ORAL ARGUMENT SCHEDULED FOR MARCH 27, 2021
No. 20-cv-099-TCF

IN THE

United States Court of Appeals

for the Thirteenth Circuit

LIBERTE CHEN,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court

for the District of Columbia (Judge Farnam)

BRIEF FOR APPELLANT

Team 5

Counsel for Plaintiff-Appellant

FEBRUARY 26, 2021

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. § 1331 to consider a violation of the Employee Retirement Income Security Act of 1974. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The final decision of the District Court is being appealed.

ISSUES PRESENTED

1. Whether the Plan's contractual time limitation is enforceable under ERISA and the Code of Federal Regulations when the Plan failed to inform Chen of the applicable time limitation in their benefit denial letter.

   Suggested Answer: No

2. Whether Liberte Chen failed to sufficiently plead that the Mail Defendants breached their fiduciary duties when they failed to monitor the Plan's third-party recordkeeper and that the AIC Defendants were fiduciaries when they exercised discretion over Plan assets.

   Suggested Answer: No

STATEMENT OF THE CASE

On December 15, Liberte Chen brought a civil action in the United States District Court for the District of Columbia against NY Mail, its 401(k) Plan, the Administrative Committee, and its individual members (collectively the "Mail Defendants"), and against Andrews Investment Company ("AIC"), Andrews Record-Keeping, Inc. ("ARK"), and Ms. Alina Oxmix Comey ("AOC") (collectively the "AIC Defendants"). ECF No. 6, 1-5, 27. Chen asserted the Mail Defendants breached their fiduciary duties owed to her under the Employee Retirement Income Security Act of 1974 ("ERISA") and that the AIC Defendants, while not named fiduciaries, became fiduciaries when they performed fiduciary functions. *Id.* at 27. The Mail Defendants and AIC Defendants collectively asserted Chen's claims were untimely, as she filed her claim more than six months past when her May 31 letter of final determination of benefit claim, contractually time-barring her lawsuit. *Id.* at 26, 29. In addition, the Mail Defendants and AIC Defendants collectively asserted Chen had simply not sufficiently pled her claims. *Id.* at 29. *Ctr. for Restorative Breast Surgery, L.L.C. v. Blue Cross Blue Shield of La.*, No. 11-806, 2016 U.S. Dist. LEXIS 61071 (E.D. La. May 6, 2016).

The District Court agreed with the Defendants. *See Chen v. N.Y. Mail*, No. 20-cv-099-TCF, 12 (D.D.C. January 21, 2021). Chen now appeals the judgement of the District Court, asking the United States Court of Appeals for the Thirteenth Circuit to reverse its decision. Chen is seeking for the court to recognize her claims as timely filed. She is also seeking equitable relief for the loss of a potential half a million dollars in gain on her defined contribution plan. Her complaint was not permitted to be amended prior to the District Court's ruling; she now comes before this court asking that her claim be heard.

STATEMENT OF THE FACTS

Liberte Chen, Plaintiff-Appellant, is a reporter for the New York Mail. ECF No. 6, 1.[2] She has lived in Washington D.C. for the past three years, where she is on an indefinite assignment. *Id.* She participates in the New York Mail 401(k) Plan (the "Plan"). *Id.* Chen, along with all other Plan participants, was sent a copy of the Summary Plan Description on April 30, 2020. *Id.* at 17. Section 12 of the Plan provides the contractual time limitation provision, stating, "[a]ny 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 a claim." *Id.* at 17.

In 2001, after utilizing the same third-party recordkeeper, Infidelity Investments, for fifteen years, the Mail decided to find a new Plan recordkeeper. *Id.* at 6. The Administrative Committee, assigned to administer the Plan, solicited bids. *Id.* ARK was a low bidder. *Id.* ARK is the wholly-owned subsidiary of AIC, a large mutual fund company. *Id.* at 4, 5. After consulting a financial advisor, the Mail, through the discretion of the Committee, hired ARK as its new recordkeeper. *Id.* at 6. ARK has now been in the position for twenty years. *Id.*

AIC, ARK, and the Plan entered into an Administrative Services Agreement detailing the nature of their relationship. *Id.* at 9. Under the Administrative Services Agreement, ARK was required to maintain records, provide an interface for participants, and provide a phone-in service center. *Id.* at 9. AIC was to arrange the investment options on the plan menu and "provide best execution reasonably practicable under the circumstances for all Plan investment transactions, including . . . transmitting any investment instructions . . . in a timely manner" in exchange for all float, 12b-1 fees, and other investment fees. *Id.* at 9, 10, 12.

[2] All stipulated facts are cited as follows: ECF No. 6, (Fact Number).

In March of 2020, hourly-paid employees of ARK went on strike. *Id.* at 18. During this strike, ARK assigned executives and salaried employees to staff the phone centers. *Id.* The phone center was unusually busy because the on-line interface was not functioning correctly. *Id.* at 19. The high volume of calls led to mistakes in processing the instructions received. *Id.*

As of January 1, well before the strike, Ms. Liberte Chen, a prudent investor, had 100% of her Plan in the money market fund, due to its safe investment return. *Id.* at 21. By mid-March, believing the market at an all-time-low and predicting specific, high-performing activity, Chen went to the ARK on-line platform to transfer her entire portfolio to the stock index fund and the technology stock fund, only to find the platform to be down. *Id.* Not wanting to miss a once-in-a-lifetime opportunity in the markets, Chen immediately called the ARK Call Center to process her investment instruction. *Id.* Chen spoke with AOC, a replacement staff member, and instructed her to make the transfer, splitting Chen's assets equally between the stock index and the technology stock fund. *Id.* at 21, 22. AOC, following her training closely, had Chen repeat her investment instruction on the recorded line, transcribed them, and repeated the instructions back to Chen for confirmation, which AOC received. *Id.* at 22. AOC then informed Chen that within the next seven business days she would be sent written confirmation of the trade. *Id.* Despite AOC's training, she became overwhelmed at her fast-paced job and neglected to forward Chen's investment instructions to AIC, as required. *Id.* Chen was never sent confirmation of the trade. *Id.*

