29 U.S.C. § 1002(21)(A)).

[57] *Abraha v. Colonial Parking, Inc.*, 243 F.Supp.3d 179, 185 (D.D.C. 2017); *see also Arakelian v. National Western Life Ins. Co.*, 680 F.Supp. 400, 404 (D.D.C. 1987) (defendant was a fiduciary of the Plan because defendant was a "named fiduciary" pursuant to the terms of the Plan instrument).

[58] ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1) (providing that "[E]very employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan").

[59] ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i) (providing that "[a] person is a fiduciary with respect to a plan to the extent . . . 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"); *U.S. Steel Corp. v. Com. of Pa. Human Relations Commission*, 669 F.2d 124, 128 (3rd. Cir. 1982) ("an ERISA 'employer' can be, and often is, an ERISA 'fiduciary.' ") (cited by *Greater Washington Bd. Of Trade v. District of Columbia*, 1992 WL 135563 (D.C. Cir. 1992).

[60] R. at 4.

ERISA requires a "[plan] fiduciary to act 'solely in the interest' of a plan's participants and beneficiaries, and to discharge his duties 'with the care, skill, prudence, and diligence . . . that a prudent man acting in a like capacity and familiar matters would use in the conduct of an enterprise of a like character."[61] The statutory scheme imposes a duty of prudence on fiduciaries.[62] Prudence under ERISA is measured according to the objective prudent person standard developed in the common law of trusts.[63] In other words, the duties of an ERISA fiduciary are not limited by the express provisions of ERISA § 404, 29 U.S.C. § 1104, but include duties derived from common law trust principles.[64] A fiduciary may be held accountable for a breach of fiduciary duty for "materially mislead[ing] those to whom the duties of loyalty and prudence . . . are owed."[65] In order to successfully establish a claim for breach of fiduciary duty based upon a fiduciary's alleged failure to disclose, the claimant must show that the fiduciary possessed material information not known to the claimant and that the fiduciary failed to

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[61] *Fink v. Nat'l Sav. & Trust Co.*, 772 F.2d 951, 955 (D.C. Cir. 1985) (quoting 29 U.S.C. § 1104(a)(1)(B)); *See also Stewart v. Nat'l Educ. Ass'n*, 404 F. Supp. 2d 122, 132 (D.D.C. 2005).
[62] *Wilcox v. Georgetown Univ.*, No. 18-422 (RMC), 2019 WL 132281, at *8 (D.D.C. Jan. 8, 2019) (citing *Abraha*, 243 F. Supp. 3d at 184).
[63] *Fink*, 772 F.2d at 955.
[64] *Eddy v. Colonial Life Ins. Co. of Am.*, 919 F.2d 747, 750 (D.C. Cir. 1990) (noting "duty to disclose material information is the core of a fiduciary's responsibilities").
[65] *Id.* at 750.

disclose such information.[66] A fiduciary's duties include a continuing duty to monitor.[67]

In *Harris v. Koenig*, the District Court of the District of Columbia, held that an ERISA fiduciary violated their fiduciary duty for monitoring and oversight of their employee's plan when the defendants "step[ped] aside" in order to preserve its independence in the fact of a potential conflict of interest because the duty to monitor should not yield to the obligation to be independent.[68] In *Stephens v. US Airways Group*, the court held that the defendant did not violate their fiduciary duties when there was a delay in disbursement of their lump sum payments because it was a single event with no continuing effect to the present.[69] In *Hunter v. Metro. Life Ins. Co.*, the court held that an employer who was also the plan sponsor and administrator could not be held liable for an insurer's decision to deny the plaintiff benefits because the plan explicitly gave the insurer discretionary authority to determine a claimant's entitlement to benefits, and there was "no

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[66] *Barry v. Trs. of the Int'l Ass'n Full-Time Salaried Officers & Emps. of Outside Local Unions & Dist. Counsel's (Iron Workers) Pen. Plan*, 404 F. Supp. 2d 145, 154 (D.D.C. 2005).

[67] *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1828 (2015) ("In short, under trust law, a fiduciary normally has a continuing duty of some kind to monitor investments and remove imprudent ones.); *Abraha*, 243 F.Supp.3d at 188-89 (co-fiduciaries breach fiduciary duties when "[they] participate knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach."); *Arakelian v. National Western Life Ins. Co.*, 755 F.Supp. 1080, 1084 (D.D.C. 1990) (the fact that all the administrative functions of the Plan were delegated to the Plan administrator did not and does not absolve the trustees of their duty to review and insure that the administrator was acting in the best interests of the participants).

[68] 602 F.Supp.2d 39, 60-61 (D.D.C. 2009).

