CASE NUMBER

In The

The United States Court of Appeals

for the Thirteenth Circuit

Liberte Chen,	)	
	)	Appeal from the U.S. District Court
Plaintiff-Appellant	)	for the District of Columbia
	)	
v.	)	
	)	No. 20-cv-099-TCF
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,	)	
Defendants- Appellees.	)	

BRIEF FOR PLAINTIFF-APPELLANT LIBERTE CHEN

Team #3

Attorneys for Appellant Liberte Chen

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

The United States District Court for the District of Columbia has jurisdiction over the matter pursuant to 28 U.S.C. §1331 as this is a matter arising under federal law. The United States District Court for the District of Columbia exercised jurisdiction over the parties and over the subject matter of this dispute, involving a claim incident to mismanagement of an employee benefits plan, pursuant to 29 U.S.C. §§1001, 1132.

The AIC Defendants filed a motion to dismiss on December 16, 2020, and the Mail Defendants filed a motion to dismiss on December 17, 2020. The District Court granted both Defendant's motions on January 18, 2021 in a final judgment.

Plaintiff filed a timely notice of appeal to the United States Court of Appeals for the Thirteenth Circuit.

The United States Court of Appeals for the Thirteenth Circuit has jurisdiction over an appeal from a final judgment pursuant to 28 U.S.C. §1291 and Fed. R. App. P. 3 and Fed. R. App. P.4.

STATEMENT OF THE ISSUES

There are two issues on appeal. The first is whether the district court erred in (a) finding the Plaintiff's complaint fell only within the confines of an ERISA 502(a)(1)(B) suit and; (b) finding the plan language limiting the time for filing suit to a mere six months was not unreasonably short, requiring the dismissal of the suit as untimely. The second issue is whether the District Court erred in finding the complaint did not sufficiently state a claim on the theory the Mail Defendants breached fiduciary duties under ERISA, and AIC Defendants were fiduciaries.

STATEMENT OF THE CASE

I. NATURE OF THE CASE AND PROCEEDINGS BELOW

This ERISA (Employee Retirement Income Security Act, 29 U.S.C. §1001 *et seq.*) complaint was brought by the Plaintiff, Liberte Chen ("Chen"), against the Defendant New York Mail ("Mail") and Defendants Andrews Investment Company ("AIC") and AIC's wholly-owned subsidiary Andrews Record-Keeping ("ARK"). On December 15, 2020 Plaintiff filed a multiple count complaint against Defendants alleging: 1. That she has been denied benefits owed under the plan; 2. That each of the defendants are fiduciaries; 3. That the Mail Defendants had an obligation to prudently select a record-keeper and to monitor its performance and address deficiencies in its performance; 4. That the Mail Defendants failed in their duty to prudently select a record-keeper by focusing on ARK's low costs rather than the quality of its services; 5. That the Mail Defendants failed to prudently monitor ARK during the strike, when it was using replacement employees; 6. That the Mail Defendants failed to create adequate procedures and policies under which ARK performed its contractual obligations; and 7. That ARK's use of inadequately trained employees during the strike to maintain the on-line interface and to staff the Call Center was a violation of its duties of prudence and put its own interests ahead of the participants. (Dist. Ct. Opinion and Judgment 5, 6). Chen asserted these claims pursuant to 29 U.S.C. §1132(a)(1)(B) (ERISA §502(a)(1)(B)) and 29. U.S.C. §1132(a)(3) (ERISA §502(a)(3)). (Dist. Ct. Opinion and Judgment 5, 6).

The Mail Defendant filed a motion to dismiss under Federal Rules of Civil Procedure 12(b)(6) on December 17, 2020, arguing the Plaintiff failed to state a claim upon which relief may be granted because the complaint was time barred, failed to show the Mail was a fiduciary, or in the alternative, the Mail failed to act prudently. (Dist. Ct. Opinion and Judgment 1, 6) The AIC Defendant filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) on December 16, 2020, arguing the Plaintiff failed to demonstrate they were fiduciaries under ERISA. (Dist. Ct. Opinion and Judgment 1, 6).

Plaintiff filed responses to both Defendants' motions on January 2, 2021. The District Court for the District of Columbia rendered a final judgment and opinion on January 18, 2021, granting the defendant motions. (Dist. Ct. Opinion and Judgment 12). Plaintiff Chen filed a timely notice of appeal. (Stip. 6)

II. Statement of Facts

Background

Liberte Chen is an employee of Defendant New York Mail (the "Mail"), and a participant in the sponsored 401(k) retirement plan (the "Plan"). (Dist. Ct. Opinion and Judgment 2). The Mail is the named fiduciary of the Plan and has appointed an administrative committee, on which each of the named defendants (King Westley, Samantha Ortiz, and LaBron Hastings) serve. (Dist. Ct. Opinion and Judgment 2, 4). The administrative committee selected Andrews Record-Keeping (ARK), a wholly owned subsidiary of Andrews Investment Company (AIC), following a call for bids. (Dist. Ct. Opinion and Judgment 2). ARK was among the lowest bidders. (Dist. Ct. Opinion and Judgment 2). The Administrative Committee reviews the performance of ARK in two ways: through a questionnaire that has never exceeded a 10% response rate; and through an annual review of the plan meeting on the first business day of December. (Dist. Ct. Opinion and Judgment 3). Apart from these, there is no evidence the Mail takes any other action to review the performance of ARK. (Dist. Ct. Opinion and Judgment 3).