As a result of this egregious error, when Chen received her March benefit statement on April 10, 2020, she saw her account balance had not changed. *Id.* at 23. Chen called the ARK Call Center consistently throughout April and May in an attempt to rectify this, never able to get

through to anyone, only to receive her April benefit statement on May 14, showing no change in her balance. *Id.*

Between when Chen had given her investment instructions to AOC through to the end of May, the stock index had increased 20% and the technology stock funds had increased 40%. *Id.* at 24. Had Chen's transfer occurred as instructed, she would have earned $537,201.54. *Id.* Instead, her portfolio showed only an increase of $692.60. *Id.* Chen had lost out on earning over half a million dollars. *Id.*

On May 15, Chen demanded the Plan correct AOC's mistake and recognize her March trade, telling them to "make this right." *Id.* at 25. However, the Plan responded via a letter dated May 31 and declined to do so, stating that 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." *Id.* at 26.

Chen filed her lawsuit December 15, 2020. *Id.* at 27.

SUMMARY OF THE ARGUMENT

The District Court erred in holding Chen's filing was time-barred for two reasons. Plans and participants may draft different, more limiting provisions into the Plan contract than those provided by ERISA, but only when the contractual limitation is reasonable and when there is no controlling statute to the contrary. The Plan's contractual limitation provision failed in both those areas.

First, the Plan's contractual time limitation was unreasonable and thus unenforceable because Chen's facially untimely filing was the result of the Plan's failure to comply with required procedural obligations. The Plan was required by the Department of Labor's Code of Federal Regulations to inform Chen of the six-month time limitation in the final letter they sent where they denied her benefits claim. By failing to inform Chen as required, the six-month time limitation became unreasonable, because enforcing the compliance of a limitation of which one was unaware is unreasonable. In addition, the government has already recognized the pervasive effects the pandemic has had on individuals, legal professionals, and the justice system, and responded by issuing emergency guidance extending deadlines for employee benefit plan participant's internal claim review and court ordered deadlines. The guidance explicitly mentions how not issuing such extensions could cause valid claims for benefits to be unjustly denied. The rationale behind such a decision can logically be transferred to the facts of this case as well.

Second, the Plan's contractual time limitation was preempted by a controlling statute to the contrary - the Department of Labor's Code of Federal Regulations claims procedures. These procedures apply to all ERISA-provided plans, and one section provides that a letter of adverse benefit determination must include any applicable review procedures, time limitations, and inform the claimant of their right to sue. The Plan's May 31 final letter to Chen had none of these required pieces of information - they failed to inform her of the review procedures, the six-month

time limitation, and her right to sue them in civil court. The Plan's failure to adhere to the Code of Federal Regulations rendered the contractual time limitation unenforceable. Therefore, the courts must turn to the most analogous state (or District) statute of limitation in the state (or District) where the claim was filed - here being the District of Columbia. When the District of Columbia three-year statute of limitation is applied, Chen's claim, filed the same year as the cause of action, is timely.

Next, Chen sufficiently pled that Mail Defendants breached their fiduciary duty. The Mail Defendants breached their duty of prudence under ERISA § 404 when they selected and failed to monitor ARK as recordkeeper. The Mail Defendants failed to have a system in place that adequately evaluated ARK's performance, failed to evaluate and ensure the competitiveness of the Plan's administrative fees, and failed to remove ARK when the AIC Defendants ceased carrying out their obligations under Section 5 of the Plan. Chen lost out on half a million dollars due to the Mail Defendants' breach, in the middle of a pandemic no less.

Lastly, Chen sufficiently pled that AIC Defendants were fiduciaries. The AIC Defendants owed a fiduciary duty under ERISA § 404 because they were required to exercise discretionary authority rather than perform purely ministerial tasks. Using the two-step test laid out in *Rozo*, AIC Defendants did not merely follow a specific contractual term set in an arm's-length negotiation when they staffed the phone centers with untrained staff during the strike and took a unilateral action respecting Plan management or assets without Chen having an opportunity to reject its decision. In fact, their actions led to Chen losing half a million dollars, even when she followed all the right steps and procedures to obtain her money.

ARGUMENT

The decision of the United States District Court for the District of Columbia should be reversed. The Employee Retirement Income Security Act of 1974 ("ERISA") was designed to balance incentivizing employers to offer benefit plans to their employees while ensuring employee-participants are not taken advantage of in these plans. *See* 29 U.S.C. § 1001b; *Fifth Third Bancorp. v. Dudenhoeffer*, 573 U.S. 409, 424 (2014) The Thirteenth Circuit should reverse the District Court's decision to dismiss Chen's claim for two reasons. First, Chen's claim was not untimely; the Plan's contractual time limitation is unenforceable because the time period is unreasonable and preempted by a controlling statute to the contrary. Second, Liberte Chen successfully pled that the Mail Defendants breached their fiduciary duty and that the AIC Defendants owed Plan participants a fiduciary duty. The standard of review of the District Court's factual findings is clear error, while its conclusions of law are reviewed de novo. *Tussey v. Abb, Inc.*, 746 F.3d 327, 333 (8th Cir. 2014).