[69] 555 F.Supp.2d 112, 119 (D.D.C. 2008).

indication in the record that [the employer] had any discretion or played any role in the determination of plaintiff's claim."[70]

Mail Respondents did not breach any of the express or implied fiduciary duties under ERISA. Mail Respondents followed a system of annual evaluations of all of the Plan service providers, including the AIC Respondents.[71] The evaluations of the AIC Respondent's performance showed no reason for concern.[72] Notably, the most recent satisfactory evaluation of the AIC Respondent's performance occurred mere months before the events that gave rise to this case.[73] Mail Respondents exercised "a prudent man standard of care" by hiring a financial advisor to determine whether ARK provided competent services.[74] In addition, Mail Respondents sent a questionnaire to Plan participants asking them if they were happy with the performance of ARK on an annual basis.[75] The Administrative Committee met with ARK each year on the first business day of December to review the Plan, including services provided to the Plan and the fees paid for such services.[76] At no time did Mail Respondents "step aside" and delegate their duties to monitor and oversee the Plan. There is no fiduciary duty for the Plan Administrator to guarantee that the record-keeper and investment service

[70] 251 F.Supp.2d 107, 113 (D.D.C.2003).
[71] R. at 3.
[72] R. at 2.
[73] R. at 3.
[74] R. at 2.
[75] R. at 3.
[76] R. at 3.

will conduct their affairs with absolute perfection. Therefore, the District Court properly dismissed the complaint for failure to state a claim because there was no showing that Mail Respondents breached any of their fiduciary duties.

B. AIC Respondents are not fiduciaries under ERISA.

Under 29 U.S.C. § 1002(21)(A),

> a person is a fiduciary with respect to a [401(k)] 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 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.[77]

A person or entity is a fiduciary under ERISA to the extent he or she exercises any discretionary authority or discretionary control over the management of a plan *or* exercises authority or control over plan assets.[78] The D.C. Circuit views the legislature's inclusion of a disjunctive clause in ERISA's definition of fiduciary, 29 U.S.C. § 1002(21)(A), as creating two different circumstances by which an individual or entity may be a plan fiduciary.[79] A fiduciary within the meaning of ERISA "must be someone acting in the capacity of manager, administrator, or

[77] 29 U.S.C. § 1002(21)(A).
[78] *Chao*, 436 F.3d at 235 (quoting 29 U.S.C. § 1002(21)(A)).
[79] *Id.* at 236; 29 U.S.C. § 1002(21)(A).

financial adviser to a 'plan.'"[80] Accordingly, a person or entity may be an ERISA fiduciary by having either discretion over a plan's management or control over plan assets.[81] Whether an individual or entity is a fiduciary under ERISA, however, is dependent on the function he or she performs with respect to the plan.[82] It is well-settled that a party "is subject to ERISA's fiduciary standards only when it acts in a fiduciary capacity."[83] Further, "[p]ersons who performed only 'administrative' or 'ministerial functions' are not plan fiduciaries."[84] Similarly, persons who perform "settlor" functions for a plan are not fiduciaries.[85] The following actions, among others, constitute fiduciary functions under ERISA: managing plan assets, administering plan investments, and granting or denying plan benefits.[86] A service provider acts as a fiduciary: if (1) it 'did not merely

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[80] *Pegram v. Herdrich*, 530 U S. 211, 222 (2000) ("'[O]nly when fulfilling certain defined functions, including the exercise of discretionary authority or control over plan management or administration,' does a person become a fiduciary under [§ 1002(21)(A)]."); *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996); *Varity Corp.*, 516 U.S. at 503 (a person who "[C]onvey[s] information about the likely future of plan benefits . . . would seem to be an exercise of a power 'appropriate' to carrying out an important plan purpose," is an ERISA fiduciary.).

[81] *Chao*, 436 F.3d at 235-36.

[82] *Hunter v. Metro. Life. Ins. Co.*, 251 F. Supp. 2d 107, 112 (D.D.C 2003) ("In ERISA, Congress took a functional approach toward defining who would be treated as a fiduciary"); *Hartline v. Sheet Metal Workers' Nat'l Pen. Fund*, 134 F. Supp. 2d 1, 15 (D.D.C. 2000), aff'd, 286 F.3d 598 (D.C. Cir. 2002) ("Whether a [arty acts as a fiduciary under ERISA is determined by reference to the nature of the particular activity at issue."); *Boster v. Reliance Standard Life Ins. Co.*, 959 F.Supp.2d 9, 27 (D.D.C. 2013) ("[f]iduciary status under § 1002(21)(A) is not an all or nothing concept.... [A] court must ask whether a person is a fiduciary with respect to the particular activity in question.").

[83] *Sys. Council EM-3 v. AT&T Corp.*, 159 F.3d 1376, 1376 (D.C. Cir. 1998).

[84] *Strumsky v. Washington Post Co.*, 922 F. Supp. 2d 96, 104 (D.D.C. 2013) (citing 29 C.F.R. § 2509.75–8).