There is an administrative services agreement between the Plan, AIC, and ARK, articulating basic elements of the relationship between the parties in this suit. (Dist. Ct. Opinion and Judgment 3). The agreement establishes that in exchange for a fee, ARK will provide: (i) maintenance of records for the Plan; (ii) an interface plan participants can use to designate and change investment vehicles; and (iii) a phone in service center in which Plan participants can provide instructions to ARK on designating and changing investment vehicles. (Dist. Ct. Opinion and Judgment 3). It falls to AIC to provide the investment options specified in the Plan, and the "best execution reasonably practicable under the circumstances for all Plan investment transactions, including but not limited to transmitting any investment instructions to the

appropriate investment manager(s) in a timely manner." (Dist. Ct. Opinion and Judgment 3). Other pertinent elements of the agreement include: ARK and AIC are not to be regarded as fiduciaries under ERISA while the Administrative Committee shall be considered the named fiduciary; and that the Plan will provide a variety of investment instruments, including a technology fund, a money-market fund, and a stock index fund. (Dist. Ct. Opinion and Judgment 4).

In 2018 the Plan was amended to add a statute of limitations provision that states, "Any lawsuit seeking Plan benefits or challenging the management and administration of the Plan must be filed within six (6) months of the date the Plan issues a determination regarding such claim." (Dist. Ct. Opinion and Judgment 4). However, this amendment was not communicated to participants until April 30, 2020, through a Summary Plan Description. (Dist. Ct. Opinion and Judgment 4).

Events Giving Rise to the Complaint

In March 2020 ARK hourly wage employees who were staffing the phone centers and were responsible for keeping the online interface operational went on strike. (Dist. Ct. Opinion and Judgment 4). In an effort to retain minimal services, ARK pressed executives and salaried employees into manning the phone centers and online interface. (Dist. Ct. Opinion and Judgment 4). This helped ARK retain strategic negotiating advantage, and is generally credited as an important factor in ending the strike on terms favorable to ARK. (Dist. Ct. Opinion and Judgment 4). However, plan participants, such as Plaintiff Chen in this suit, were adversely affected by ARK's stance on the strike because there were a number of mistakes and delays in executing investment instructions as a result of high call volumes incident to failures of ARK to maintain quality online interface service. (Dist. Ct. Opinion and Judgment 4). The combination of temporary staff and the high call volume led to mistakes and delays in processing investment instructions. (Dist. Ct. Opinion and Judgment 4).

Plaintiff Chen attempted to make some fundamental changes to her investment portfolio on March 15, 2020. (Dist. Ct. Opinion and Judgment 5). She first visited the online interface, but it was down. (Dist.

Ct. Opinion and Judgment 5). She then immediately called the call center, and spoke with one of the replacement staff, Alina Oxmix Comey ("AOC"). (Dist. Ct. Opinion and Judgment 5). Chen instructed AOC to move 100% of her funds out of the conservative money market fund into a combination of more aggressive investment instruments (the stock index fund and the technology index fund). (Dist. Ct. Opinion and Judgment 5). Chen was keenly aware of the unique opportunity to profit from the impact of the global pandemic on the stock market. (Dist. Ct. Opinion and Judgment 4). AOC asked Chen to repeat her instructions, transcribed and recorded them, repeated them, and assured Chen her instructions would be communicated upstream and executed. (Dist. Ct. Opinion and Judgment 5). She promised Chen a confirmation of the trades would be provided within seven (7) days. (Dist. Ct. Opinion and Judgment 5). However, AOC entirely failed to communicate the trades to AIC. (Dist. Ct. Opinion and Judgment 5). Chen did not receive the promised confirmation. (Dist. Ct. Opinion and Judgment 5).

Plaintiff received the March 31, 2020 benefit statement on April 10, 2020, which showed no changes had been made to her investments. (Dist. Ct. Opinion and Judgment 5). Chen made several calls to the ARK call center in April and May 2020, but due to long wait times and her busy schedule she was unable to reach a representative. (Dist. Ct. Opinion and Judgment 5). The April 30, 2020 benefit statement, received May 14, 2020, continued to show no change to her investments. (Dist. Ct. Opinion and Judgment 5). In the meantime, the value of the stock index fund increased by 20% and the value of the technology fund increased by 40%. (Dist. Ct. Opinion and Judgment 5). Chen's money market account increased in value by $692.60, whereas had her instructions been executed reasonably, her account would have increased in value by $537,201.54. (Dist. Ct. Opinion and Judgment 5).

On May 15, 2020 Chen sent a letter demanding the Plan recognize the trade she had instructed on March 15, 2020 and to "make this right." (Dist. Ct. Opinion and Judgment 5). Over two weeks later, in a letter dated May 31, 2020, the plan replied to Chen's request to rectify the failure, stating it "apologizes if errors were made, but there is nothing the Plan can do at this time because the matter was not brought to the Administrative Committee's attention in a timely manner." (Dist. Ct. Opinion and Judgment 5). On

December 15, 2020 Chen filed this present lawsuit in the United States District Court for the District of Columbia, naming the Mail, ARK and AIC as defendants, claiming $537, 191.06 in damages. (Dist. Ct. Opinion and Judgment 1, 5).

SUMMARY OF THE ARGUMENT

The District Court erred in dismissing Plaintiff's complaint as time barred under Section 12 of the Plan as there was a controlling statute to the contrary and Section 12's time limit was unreasonable. 29 U.S.C. §1113 is a controlling statute to the contrary and the United States Supreme Court has not held that it is not a controlling statute. Further, Section 12 was unreasonable based upon the fact that it was unreasonably short. The limitation contained in Section 12 was not communicated to the Plan Participants until April 30, 2020, two years after the plan fiduciaries changed same. (Dist. Ct. Opinion and Judgment 4). Further, there was no process for the participants to appeal any decision made by the plan.