I. THE DISTRICT COURT ERRED IN HOLDING CHEN'S FILING TIME-BARRED BECAUSETHE PLAN'S TIME LIMITATION WAS UNENFORCEABLE DUE TO ITS UNREASONABLE LENGTH AND THE PRESENCE OF A CONTROLLING STATUTE TO THE CONTRARY.

Chen's filing was not time-barred by the Plan's six-month contractual time limitation, despite being facially untimely. Section 1132 of ERISA grants Plan participants the power to bring a civil action against their Plan provider to recover benefits and rights due to them under their Plan. *See* 29 U.S.C. § 1132(a)(1)(B). ERISA provides no statute of limitation within this section. However, ERISA does provide statutes of limitation periods for specific causes of action, such as breach of fiduciary duty, responsibility, or obligation. *See* 29 U.S.C. § 1113(2) (three years from actual knowledge). Notwithstanding ERISA-provided statute of limitations, a Plan and participant may draft different, more limiting provisions into the Plan contract, but only

when two factors are both met. *See Order of United Commercial Travelers of America v. Wolfe*, 331 U.S. 586, 608 (1947). First, the contractual time limitation must be reasonable to be enforceable. *See id.* at 608; *Heimeshoff,* 571 U.S. at 105-06. Generally, a time limitation is unreasonable when it leaves the claimant a small chance of bringing a claim *not* time-barred. *See Heimeshoff*, 571 U.S. at 110. Second, the contractual provision must not be preempted by a controlling statute to the contrary. *See id.* at 105-06. The Court did not elaborate on what constitutes a controlling statute to the contrary. However, the Code of Federal Regulations establishes obligations, such as the section on required claims procedures, which explicitly apply to all ERISA Plans. *See* 29 C.F.R. § 2560.503-1(a) ("these requirements apply to every employee benefit plan"[3]). *See also* 29 U.S.C. § 1003(a) (establishing the types of plans ERISA governs). As the contractual limitation provision is unreasonable, because the circumstances surrounding the limitation gave Chen little chance of bringing a claim not time-barred, and the Code of Federal Regulation claim procedure provisions constitute a controlling statute to the contrary, the Plan's limitation provision is not enforceable.

A. The contractual time limitation was unreasonable and thus unenforceable because Chen's facially untimely filing was the result of the Plan's failure to comply with required procedural obligations, combined with the policy considerations of the pandemic's delaying and impeding effect on judicial proceedings.

The Plan's six-month time limitation is unreasonable because they failed to inform Chen of it in their final letter, as required by federal statute and regulations, and because enforcing a pre-pandemic time limitation is unreasonable in light of the pandemic's delaying and impeding effect on judicial proceedings and accessibility to legal resources.

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[3] Directly after is listed the exceptions to this regulation, none of which apply here. 29 U.S.C. § 1003(b).

Contractual limitation provisions are only enforceable when the period is reasonable. *See Heimeshoff*, 571 U.S. at 105-06. A time period is unreasonably short when it leaves the claimant "little chance of bringing a claim not barred" by the applicable time limitation. *See id.* at 110. When a claimant does not have time to investigate before the limitation has run, then such a limitation is unreasonable. *See Ctr. for Restorative Breast Surgery, L.L.C. v. Blue Cross Blue Shield of La.*, No. 11-806, 2016 U.S. Dist. LEXIS 61071, *48 (E.D. La. May 6, 2016). As demonstrated by the flexible, vague nature of these rules, courts prefer not to explicitly define the distinction between reasonable and unreasonable time limits; depending on the case-specific circumstances, anytime between ninety days to three years may be reasonable or unreasonable. *Compare Koert v. GE Grp. Life Assurance Co.*, 231 F. App'x 117, 120 (3d Cir. 2007) (finding three years reasonable for a contractual limitation provision), *and Northlake Reg'l Med. Ctr. v. Waffle House Sys. Employee Benefit Plan*, 160 F.3d 1301, 1304 (11th Cir. 1998) (finding ninety days reasonable when the Plan did not seem to have contracted this shorter time limitation for a nefarious purpose),[4] *with Baptist Mem'l Hosp. - Desoto, Inc. v. Crain Auto., Inc.*, 392 F. App'x 289, 295 (5th Cir. 2010) (finding one year unreasonable because the Plan's failure to comply with procedural obligations resulted in the claimants facially untimely filing), *Restorative Breast Surgery*, U.S. Dist. LEXIS 61071 at *48, 49 (finding ninety days unreasonable when Plan's review process provided negligible time for the claimant to investigate themselves), *and Hansen v. Aetna Health & Life Ins. Co.*, No. 98-949-HA, 1999 U.S. Dist. LEXIS 23967, *19 (D. Or.

[4] *Northlake* used three elements to analyze if the Plan's contracted time limitation was reasonable: (1) was the contracted time provision a subterfuge to avoid lawsuits, (2) was the contracted time provision commensurate with the other time provisions in the Plan, and (3) had the Plan followed the ERISA-required internal appeals process? *See Northlake*, 160 F.3d at 1304. These elements are not used in this brief's analysis, as they concern internal details of the Plan which are not provided in the Record.

Nov. 3, 1999) (finding two years unreasonable because Plan’s decision to have a lengthy internal review process caused the claimant to miss their filing deadline).