[85] *Hartline v. Sheet Metal Workers' Nat'l Pen. Fund*, 286 F.3d 598, 599 (D.C. Cir. 2002) ("[E]mployers and plan sponsors do not act in a fiduciary capacity when they modify, adopt or amend plans."); *In re Ullico Inc. Litig.*, 605 F. Supp. 2d 210, 217 (D.D.C. 2009) ("[A]n employer or plan sponsor does not act as an ERISA fiduciary when taking steps to modify or amend an employee benefit plan."); *Adams v. Pen. Ben. Guar. Corp., 332 F. Supp. 2d 231, 237 (D.D.C. 2004) (same).*

[86] *Chao*, 436 F.3d at 235-36 (exercising authority and control over the disposition of plan assets); *Hunter v. Metro. Life. Ins. Co.*, 251 F. Supp. 2d 107, 112-13 (D.D.C 2003) (exercising discretionary authority over benefits claim

follow a specific contractual terms 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."[87] Each of these functions involve a party making a discretionary determination with respect to plan management or the exercise of control over plan assets.

Many retirement plans have multiple trustees and, therefore, multiple persons with fiduciary duties to the beneficiaries at the same time. If one fiduciary recognizes a breach committed by another, it has an obligation to make reasonable efforts to remedy the breach.[88] This does not mean that a successor trustee is always liable for a breach by its predecessor: such a result would clearly be at odds with § 1109(b).[89] Whether a party acts as a fiduciary under ERISA is determined by reference to the nature of the particular activity at issue.[90] Mere influence over a fiduciary's decisions regarding a plan is not enough to constitute discretionary control, triggering ERISA liability.[91] Professional service providers become liable under ERISA when their participation is so substantial that they cross the line from

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determinations); *Eaton v. D'Amato*, 581 F. Supp. 743, 746-47 (D.D.C. 1980) (making awards, setting priorities, and selecting banks and accounts for trust funds).

[87] *Rozo v. Principal Life Ins. Co.*, 949 F.3d 1071 (8th Cir. 2020) (quoting *Teets v. Great-West Life & Annuity Ins. Co.*, 921 F.3d 1200 (10th Cir. 2019)).

[88] *Stephens v. US Airways Group*, 555 F.Supp.2d 112, 119 (D.D.C. 2008).

[89] *Id.* at 119.

[90] *Hartline*, 134 F. Supp. 2d at 15, aff'd, 286 F.3d 598 (D.C. Cir. 2002); *Arakelian v. National W. Life Ins. Co.*, 748 F.Supp. 17, 22 (D.D.C. 1990).

[91] *Fink*, 772 F.2d at 958.

advisor to fiduciary.[92] Whether a person is a fiduciary is a fact-bound inquiry depending upon the degree of individual discretion or control that is vested in the person.[93]

Section 8 of the Agreement provided that "ARK and AIC are not and shall not be regarded as a fiduciary for purposes of ERISA."[94] It is conceded that AIC might become a Plan fiduciary when it engages in transactions with respect to the assets of the Plan. However, Petitioner's investment instructions were never communicated to AIC.[95] AIC was an innocent party and never had any knowledge that Petitioner was seeking to make the trade on March 15, 2020.[96] Therefore, AIC could not have acted as a fiduciary with respect to implementing the Petitioner's instructions, which it never received.

According to Section 1 of the Administrative Services Agreement, ARK provided, (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

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[92] *Mertens v. Hewitt Associates*, 508 U.S. 248, 260 (1993); *Teets v. Great-West Life & Annuity Insurance Company*, 921 F.3d 1200, (10th Cir. 2019) 1213 ("[W]hen a service provider acts with authority or control beyond the contract's specific terms, the service provider may be a fiduciary. And when the plan or the plan participants cannot reject the service provider's action or terminate the contract without interference or penalty, the service provider is a functional fiduciary.").
[93] *Id.* at 260.
[94] R. at 3.
[95] R. at 5.
[96] R. at 5.

changing investment vehicles.[97] ARK was merely providing services in accordance with the clear terms of the Agreement and Plan document. ARK's role was to receive and transmit instructions that it had received from the Petitioner.[98] ARK's role is clearly ministerial because it has no discretionary power. Following the instructions of someone with authority under the plan does not make one a fiduciary. Furthermore, even if ARK was an ERISA fiduciary, ARK would not be liable under ERISA for any loss, or by reason of any breach, which results from Appellant's exercise of control over her Plan account.[99] ARK did not take unilateral action with respect to Petitioner's Plan account.[100] Petitioner's account remained protected in the money market fund.[101] Under the objective "prudent man standard,"[102] ARK made do with its resources to the best of its ability. Petitioner could have followed up seven days after her initial call; however, failed to do so.[103] Therefore, because AIC Respondents were not fiduciaries under ERISA, the court should affirm the District Court's decision and dismiss Petitioner's claim.

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[97] R. at 3.
[98] R. at 3.
[99] *Middleton v. United States Department of Labor*, 318 F.Supp.3d 81, 89 (D.D.C. 2018) ("[ERISA] defines fiduciaries as only those persons who exercise authority or control with respect to an ERISA investment plan.").
[100] R. at 5.
[101] R. at 4.
[102] *Abraha*, 243 F. Supp. at 184; *Fink*, 772 F.2d at 955 ("[P]rudence under ERISA is measured according to the objective prudent person standard developed in the common law of trust.").
[103] R. at 5.

CONCLUSION

The Respondents asks this honorable Court to affirm the decision of the District Court on both issues presented and dismiss Petitioner’s claims.