The District Court erred in finding the Plaintiff's Complaint failed to plead with particularity the Mail Defendants breached any fiduciary responsibilities under ERISA. Notice pleadings is all that is required for a valid ERISA complaint and the requirement for pleading with particularity is only necessary where misrepresentation, fraud or mistake are alleged. Plaintiff was not required to plead with particularity regarding the Mail Defendants breach of fiduciary responsibilities under ERISA. A complaint is ideally a short and plain statement the pleader is entitled to relief, containing more than mere allegations that a defendant unlawfully harmed a defendant. A plaintiff's claims must be plausible. Plaintiff's claims here were plausible, and a trier of fact could find the Mail Defendant breached their fiduciary duty being aware of the ongoing Covid-19 pandemic causing an unusually high number of Participants calling the phone center, manned by poorly trained temporary staff during the strike, and leading to mistakes and delays in processing investment instructions. (Dist. Ct. Opinion and Judgment 4).

The District Court further erred in relying on extrinsic evidence in considering the Defendants' Motions to Dismiss, contrary to established practices. The lower court's acceptance of external material to the complaint required the District Court to treat the Defendants' Motions to Dismiss as Motions for

Summary Judgment. However, a motion for summary judgement should not be granted where there are genuine issues of material fact. Given the nature of the complaint alleges material facts, such as breach of fiduciary duty by both the Mail defendants and AIC defendants, and that these defendants dispute the facts of such allegations, this matter should not have been dismissed.

The District Court erred in finding the Plaintiff failed to plead with sufficient particularly that the AIC Defendants were fiduciaries. As noted above, ERISA does not require a plaintiff to plead with particularity regarding breach of fiduciary duty unless there are allegations of misrepresentation, fraud or mistake. Further, AIC acted as a functional fiduciary under 29 U.S.C. §1002(21)(A) and 29 U.S.C. §1105(c)(1)(B) and has liability for its breach of fiduciary duty pursuant to 29 U.S.C. §1104(a)(1)(B).

The District Court opined AIC could not be held responsible for a breach of fiduciary duty because they had not failed to execute the Plaintiff's instructions because they never received them. (Dist. Ct. Opinion and Judgment 11). However, the agreement between AIC and the Mail unambiguously assigns responsibility for transmitting participant instructions to AIC. Therefore, the finding that AIC is not a fiduciary because they failed to receive Plaintiff Chen's instructions is in error. AIC was first a fiduciary because AIC exercises discretion over the plan, and they breached their fiduciary duty by failing to receive and execute Plaintiff Chen's instructions. We therefore respectfully request the Court remand the case for further proceedings.

STANDARD OF REVIEW

The courts review a grant of a Rule 12(b)(6) motion to dismiss *de novo*. *Directv, Inc., v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). A Rule 12(b)(6) motions should not be granted unless it appears beyond a doubt that a plaintiff cannot prove a set of facts in support of his claim which entitles him to relief. *Id.* In reviewing a motion to dismiss, the court will construe the complaint in the light most favorable to the plaintiff, accept its allegations as true and draw all reasonable inferences in favor of plaintiff. *Id.*

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF'S COMPLAINT AS TIME BARRED UNDER SECTION 12 OF THE PLAN AS THERE WAS A CONTROLLING STATUTE TO THE CONTRARY, AND THE TIME LIMITATION WAS UNREASONABLE UNDER THE TERMS OF THE PLAN AND THE CIRCUMSTANCES GIVING RISE TO THIS CASUE OF ACTION

The United States Supreme Court noted a participant's cause of action under ERISA does not accrue until the plan issues a final denial. *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 571 U.S. 99, 105 (2013). Absent a controlling statute to the contrary, a participant and a plan may agree by contract to a particular limitations period, even one that starts to run before the cause of action accrues, as long as it is reasonable. *Id. at 105-106.* The Court will give effect to the Plan's limitations provisions unless the Court determines either the period is unreasonably short, or that a controlling statute prevents the limitations provision from taking effect. *Id. at 109* (quoting *Order of United Commercial Travelers of America v. Wolfe*, 331 U.S. 586, 608 (1947)). There are two thus issues: whether the limitation is unreasonably short, and whether there is a controlling statute.

A. Section 12 of the Plan is Unreasonable

The District Court failed to apply §1113 in part because it determined Plaintiff's claim was fundamentally a claim for benefits due (502(a)(1)(B)), and not a claim for equitable relief (502(a)(3)). (Dist. Ct. Opinion and Judgment 9). This conclusion is self-contradictory because the benefits under dispute are those that would only have accrued had the Plaintiff's instruction been followed. That they were not followed is the material of the breach of fiduciary claim. Therefore, one cannot conclude the complaint is primarily one for benefits due without already assuming there is a breach of fiduciary duty. The benefits are only due because there was a basic failure to comport with a fiduciary duty. If there is no breach, then there are no benefits to withhold. To say there are benefits withheld is already to acknowledge there was a breach of fiduciary duty. Notwithstanding the faulty logic, the District Court applied the limitation provision of the Plan to the claim, and ruled Plaintiff's action was time-barred. Were Plaintiff to accept the

lower court's finding that Plaintiff's claim is one for benefits due, as opposed to one based on breach of fiduciary duty, Plaintiff would nonetheless argue the District Court erred in applying the limitation language of the Plan because it is unreasonable.

The "reasonableness" of a limitation is generally fact specific, though in a pre *Heimeshoff* case, the 11th circuit used a three-prong test to consider whether a limitation was reasonable. This test asked: first, whether the provision was a subterfuge to prevent lawsuits; second, whether the limitation was commensurate with other elements of the plan; and third, whether there is provision for an ERISA internal appeals process to be completed. *North Lake Regional Medical Center v. Waffle House Sys. Employee Benefit Plan*, 160 F.3d 1301 (11th Cir. 1998).

As to the facts in this case, the limitations provision in the Plan is unreasonably short. 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 such claim." (Dist. Ct. Opinion and Judgment 4). First, based on the stipulated facts, the limitations were not communicated to plan participants until after serious errors occurred in the transmission and execution of participant instructions. (Dist. Ct. Opinion and Judgment 4). The strike began in March, but the limitations provision was not communicated until April. (Dist. Ct. Opinion and Judgment 4). The fact the change was communicated in the midst of excessive errors reflects a strong possibility the notice was given at that time in order to reduce the likelihood plan participants would know their right to bring suit had been limited. To all outward appearances, the Mail waited to inform participants of this limitation language until after causes of action had already arisen, and did nothing to ensure participants who had been harmed during the call center strike were aware of the new limitations beyond sneaking it in a summary plan description. This looks an awful lot like underhanded subterfuge. We therefore argue the facts could plausibly lead one to conclude the first prong of the reasonableness test can be met.