When a Plan fails to adhere to their ERISA-required procedural obligations and such failure causes a claimant to be unaware of or miss their filing deadline, an otherwise reasonable, short, contractual limitation becomes unreasonable. *See Baptist*, 392 F. App'x at 295. In *Baptist*, the Plan failed to comply with the ERISA-required procedural obligation of establishing and maintaining reasonable internal claim procedures, per the Code of Federal Regulations. *See* 29 C.F.R. § 2560.503-1(b); *Baptist*, 392 F. App’x at 295. Because of the Plan’s failure, the claimant was unaware of the then-running one-year time limitation. *See Baptist*, 392 F. App’x at 294, 295. This resulted in the claimant filing their lawsuit years after the time limitation had passed. *Id.* at 294. The court found, even though the filing was facially untimely, the otherwise reasonable one-year time limitation became unreasonable and unenforceable because it was the result of the Plan’s failure to comply with the required procedural obligations. *Id.* at 295.

Here, the Plan failed to comply with their required procedural obligations, resulting in Chen filing after the contractual time limitation passed. Like in *Baptist*, where the Plan was required to and yet failed to follow the procedural obligations established in Code of Federal Regulations section of proper claims procedure, here too was the Plan required to and yet failed to follow those same procedural obligations. Per ERISA, the Plan was required to provide an “adequate notice” of any adverse claim determination, and per the Code of Federal Regulations, such notice must include any applicable time limitation, here being the contractual six-month limitation. 29 U.S.C. § 1133; 29 C.F.R. § 2560.503-1(g)(1)(iv); ECF No. 6, 17. The Plan failed to comply with their statutory and regulatory obligations to inform Chen of her contractual filing deadline, and Chen subsequently filed her lawsuit after the deadline had passed. ECF No. 6, 26,

27. Because of the Plan's actions, Chen did not have time to investigate her claim because she was not informed of the time limitations at the proper time, making the time limitation unreasonable. *See Restorative Breast Surgery*, U.S. Dist. LEXIS 61071 at *48. Though a six-month time limitation may otherwise be reasonable, because the Plan's failure resulted in Chen filing after the time limitation had passed, the time limitation is unreasonable and unenforceable.

In addition, the judicial system, legal professionals, and parties seeking legal justice have not been immune to the pervasive effects of the COVID-19 pandemic, and the case at hand is no exception. The pandemic disrupts compliance with requirements and deadlines for individuals, legal professionals, and the court itself, as well as reducing the public's access to justice. *See* U.S. Dep't of Labor, *EBSA Disaster Relief Notice 2020-01: Guidance and Relief for Employee Benefit Plans Due to the COVID-19 (Novel Coronavirus) Outbreak* (2020) ("The Department of Labor (Department) recognizes that the COVID-19 outbreak may temporarily impede efforts to comply with various requirements and deadlines under the Employee Retirement Income Security Act of 1974, as amended (ERISA)."); Zhao (Ruby) Liu et al., *Access to Justice in Light of COVID-19: Benefits, Burdens and Lessons*, Business Law Today, Sept. 16, 2020, https://www.americanbar.org/groups/business_law/publications/blt/2020/09/access-to-justice/ ("[T]he pandemic poses significant challenges—and opportunities—for increasing access to justice."). In implementing emergency guidance which provides for deadline extensions for employee benefit plan participant's internal claim review and court ordered deadlines, the Department of Labor explained absent such an extension, "individuals might miss key deadlines during the COVID-19 outbreak that could result in the loss or lapse of group health coverage or the denial of a valid claim for benefits." While the issues in the case at hand do not directly qualify for these filing and deadline extensions, the Department's emergency guidance highlights

the government's acknowledgement of the detrimental effect the pandemic has on judicial proceedings - a rationale which is easily applied here. The effects of the pandemic may be one of many contributing factors resulting in the denial of Chen's valid claim for benefits due to a contractual time limitation drafted before the pandemic. This Court should apply the reasoning of the Department of Labor's emergency EBSA deadline extension guidance and hold the application of a pre-pandemic contracted time limitation unreasonable and unenforceable.

The Plan was required, per ERISA and the Department of Labor, to inform Chen of the applicable time limitation in their final letter. Their failure to properly and timely inform Chen of the limitation renders such limitation unreasonable and therefore unenforceable. In addition, the Department of Labor has already recognized the pandemic's delaying and impeding effect on ERISA-related deadlines, and it would be logical to extend such rationale to the facts here.

B. The Plan's contractual time limitation was preempted by the Department of Labor's Code of Federal Regulations claims provision, and when the appropriate analogous statute of limitation is applied, Chen's claim is timely.

Chen's suit was timely because a controlling statute to the contrary preempts the Plan's six-month limitation; under the appropriate statute of limitations, Chen's suit is timely. First, contractual limitations are only enforceable in the absence of a statute to the contrary, the qualities of which the Court did not explicitly elucidate. *See Heimeshoff*, 571 U.S. at 106-07, 110. Second, when the time limitation is unenforceable, courts use the most analogous state statute of limitation. *See, e.g.*, *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660 (1985). Many states, as well as the District of Columbia, characterize ERISA as contract law for this purpose. *See Walker v. Pharm. Research & Mfrs. of Am.*, 461 F. Supp. 2d 52, 56 n.6 (D.D.C. November 15, 2006). The District of Columbia's contract statute of limitation is three years. D.C. Code §

12-301(a)(7). As a statute to the contrary preempts the Plan's contractual six-month limitation, under the applicable statute of limitation of three years, Chen's claim was timely.

1. The Plan's failure to include the time limitation in the final letter to Chen was in violation of the Code of Federal Regulations claims procedure; therefore, the contracted six-month limitation period is unenforceable.

The Plan's six-month filing limitation is unenforceable because the Code of Federal Regulations is a controlling statute to the contrary; the failure to include notice of the time limitation in their letter to Chen, as required by the Code of Federal Regulations and ERISA § 1133, violated those statutes, rendering the contractual time limitation unenforceable.