Second, the provision is not commensurate with other elements of the Plan. The Plan uses a once yearly process to evaluate the Plan and its administration. (Dist. Ct. Opinion and Judgment 3). It would

thus be more commensurate with other elements of the Plan if the statute were equally at least a one year limitation. ERISA imposes a duty upon fiduciaries to respond promptly and adequately to employee-initiated inquiries regarding the plan or any of its terms. *Krohn v. Huron Mem. Hosp.*, 173 F.3d 542, 550 (6th Cir. 1999) (quoting *Electro-Mechanical Corp. v. Ogan*, 9 F. 3d 445, 451 (6th Cir. 1993)). The D.C. Circuit noted in *Eddy v. Colonial Life Ins. Co.,* that a fiduciary's duty is not discharged simply by the issuance and dissemination of summary plan descriptions and notices. *Eddy v. Colonial Life Ins. Co.,* 919 F.2d 747, 750 (D.C. Cir. 1990). The reasonableness of the plan's limitation should be understood within the fiduciaries' own actions in communicating with participants about the language of the limitation.

In this case the Mail fiduciaries made the change to plan in 2018, but did not communicate this change until 2020. ((Dist. Ct. Opinion and Judgment 4). In other words, the fiduciaries found it acceptable to make a significant change to the limitations language of the plan but to communicate that change as much as two years after the fact. Perhaps a two-year limitation would be better in keeping with their own actions. Given the timeframe of Chen's interactions with the plan fiduciaries, it is unknown if Plaintiff received this Summary Plan Description, or read it, by the time the Plan issued its final determination regarding her claim. Per the *Eddy* Court, the issuance of this Summary Plan Description did not discharge the Plan from its fiduciary duty. *Eddy*, 919 F.2d at 750. The statute of limitations contained in the Plan was unreasonable based on the lengthy delay in which the Plan informed its Participants regarding same after its implementation. A reasonable action, on the part of the plan fiduciary, would have been to inform Plaintiff, at the time of the final determination denial, that she had six months to file a claim. We therefore argue one could conclude the second prong of the reasonableness test is also met.

Third, there was no process provided for participants to appeal the decision. The Plan requires only that a final determination be given for the limitation tolling to begin, and the Plan is silent on whether there is an appeal process or whether the limitation would pause upon an appeal. (Dist. Ct. Opinion and Judgment 3, 4). Therefore, the three-prong test of the 11th circuit supports the conclusion the provision is unreasonable.

In addition to the above three-pronged analysis, Section 12 of the Plan is unreasonable based upon the events occurring at the time the cause of action arose. The stipulated facts include: a call center strike (Dist. Ct. Opinion and Judgment 3), an economic crisis (Dist. Ct. Opinion and Judgment 3), consistent failures of online resources (Dist. Ct. Opinion and Judgment 3), and the use of untrained employees (Dist. Ct. Opinion and Judgment 3). ARK and AIC themselves struggled to operate properly under the circumstances. (Dist. Ct. Opinion and Judgment 3). The failures of the plan managers is partially based on the extraordinary circumstances enveloping the call center strike.

In addition to the failures of the Plan administrators and fiduciaries to maintain promised service quality, the unprecedented cessation of economic and social institutions due to a global pandemic make the six-month limitation unreasonable. The global pandemic led to the shutdown of businesses, schools, and public institutions generally. It is unreasonable to hold the Plaintiff to a short limitation period, communicated lately, in the midst of a world in tumult. Based upon the facts of this case, it is plausible that a trier of fact would have found the statute of limitations unreasonable; therefore, the District Court erred in dismissing Plaintiff's Complaint as time barred.

B. 29 U.S.C. § 1113 is a Controlling Statute to the Contrary

The *Heimeshoff* decision did not explicitly take up the question of a controlling statute, but did expressly note plaintiff Heimeshoff had not made the argument that 29 U.S.C. §1113 was a controlling statute. This leads us to argue, at a minimum, the Supreme Court is inclined to see §1113 as potentially controlling on the question of contractual limitations. *Falberg v. Goldman Sachs Grp., Inc.*, 2020 U.S. Dist. LEXIS 242934 at *6 (S.D. N.Y. 2020) (quoting *Heimeshoff*, 571 U.S. at 110).

29 U.S.C. § 1113 provides, in pertinent part, a limitation for actions for breach of fiduciary duty of six years after "(a) the date of the last action which constituted a part of the breach, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach." 29 U.S.C. §1113. The statute limits an action to three years after the "earliest date on which the plaintiff had actual knowledge of the

breach or violation." *Id.* In *Chelf v. Prudential Ins. Co. of Am.*, the Court held §1113 governed a breach of fiduciary duty claim despite plan's limitation provision. *Chelf v. Prudential Ins. Co. of Am.*, 2018 WL 4219424, at *7 (W.D. Ky. Sept. 5, 2018). Further, in *Winburn v. Progress Energy Carolinas, Inc.*, the Court held the Supreme Court applied the statute's limitations language to a statutory ERISA claim instead of the plan's limitation provision. *Winburn v. Progress Energy Carolinas, Inc.*, 2015 WL 505551 at *11 (D.S.C. Feb. 6, 2015).

In this case, Plaintiff's claim is based upon a breach of fiduciary duty leading to a loss in Plaintiff's benefits. The claim is therefore open to application of 29 U.S.C. §1113, as in *Chelf* and *Winburn*. The District Court erred in dismissing Plaintiff's complaint as time barred pursuant to Section 12 of the Plan and erred in holding there was no controlling statute to the contrary because the claim is based on a breach of fiduciary duty, and should be governed by the statute of limitations contained in §1113 of ERISA.

II. THE DISTRICT COURT ERRED IN FINDING THE COMPLAINT FAILED TO PLEAD WITH PARTICULARITY THE MAIL DEFENDANTS BREACHED ANY FIDUCIARY RESPONSIBILITIES UNDER ERISA BECAUSE: (A) ERISA DOES NOT REQUIRE THE HEIGHTENED PLEADING STANDARD OF FEDERAL RULE OF CIVIL PROCEDURE 9(B); (B) PLAINTIFF WAS NOT REQUIRED TO PLEAD WITH PARTICULARITY THE ALLEGED BREACH OF FIDUCIARY DUTY; AND (C) IT IS PLAUSIBLE PLAINTIFF WAS INJURED DUE TO MAIL DEFENDANT'S BREACH OF FIDUCIARY RESPONSIBILITY

A. Federal Rule of Civil Procedure Rule 9(b) particularity

The District Court erred in finding the complaint failed to plead with particularity the Mail Defendants breached any fiduciary responsibilities under ERISA because ERISA does not require the heightened pleading standards of Federal Rule of Civil Procedure 9(b) for the complaint filed by the Plaintiff in this case. Generally, notice pleading is all that is required for a valid ERISA complaint. *In Re Coca-Cola Enterprise, Inc., ERISA Litigation*, 2007 U.S. Dist. LEXIS 44991 at *8 (N.D. Ga.). Under notice pleading, the plaintiff must provide defendant fair notice of the claim and the grounds upon which it rests. *Id.*

Though fraud is not alleged in the complaint, there is nonetheless a split of authority when it comes to the heightened pleading requirements of Rule 9(b) for claims arising under ERISA amongst the district

and circuit courts that have taken up the issue. *In Re Coca-Cola Enterprise, Inc., ERISA Litigation*, 2007 U.S. Dist. LEXIS 44991 at *15. Some courts have stated the requirements of Rule 9(b) must be met when the underlying allegations of the claim are grounded in fraud. *Id.* Other Courts have determined that a fiduciary claim brought under ERISA only needs to provide notice pleading, regardless of whether the claims are based upon underlying fraud. *Id.* In all circuits where particularity is required it is necessary only where misrepresentation, fraud, or mistake are alleged. *In re Sears, Roebuck & Co. ERISA Litigation,* 2004 U.S. Dist. LEXIS 3241 at *16 (N.D. Ill.). In the context of an ERISA cause of action, where fraud, misrepresentation or omission is alleged, but is not itself the basis for the alleged breach, Rule 9(b) is not applied. *Id.* (citing *In re Xcel Energy, Inc. Sec., Derivative and ERISA Litig*., 312 F. Supp 2d1165, 1179 (D. Minn. 2004)).

In the instant case, the Plaintiff does not allege fraud, misrepresentation or omission. She merely alleges she was damaged when the Defendants breached their fiduciary duties under the plan. (Dist. Ct. Opinion and Judgment 5-6). Therefore, as Plaintiff has not alleged fraud, misrepresentation or omission, the District Court erred in finding the Plaintiff failed to plead with particularity the Mail Defendants breached any fiduciary responsibilities under ERISA.

B. Breach of Fiduciary Duty Under ERISA

The District Court erred in finding the complaint failed to plead with sufficient particularity the Mail Defendants breached any fiduciary responsibilities under ERISA as Plaintiff was not required to plead with particularity the alleged breach. Plaintiff has, however, met the expectations of a pleading based on breach of fiduciary duty.

A fiduciary of a 401(k) plan is subject to a Prudent Man Standard of Care" under 29 U.S.C. 1104(a): that the fiduciary "discharge his duties with respect to a plan solely in the interest of participants and beneficiaries . . . with the skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in like capacity and familiar with such matters would use. . .". To plead breach of

fiduciary duty under ERISA, a plaintiff must allege the following: (1) defendant was a fiduciary of the plan; (2) defendant was acting in that capacity; and (3) defendant breached a fiduciary duty. 29 U.S.C. §1109 and *In re Xcel Energy, Inc. Sec., Derivative and ERISA Litig*., 312 F. Supp 2D 1165, 1175 (D. Minn. 2004). A fiduciary is generally one who exercises discretionary control over some aspect of the management or administration of an ERISA plan, or any control whatsoever over plan assets. *Id.* An ERISA fiduciary may be named in the plan instrument. *Id.* In this case, the Plan itself names the Mail as the Plan fiduciary. The first element of a sufficient pleading is thus met.

As to the second element of the pleading requirement for breach of fiduciary duty, Plaintiff has alleged the Mail was acting as a fiduciary in failing to monitor the management of the plan under the unusual circumstances giving rise to the Plaintiff's complaint. The Mail has express responsibility to monitor the performance of the services provided by ARK and AIC. (Dist. Ct. Opinion and Judgment 4). The complaint alleges the routine practices the Mail has used were insufficient to ensure the Plan was properly managed. (Dist. Ct. Opinion and Judgment 10). The District Court noted the Mail performed some oversight functions "mere months" before the events giving rise to this complaint, but the problem with that opinion is that the months intervening were dramatic, and had direct impact on the performance of the plan. (Dist. Ct. Opinion and Judgment). The strike and pandemic were intervening events that should have triggered closer oversight. Under such circumstances, a reasonable fiduciary would take action to ensure the plan was being properly administered. The Mail was acting as a fiduciary relative to the substance of the complaint because they failed to monitor the management of the plan under these fact-specific circumstances, and this is squarely within the duties of a fiduciary.