Where there is a "controlling statute to the contrary[,]" a contractual limitations period is unenforceable, even when reasonable. *See Heimeshoff.*, 571 U.S. at 106-07. The *Heimeshoff* court neglected to define a controlling statute to the contrary, but highlighted possible persuasive arguments, such as § 1113 and its three-year limitation for fiduciary breach, or regulations contradicting the Plan's contracted limitation provision. *See* 29 U.S.C. § 1113; *Heimeshoff*, 571 U.S. at 110. The Code of Federal Regulations, issued by the Department of Labor, contains within it procedural requirements and obligations, which all ERISA-governed plans are required to follow. *See* 29 C.F.R. § 2560.503-1(a) ("[T[hese requirements apply to every employee benefit plan [covered by ERISA.]"). Per the Code of Federal Regulations' procedures, any written notice of adverse benefit determination must include the applicable time limitation and inform the claimant of their right to sue to recover benefits in civil court, as reflected by § 1132 of ERISA. *See* 29 C.F.R. § 2560.503-1(g)(1); 29 U.S.C. § 1132. However, per the claim procedures found in ERISA, "[i]n accordance with the regulations of the Secretary [of Labor],

every employee benefit plan shall provide adequate notice in writing" of denied benefit claims. 29 U.S.C. § 1133. However, there is a split of authority concerning whether a final benefit denial letter, as described in § 1133 of ERISA, must include all the requirements listed in Subsection (g) of the Code of Federal Regulations together in one denial letter, or if the information listed may be separated and sent to the participant claimant at different times. *See* 29 C.F.R. § 2560.503-1(g)(1); 29 U.S.C. § 1133; *Hewitt v. Lincoln Fin. Corp.*, No. 18 C 8235, 2021 U.S. Dist. LEXIS 19003 (N.D. Ill. Feb. 2, 2021) (where the court examined the two dominant approaches demonstrated in seven different circuits to determine whether different provisions and regulations of claims procedures could render a contractual limitations provision not mentioned in the final denial letter unenforceable).

One view, held by only two circuits, holds a Plan is not required to inform a claimant of any applicable time limitations in a letter of adverse benefit determination for those limitations to be enforceable, as long as the letter references where the claimant may find information regarding such procedures. *See Scharff v. Raytheon Co. Short Term Disability Plan*, 581 F.3d 899, 906 (9th Cir 2009) (interpreting the "adequate notice" required by § 1133 to be satisfied by reference to the Plan Summary, where all information required by the Code of Federal Regulations was found; thus, the claimant was still bound to the contractual statute of limitation despite the Plan's failure to include such information in the denial letter); *Wilson v. Standard Ins. Co.*, 613 F. App'x 841, 844 (11th Cir. 2015) (interpreting the Code of Federal Regulations to require in a final denial letter only a notice of and reference to the existence of applicable claims procedures, but not what those procedures or applicable time limitations are). Other circuits who have addressed this issue have interpreted that same Code of Federal Regulation provision as a list of types of information that must each be included in the same letter of adverse benefit

determination. *See, e.g.*, *Santana Diaz v. Metro. Life Ins. Co.*, 816 F.3d 172, 180 (1st Cir. 2016) (holding the language of 29 C.F.R. § 2560.503-1(g)(1)(iv) to require notice of the applicable time limitation in the determination); *Mirza v. Ins. Adm'r of Am., Inc.*, 800 F.3d 129, 133-37 (3rd Cir. 2015) (holding the language of the provision to require notice of any applicable time limitation in any letter of adverse benefit determination); *Moyer v. Metro Life Ins.*, 762 F.3d 503, 505 (6th Cir. 2014) (noting the language of the provision was explicit in that time limits must be provided in an adverse benefit determination letter). These circuits view a Plan's failure to follow the Code of Federal Regulations' claims procedure provisions as running counter to the remedial purpose of ERISA as a whole, rendering the contractual time limitations void. *See, e.g.*, *Hewitt*, U.S. Dist. LEXIS 19003, at *6 ("[T]he First, Third, and Sixth circuits' opinions are better reasoned because they consider the statute and regulation in the context of the ameliorative intent of the Congress in enacting ERISA.").

Both the plain meaning and the purpose of the Code of Federal Regulations provision reflect that failure to adhere to it renders any contractually applicable time limitation unenforceable. *See Mirza*, 800 F.3d at 137-38. In *Mirza*, a Third Circuit case, claimant Mirza received a benefit denial letter which failed to state the Plan's applicable time limitation and the court analyzed whether this failure rendered the limitation unenforceable. *Id.* at 130-31. Starting first with the plain language of the provision, the court interpreted it on its face, then in the context of the general purpose of the section as a whole and the practical consequences of an alternative interpretation. *See generally*, *id.* at 133-37. Facially, the use of the word "including" after "description" in the provision makes the meaning clear: "'Including' modifies the word 'description,' which is followed by a prepositional phrase explaining what must be described[.]" *Id.* at 134. Therefore, a letter with an adverse benefit determination must include the Plan's

procedures, applicable time limits, and a notice of the claimant's right to civilly sue - failure to include all three pieces of information renders the contractual limitation unenforceable. *Id.* at 134, 137-38. To interpret the provision otherwise both goes against its purpose within the statute as a whole and would have negative consequences. *Id.* at 135-136. The Department of Labor believed inclusion of the procedures, time limits, and a notice of the right to sue were important enough to write them into the statute. *Id.* at 135, 136. To fail to include them would render the letter not in substantial compliance with the claims procedures of the Code of Federal Regulation, and in doing so, not in compliance with § 1133 of ERISA, resulting in the inhibition of the claimant's right to judicial review, contravening the purpose of ERISA as a remedial statute. *Id.* at 135, 136. To hold otherwise would create a dangerous precedent where Plan administrators are able to withhold information from claimants in an effort to obstruct them from the justice to which they are entitled under both ERISA and the Department of Labor. *Id.* at 135.