Here, plaintiff alleges the Mail Defendants were acting as a fiduciary of the plan; that it was acting in that capacity when the breach occurred, and lastly alleges Mail Defendants breached their fiduciary duty to prudently select a record-keeper, monitor its performance, and address deficiencies in that performance. Mail Defendants failed in their duty to prudently select a record-keeper by focusing on ARK's low costs rather than quality; and failed to prudently monitor ARK during the strike. (Dist. Ct. Opinion and Judgment

5-6). The stipulated facts indicate The Mail knew that ARK was staffing the call-center and maintaining the online portal with temporary staff, who were not properly trained. (Stip. 4). Further, the facts establish ARK and AIC benefitted from this decision in obtaining favorable terms ending the strike. (Dist. Ct. Opinion and Judgment 4). Therefore, the Mail defendants knew the Plan was being administered poorly but failed to take steps any prudent person would take to promote the interests of Plan participants over the interests of the Plan administrators (ARK and AIC) pursuant to 29 U.S.C. §1104(a). These facts are sufficient to establish a case for breach of fiduciary duty. Plaintiff's complaint therefore fulfilled the pleading requirements for breach of fiduciary duty pursuant to 29 U.S. C. §1109. The District Court erred in finding that Plaintiff's complaint failed to plead with sufficient particularity that the Defendants Mail breached their fiduciary duty as Plaintiff followed the pleading requirements contained in 29 U.S.C. §1109.

C. Plausibility of Plaintiff's claim

A complaint is required to include a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). The United States Supreme Court stated that the purpose of said rule is to give the defendant fair notice of what the claim is and the grounds upon which it rests. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). A pleading must contain more than defendant unlawfully harmed plaintiff accusations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A plaintiff's claims must nudge across the line from conceivable to plausible. *Twombly*, 550 U.S. at 570. In order to survive a motion to dismiss, the complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. *Iqbal*, 556 U.S. at 678. A claim has facial plausibility when the plaintiff pleads factual content that allows a court to draw the reasonable inference the defendant is liable for the misconduct alleged. *Id.* The plausibility standard is not akin to a probability requirement, but asks for more than a sheer possibility the defendant acted unlawfully. *Id.*

When considering whether a plaintiff has brought a plausible claim, the court will not rely on extrinsic evidence. *Cunningham v. Osram Sylvania, Inc*., 221 Fed. App'x 420, 422-23 (6th Cir. 2007). A

court will, however, consider the complaint in its entirety, including documents incorporated into the complaint by reference. *Solo v. United Parcel Serv. Co.*, 819 F.3d 788, 794 (6th Cir. 2016) (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)).

Based upon facts stipulated by the parties herein, the complaint meets the requirements of plausibility. A fact finder could plausibly conclude the Mail Defendants breached their fiduciary duty. First, they were aware of the strike by the ARK employees as they did a series of stories regarding the strike. (Dist. Ct. Opinion and Judgment 4). Second, they were aware the ongoing Covid-19 pandemic was creating a panic in March of 2020, in which an unusual number of Participants called the ARK phone center, as the on-line interface often did not work. (Dist. Ct. Opinion and Judgment 4). The Mail Defendants were aware a combination of temporary staff and the high call volume from the pandemic panic led to mistakes and delays in processing investment instructions. (Dist. Ct. Opinion and Judgment 4). This included the Plaintiff's instructions of March 15, 2020, which authorized the trade into the stock index and technology stock funds. (Dist. Ct. Opinion and Judgment 5). These facts lay a sufficiently plausible foundation for the allegation of breach of fiduciary duty. We thus ask this matter be remanded to the District Court to allow the presentation of arguments to a trier of facts.

In another error, the District Court relied upon extrinsic evidence in considering the Defendants' Motions to Dismiss, contrary to established practice. *Cunningham* 221 Fed. App'x at 422-23 (6th Cir. 2007). The District Court looked at evidence outside the complaint in determining the Defendants' Motions to Dismiss should be granted, such as: Mail Defendants hired a financial consultant to consider whether ARK was a competent record-keeper, as well as Mail Defendant's claim they prudently monitored ARK by keeping track of complaints and surveying employees. (Dist. Ct. Opinion and Judgment 6). This evidence was not contained within the Plan documents and Plan contract upon which this matter is brought, and do not form any part of the Plaintiff's complaint. Therefore, the District Court erred in relying upon extrinsic evidence in determining Defendants' Motions to Dismiss.

If matters outside the pleadings are present on a Rule 12(b)(6) motion to dismiss, the motion must be treated as one for summary judgment under Rule 56. Fed. R. Civ. P. 12(d). All parties must be given reasonable opportunity to present all material that is pertinent to the motion. *Id.* Here, Plaintiff filed her Complaint on December 15, 2020. (Dist. Ct. Opinion and Judgment 5). Defendants AIC filed their Motion to Dismiss on December 16, 2020 and Defendants Mail filed their Motion to Dismiss on December 17, 2020. R. 1. The District Court granted the Motions to Dismiss on January 18, 2021, a little over a month after Plaintiff filed her Complaint. (Dist. Ct. Opinion and Judgment 12). No discovery was conducted. There seems have been little time for initial discovery disclosures required by Federal Rule of Civil Procedure 26(a) to be tendered. The Defendants brought Motions to Dismiss under Rule 12(b)(6), but contrary to the rule, brought in additional facts that were not included in Plaintiff's Complaint. Thus, the District Court should have treated the Defendants' Rule 12(b)(6) Motions as Summary Judgment Motions under Rule 56.

Based upon the facts in this matter, and the fact that the District Court looked to facts outside the scope of the pleadings, a trier of fact could determine there is a genuine issue of material fact in this matter and the suit should therefore be remanded to the District Court.

III. THE DISTRICT COURT ERRED IN FINDING THE COMPLAINT FAILED TO PLEAD WITH SUFFICIENT PARTICULARITY THE AIC DEFENDANTS WERE FIDUCIARIES

A. Particularity pleading not an element of ERISA.

The District Court erred in finding the Plaintiff failed to plead with sufficient particularity the AIC defendants were fiduciaries. This is because ERISA does not require particularity pleading in complaints for breach of fiduciary duty, unless the breach includes an element of fraud, mistake, or misrepresentation. *In Re Sears, Roebuck & Co., ERISA Litigation*, 2004 U.S. Dist. LEXIS 3241 at *16,

In this case, the Plaintiff does not allege the breach of fiduciary duty involved fraud, mistake, or misrepresentation. Therefore, the Plaintiff is not required to plead with particularity. In point of fact, the argument AIC is liable for breach of fiduciary duty depends first on a finding AIC is a fiduciary. However,

the argument that AIC is a fiduciary cannot include any claims of fraud, mistake, or misrepresentation, as these would come only after establishing a fiduciary duty in the first place. The District Court therefore erred in holding the pleading to a particularity standard.

B. AIC acted as a functional Fiduciary under 29 U.S.C. Secs. 1002(21)(A) and 1105(c)(1)(B), and has liability for its breach of fiduciary duty under 29. U.S.C. 1104(a)(1)(B).

To plead breach of fiduciary duty under ERISA, a plaintiff must allege the following: (1) defendant was a fiduciary of the plan; (2) defendant was acting in that capacity; and (3) defendant breached a fiduciary duty. 29 U.S.C. §1109 and *In re Xcel Energy, Inc. Sec., Derivative and ERISA Litig*., 312 F. Supp 2D 1165, 1175 (D. Minn. 2004). A fiduciary is generally one who exercises discretionary control over some aspect of the management or administration of an ERISA plan, or any control whatsoever over plan assets. *Id.* An ERISA fiduciary may be named in the plan instrument. (*Id.*) However, a plan fiduciary need not be someone formally named as such in the plan. A "person 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 its assets . . .or (iii) has any discretionary authority or discretionary responsibility in the administration of such plan." 29. U.S.C. §1002 (21)(A). A plan may also outline "procedures (A) for allocating fiduciary responsibilities . . . for named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities . . . under the plan." 29 U.S.C. §1105(c)(1)(A)-(B).

Courts have consistently found a party not named by the Plan "involved in managing a benefit plan takes on fiduciary obligations". *In re Luna*, 406 F.3d 1192, 1201 (10th Cir. 2005). In this way, a party not specifically named in the Plan can be a "functional fiduciary by virtue of the authority the party holds over the plan." *Id.* See *Santomenno v. Transamerica Life Ins. Co.*, 883 F.3d 833, 837 (9th Cir. 2018) ("*Transamerica Life Insurance*"); *David P. Coldesina, D.D.S., P.C., Emp. Profit Sharing Plan & Tr. v. Estate of Simper*, 407 F.3d 1126, 1132 (10th Cir. 2005) ("*Coldesina*") (describing the "functional" approach

to evaluating fiduciary status). And, *Teets v. Great-W. Life & Annuity Ins. Co.*, 921 F.3d 1200, 1206 (10th Cir.), cert. denied, 140 S. Ct. 554, 205 L. Ed. 2d 357 (2019).

The question concerning whether a functional fiduciary is liable for a breach of fiduciary duty involves first identifying "whether the party was acting as an ERISA fiduciary 'when taking action subject to complaint.'" *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000). See *Santomenno v. Transamerica Life Ins. Co.*, 883 F.3d 833, 838 (9th Cir. 2018).

In this case, AIC was a functional fiduciary. Though the plan expressly states, "ARK and AIC are not and shall not be regarded as fiduciary for purposes of ERISA," AIC nonetheless acts as a fiduciary by exercising discretion over plan assets. Section 4.1 of the contract with ARK and AIC specifies AIC "will arrange for the provision to the Plan and its participants the investment options that are specified in the Plan document." (Dist. Ct. Opinion and Judgment 3). Section 6 of the Plan provides several funds managed by AIC: a long-term bond fund; a stable value fund; a life-cycle fund; a foreign investment fund; and a money-market fund. In fact, of the eight (8) funds provided by the Plan, five (5) are managed by AIC. (Dist. Ct. Opinion and Judgment 3, 4). AIC both makes various funds available to the Plan participants, and also manages those funds. By virtue of its management of funds within the plan, AIC has discretion on how to invest all participant contributions to the funds it manages within the Plan. AIC is therefore a fiduciary because AIC exercises discretion over plan assets.

The lower court opined "AIC might become a Plan fiduciary when it engages in transactions with respect to the assets of the Plan." (Dist. Ct. Opinion and Judgment 11). This is a correct statement of the law. A functional fiduciary is one who engages in transactions with plan assets. AIC is therefore a functional fiduciary because, as a matter of course, AIC manages Plan assets. The District Court, however, erred in its application of the law to this case.

The District Court continued, "However, Plaintiff's investment instructions were never communicated to AIC. Consequently, AIC could not have acted as a fiduciary with respect to implementing

the Plaintiff's instructions, which it never received." (Dist. Ct. Opinion and Judgment 11). The District Court implicitly acknowledges that if AIC had received the instructions and failed to execute them, that would have been sufficient to prove AIC was acting as a fiduciary when the actions occurred giving rise to this complaint. That AIC failed to receive instructions does not prevent the plaintiff from claiming that the failure to receive the instructions is itself an element in the breach of AIC's fiduciary duty. The Plan explicitly conveys to AIC a duty to follow participant's instructions, this entails that AIC have a process in place to receive those very instructions. Section 5 of the agreement specifically states, "AIC intends to provide best execution reasonably practicable under the circumstances for all Plan investment transactions, including but not limited to *transmitting any investment instructions* to the appropriate investment manager(s) in a timely manner." (Dist. Ct. Opinion and Judgment 3 emphasis added). At a minimum the language of this section of the agreement represents a plausible cause of action when AIC failed to receive Plaintiff's instructions because AIC has express responsibility for "the transmission of investment instructions." That AIC delegates a step in the transmission of participant instructions to ARK is a decision for which AIC could plausibly be accountable. In other words, AIC expressly has the duty for executing all plan investment transactions, and also the duty to transmit any investment instructions. AIC presumably has discretion on how to manage the transmission of instructions, but is not relieved of this duty merely because it delegates a step in the process to its own wholly-owned subsidiary.