While there are a few circuits who break from the norm and do *not* interpret the Code of Federal Regulations claims procedure provisions as a list of all the required information to be included in a final benefit denial letter, these circuits *do* require some minimal reference to such information be included. *See Scharff*, 581 F.3d at 907. In *Scharff*, a Ninth Circuit case, the claimant received a letter of adverse benefit determination which failed to include the applicable contractual time limitation, but referred her to the Plan Summary should she have any questions. *See id.* at 902. The court found even though the letter did not list the applicable time limitation, because the letter referred the claimant to the Plan Summary (which did contain the information) and a reasonable Plan participant would read the Plan Summary in entirety should they have an inquiry, the claimant was properly put on notice and the Plan fulfilled all statutory and regulatory requirements. *Id.* at 907. It should be noted the claimant was asking the court to apply a

California state insurance regulation requiring a letter of adverse benefit determination to contain any applicable time limitations - a requirement already established in the Code of Federal Regulations, which both the claimant and the court curiously neglected to include in their analysis. *See* 29 C.F.R. § 2560.503-1(g)(1)(iv); *Scharff*, 581 F.3d at 907. The absence of any discussion concerning that requirement combined with the results of the future application of the court's reasonable Plan participant standard have been the cause of *Scharff*'s almost exclusively unsupportive subsequent treatment in the courts. *See, e.g.*, *Mirza*, 800 F.3d at 137-38 (criticizing, in a case to decide whether a Plan's failure to include the applicable time limitations in a final adverse benefit determination would render such limitation unenforceable, the defendant's use of *Scharff* because the analysis failed to consider the Code of Federal Regulations' claims procedures); *Spinedex Physical Therapy USA Inc. v. United Healthcare of Ariz., Inc.*, 770 F.3d 1282, 1295-96 (9th Cir. 2014) (criticizing *Scharff*'s reasonable Plan participant standard for creating a new participant duty to read the plan summary in its entirety to ensure they do not miss any important details, which contravenes the purpose of the general disclosure requirement in the Code of Federal Regulations' claims procedures); *Davis v. Minn. Life Ins. Co.*, No. 1:19-cv-00453-DCN, 2020 U.S. Dist. LEXIS 196626, *24-25 (D. Idaho Oct. 21, 2020) (criticizing defendant's use of *Scharff*'s standard because of the distinction between having access to the Plan Summary versus being informed of important provisions which affect a negative determination); *McPherson v. AIG Life Ins. Co.*, No. LA CV17-08860 JAK (PLAx), 2019 U.S. Dist. LEXIS 141469, *14-15 (C.D. Cal. May 7, 2019) (criticizing the impracticable number of steps *Scharff*'s standard requires of participants, resulting in a significantly high burden).

Here, the court should follow the guidance of the majority of circuits, such as the Third Circuit, and hold the Code of Federal Regulations' claims procedure provisions a controlling

statute to the contrary, and the Plan's failure to follow such provisions renders the otherwise applicable six-month time limitation unenforceable to Chen's filing, making her initial filing on December 15 not time-barred. *See* 29 C.F.R. § 2560.503-1(g)(1)(iv); ECF No. 6, 27. Section 1133 of ERISA requires all Plans to provide adequate notice of a claim denial, and Section 2560.503-1(g)(1)(iv) of the Code of Federal Regulations requires notification of adverse benefit claim determination (such a denial) contain the Plan's review procedures and applicable time limits. *See* 29 U.S.C. § 1133; 29 C.F.R. § 2560.503-1(g)(1)(iv). Taken together, because the Plan's letter - a notification of adverse benefit claim determination - mentioned neither the review procedures nor the applicable time limit nor Chen's right to sue in civil court, they failed to provide adequate notice, as required in § 1133 of ERISA, and obstructed Chen's access to justice. ECF No. 6, 26. Following the rules of the First, Third, and Sixth Circuits, this means the contracted six-month time limitation is unenforceable.

Even should this court prefer the *Scharff* reasonable Plan participant standard, for the contractual time limitation to be enforceable under that standard, the Plan's letter would have to include at minimum some reference to the Summary Plan Description. *See Scharff*, 581 F.3d at 907. Here, the Plan's letter did not even refer Chen to her Plan Summary, so even application of the *Scharff* standard does not absolve the Plan of its failure and the contractual time limitation is still unenforceable. ECF No. 6, 26.

The Plan's contractual six-month time limitation is unenforceable because the Plan failed to include such information in their letter to Chen, acting in violation of ERISA and the Code of Federal Regulations, which they are subject to follow, and rendering the otherwise applicable time limitation unenforceable. *See* 29 C.F.R § 2560.503-1(g)(1)(iv), 29 U.S.C. § 1133.

2. *Under the analogous District of Columbia statute of limitation, Chen's filing was within the statutory three years, making her claim timely and not time-barred.*

As the contracted limitation provision is unenforceable, the court must turn to the most analogous law in the District of Columbia, contract law, which provides a three-year statute of limitation. Applied here, Chen's December filing was timely and, therefore, not time-barred.

While § 1113 provides a time limitation for fiduciary breach claims (three years from point of actual knowledge), the specific authority under which ERISA claims are filed is § 1132, which does not provide any time limitation. *See* 29 U.S.C. § 1113; 29 U.S.C. § 1132. Therefore, courts refer to the most analogous statute of limitations from the state the court sits in; many states, as well as the District of Columbia, characterize ERISA as contract law for this purpose. *See, e.g.*, *Goodman* 482 U.S. at 660 (where the court held when there was no time limitation in the statute, federal courts should use the most analogous state statute of limitations); *Hewitt,* U.S. Dist. LEXIS 19003 at *8 (where, after determining the contracted time limitation provision unenforceable, the court applied Illinois' statute of limitations for contracts to an ERISA fiduciary breach claim). *See also Walker,* 461 F. Supp. 2d at 56 n.6 ("[§ 1132] claims are most analogous to breach of contract claims"). The District of Columbia provides a three-year statute of limitation for breach of contract claims. *See* D.C. Code § 12-301(a)(7). While the courts in these instances draw from state law for the statute of limitation, because a claim under ERISA is a federal claim, courts utilize the federal discovery rule, where the statute of limitation starts to run when a claimant discovers the injury which is the basis of the claim. *See, e.g.*, *Miller v. Fortis Benefits Ins. Co.*, 475 F.3d 516, 520 (3d Cir. 2007).

Here, the court should apply the District of Columbia's three-year statute of limitation for contract claims and hold Chen's filing timely. As Chen filed her claims under ERISA, they are

filed under the authority of § 1132, which does not provide a statute of limitation. *See* 29 U.S.C. § 1132; ECF No. 6, 27. Because the contractual time limitation is unenforceable, the court must turn to the most analogous state law, which here is the contract law for the District of Columbia, where this suit was originally filed. *See Goodman*, 482 U.S. at 660; *Hewitt*, 2021 U.S. Dist. LEXIS 19003, at *8; *Walker*, 461 F. Supp. at 56 n.6; ECF No. 6, 27. Applying the federal discovery rule, this three-year limitation began to run when Chen initially discovered the injury leading to the claim, April 10. ECF No. 6, 23. As Chen filed December 15 of the same year, she filed well within this period; therefore, Chen's claims were timely. ECF No. 6, 27.

The most analogous law and limitation in the District of Columbia is the three-year contract statute of limitation. Applying it here, Chen's December filing was timely, and so her suit is not time-barred.

II. LIBERTE CHEN SUFFICIENTLY PLED THAT MAIL DEFENDANTS BREACHED THEIR FIDUCIARY DUTY AND THAT THE AIC DEFENDANTS OWED PLAN PARTICIPANTS A FIDUCIARY DUTY.

Liberte Chen sufficiently pled that the Mail Defendants breached their fiduciary duty and that the AIC Defendants owed a fiduciary duty under ERISA. Federal Rule of Civil Procedure 8 requires that a complaint present a "short and plain statement" showing that the pleader is entitled to relief. Fed. R. Civ. P. 8. In order to survive a 12(b)(6) motion, the complaint must establish more than legal conclusions. *Ashcroft v. Iqbal,* 556 U.S. 662, 663 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). When a motion to dismiss is made, the sufficiency of the facts pled in the complaint are evaluated, drawing all reasonable inferences in favor of the non-moving party. *Id.* A breach of fiduciary duty claim is a three-step analysis, considering: (1) whether the defendant acted as a fiduciary; (2) whether the defendant breached its fiduciary duty; and (3) whether the defendant's breach caused a loss to the Plan. *Pegram v.*

Herdrich, 530 U.S. 211, 266 (2000). On appeal, it is disputed only whether the Mail Defendants breached their fiduciary duty and whether the AIC Defendants acted as a fiduciary. The Mail Defendants breached their duty of prudence owed because they failed to monitor ARK. The AIC Defendants owed a fiduciary duty because they exercised authority and discretion over the Plan.

A. The Mail Defendants breached their duty of prudence under ERISA § 404 when they selected and failed to monitor ARK as recordkeeper.

The Mail Defendants breached their fiduciary duty when they selected and subsequently failed to monitor ARK as the Plan's recordkeeper. The fiduciary duties codified by ERISA § 404(a) derive from the common law of trusts and are "'the highest known to the law.'" *Braden v. Wal-Mart Stores*, 588 F.3d 585, 598 (8th Cir. 2009) (quoting *Donovan v. Bierwith*, 680 F.2d 263, 272 n.8 (2d Cir. 1982)). Under the pleading standards, for Chen's claim of breach to survive defendant's motion to dismiss, she need only show that it is *plausible* that the Mail Defendants failed to act in accordance with the *highest fiduciary standards known to the law*. These duties include: (1) a duty of prudence; (2) a duty of loyalty; (3) a duty to diversify investments; and (4) a duty to act in accordance with plan documents. 29 U.S.C. § 1104(a)(1). The duty of prudence requires a fiduciary to act "with the type of 'care, skill, prudence, and diligence under the circumstances' not of a lay person, but of one experienced and knowledgeable with these matters." *Id;* see also *Fifth Third Bancorp,* 573 U.S. at 425. The duty of prudence encompasses a duty to monitor investments. *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1829 (2015). A defendant breaches its duty to monitor when it: (1) fails to evaluate an appointee's performance or have a system in place for doing so; (2) fails to ensure that the monitored fiduciaries have a prudent process in place for evaluating the Plan's administrative fees and ensuring the fees are competitive; and fails to remove appointees who perform inadequately. *Marshall v. Northrop*

Grumman Corp., No. 16-cv-06794-AB (JCx), 2017 U.S. Dist. LEXIS 174203, at *34 (C.D. Cal. Jan. 30, 2017).