The failure to receive instructions, when executed in the manner selected by AIC, falls within the scope of AIC's fiduciary duty, and is properly the action at question in the Plaintiff's complaint. At most, there would remain a question of fact as to whether, and to what degree, AIC breached its fiduciary duty to the Plaintiff. However, that AIC did not receive the particular investment instructions of this particular participant has no impact whatsoever on whether AIC is a functional fiduciary as a matter of law. The District Court simply erred in its application of the law to the facts of this case. What remains, upon remand, is for Plaintiff to show how failure to receive and, consequently, to execute her instructions represents a

breach of fiduciary duty. What is indisputable at this stage in the case, is that AIC is a Plan fiduciary, a conclusion contrary to the opinion of the lower court.

C. ERISA 502(a)(3) cause of action available to plaintiff to obtain appropriate equitable relief.

The Supreme Court has provided for the simultaneous pleading of a 502(2)(3) claim for equitable relief alongside a 502(a)(1)(B) claim for benefits due. *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011). The Court recognized the need for suits in equity to promote the legislative intent of ERISA: to protect a participant in a retirement plan. (*Id.*) There are times, the Court noted, when a remedy for a Plan's failure will resemble equitable estoppel. Equitable estoppel attempts "to place the person entitled to its benefit in the same position he would have been in" had the Plan performed as promised. (*CIGNA,* 441, citing J, Eaton, Handbook of Equity Jurisprudence §62, p. 176 (1901). Finally, the Court noted equitable relief "forms a very essential element in fair dealing" through "the power to provide relief in the form of monetary "compensation" for a loss resulting from a trustee's breach of duty." (*Id.*) To prevail in a case under equitable relief, the Court established a plaintiff must show "actual harm" which could "come from the loss of a right protected by ERISA."

In this case, the District Court made a distinction between ARK, a wholly owned subsidiary of AIC, and AIC. The lower court opined AIC could not be held responsible for a breach of fiduciary duty because they had not failed to execute the Plaintiff's instructions simply because they never received them. (Dist. Ct. Opinion and Judgment 11). The separation of the acts of receiving instructions, transmitting instructions, and then executing instructions seems to be a scheme allowing both ARK and AIC to escape responsibility for a fundamental failure to manage the Plan. In essence, they have devised a schema whereby they can deprive participants of benefits in violation of ERISA's aim to protect employee benefits without exposing themselves to liability for that violation. By the terms of the contract between the Mail, AIC and ARK, ARK was to operate a call center and online portal to enable plan participants to make changes to their investments in the Plan, while AIC was to execute the instructions as given to ARK. The contract, however, plausibly specifies AIC is responsible for the transmission of instructions. (Dist. Ct. Opinion and

Judgment 3). Section 5 of the contract specifically states, "AIC intends to provide best execution reasonably practicable under the circumstances for all Plan investment transactions, including but not limited to transmitting any investment instructions to the appropriate investment manager(s) in a timely manner." (Dist. Ct. Opinion and Judgment 3). Essentially, the lower court did not hold AIC responsible for upholding this element of its contract, by making ARK responsible solely for the transmission of instructions, and AIC responsible only for executing them, if they were transmitted. (Dist. Ct. Opinion and Judgment 11). This is. However, a poor reading of the agreement and amounts to contractual reformation. The contract at issue here is between AIC and the Mail. Upon remand, we will demonstrate that IAC is responsible for transmitting and executing participant instructions. The agreement between AIC and ARK is not of concern to this complaint, though AIC may have a cause of action against ARK depending on the agreement between them. What is at issue here is that AIC is contractually obligated for the failure to transmit instructions, as detailed in section 5 of the contract.

ARK and AIC should not escape liability through structuring the duties to ARK for receiving instructions, and AIC for executing them, leaving no one responsible for transmitting them. That ARK is not a fiduciary means they cannot be held responsible for a breach of fiduciary duty. And yet AIC, as a fiduciary, is not liable because AIC did not receive instructions. The lower court's ruling essentially allows AIC, which wholly owns ARK, to escape liability for breach of fiduciary duty. However, the contract as it stands, contemplates implicitly the possibility instructions would not be received, and expressly hold AIC responsible for the transmission of instructions in a timely manner. If AIC were only liable for receiving instructions the contract would have been written in such a way as to reflect that expectation. However, the contract clearly places responsibility for the *transmission* of instructions to AIC. AIC and ARK together have created a gap allowing them to evade a basic fiduciary duty.

Into this breach, Plaintiff steps with a prayer for equitable relief. The CIGNA court's ruling requires Plaintiff to show actual harm, and to connect that harm to a failure of the fiduciary of the Plan. First, AIC breached its fiduciary duty by failing to transmit instructions to a manager for execution in a

timely manner. This is a clear breach of section 5 of the contract. Second, as has been stipulated, the Plaintiff in this case suffered a loss of $537,191.06. (Dist. Ct. Opinion and Judgment 6). With this, Plaintiff has met the requirements of a case in equity: first she has shown there was a breach of fiduciary duty; and second, she has shown actual harm. The lower court erred in refusing to apply equitable remedies to this case. We therefore ask the court to remand this case for further proceedings in harmony with equitable principles.

CONCLUSION

WHEREFORE, Plaintiff-Appellant, LIBERTE CHEN, respectfully request that this Court remand this matter to the U.S. District Court for the District of Columbia for further proceedings.

Respectfully submitted,

____/s/________________________________
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