1. The Mail Defendants failed to have a system in place that adequately evaluated ARK's performance.

The yearly questionnaire sent to Plan participants allows *participants* to evaluate ARK, not the Mail Defendants. A fiduciary breaches its duty of prudence when it fails to evaluate the performance of its plan's recordkeeper. *Difelice v. U.S. Airways, Inc.,* 497 F.3d 410, 410 (4th Cir. 2007). In *Difelice*, U.S. Airways was the named administrator of the defined contribution plan it offered employees. *Id.* at 414. U.S. Airways delegated its duty to the Pension Investment Committee ("PIC"). *Id.* The PIC was responsible for determining investment decisions offered by the plan. *Id.* The PIC met more than four times in nine months and regularly conferred with financial advisors regarding investment options. *Id.* The Court found that U.S. Airways' had prudently monitored the plan investments through the PIC. *Id.* at 421.

Here, NY Mail did not prudently monitor Plan investments, nor did its Committee. Like U.S. Airways in *Difelice*, NY Mail has delegated its duty to administer the Plan to its Administrative Committee. ECF No. 6, 15. While the PIC was responsible for determining investment decisions as a named fiduciary, here the Committee, although the named fiduciary, delegated that decision to AIC via the Agreement. *Id.* at 10. The PIC in *Difelice* met four times in nine months and regularly conferred with financial advisors, but here the Committee met with ARK but once a year. *Id.* at 8. Starkly contrasting the use of financial advisors in *Difelice*, the committee here relies on *participants'* feedback via survey each year to evaluate its recordkeeper's performance. *Id.* at 7. In fact, unlike the regular use of financial advisors in *Difelice*, the Committee here only used a financial advisor when it changed recordkeepers *once*

in a 35-year period. *Id.* at 6. While the court in *Difelice* found that U.S. Airways adequately monitored plan investments through its PIC, here the court should find that NY Mail failed to monitor its Plan investments despite its appointment of a Committee. Instead of financial advisors to evaluate ARK's performance, the Committee relied on surveys from Plan *participants*- who have no fiduciary duty like that of the Committees'. *Id.* at 7 Further, the response rate was so low, at just 10%, that it constructively amounted to no evaluation at all. *Id.*

2. The Mail Defendants failed to evaluate and ensure the competitiveness of the Plan's administrative fees.

The Mail Defendants failed to utilize a competitive bidding process and ensure competitive administrative fees when utilizing ARK as recordkeeper. A fiduciary breaches its duty of prudence if it fails to utilize a competitive bidding process when selecting a recordkeeper. *Krueger v. Ameriprise Fin., Inc.,* No. 11-cv-02781 (SRN/JSM), 2012 U.S. Dist. LEXIS 166191, at *29 (D. Minn. Nov. 20, 2012); *see also Henderson v. Emory Univ.,* 252 F. Supp. 3d 1344, 1353 (N.D. GA 2017). In *Henderson*, Emory University's investment office developed its plan's investment strategies while the investment committee reviewed the reasonableness of Plan fees annually. *Henderson,* 225 F. Supp. 3d at 1348. The recordkeepers for the Plan required that their investments be included in the Plan menu and included unneeded layers of fees. *Id.* at 1350-51. The plaintiffs sufficiently alleged that the University defendants acted imprudently when they were forced to use certain funds owned by the recordkeepers. *Id.*at at 1350-51. Additionally, the fees were improperly based on the amount of assets held by the Plan, rather than the number of Plan participants. *Id.* at 1353. Further, when the plaintiffs alleged that the University defendants should have put the recordkeeping services out for bid every three years, the court found that they had sufficiently stated a claim for relief. *Id.* at 1353.

Here, like the committee in *Henderson*, the Committee meets with ARK annually to evaluate the Plan fees. ECF No. 6, 8. While the recordkeepers in *Henderson* required their investments to be included in the plan menu, AIC, the parent-company of recordkeeper ARK, had full discretion to choose the Plan menu. *Id.* at 10. Five out of eight of the investments chosen for the Plan menu belonged to AIC, ARK's parent company. *Id.* at 14. Similar to *Henderson*, where the recordkeeper charged unnecessary fees, here ARK is entitled to *all* float *and* 12b-1 fees *and* other investment fees. *Id.* at 11. Although this offsets a Per Capita Fee, the fees charged by ARK here, like those in *Henderson* are based on the amount of assets, rather than the number of Plan participants. *Id.* Lastly, while the University defendants in *Henderson* failed to put the recordkeeping position for its plan through a competitive bidding process every three years, here the Mail Defendants put the recordkeeping position for the Plan through a bidding process just once in thirty-five years. *Id.* at 6. The lack of any repetitive bidding process, ARK's entitlement to asset-based fees, and AIC's full discretion to choose the investments via the Agreement, all clearly allege the Mail Defendant's breach of their duty to monitor.

3. The Mail Defendants failed to remove ARK when the AIC Defendants ceased carrying out their obligations under Section 5 of the Plan.

The Mail Defendants breached their duty to monitor when they failed to remove ARK as recordkeeper. A fiduciary breaches when it fails to engage in a reasoned decision-making process. *Difelice,* 497 F.3d at 421. The analysis of the decision-making process is focused on the strategies employed rather than the results achieved. *Id.* at 420. In *Difelice*, the court found U.S. Airways had not violated its duty to monitor company funds when it engaged in a reasoned decision-making process. *Id.* at 421. After 9/11 U.S. Airways as a company began to struggle. *Id.* at 413. There was debate about whether to retain company fund as an investment option in the

company's plan. *Id.* at 416. The court found that U.S. Airways had not violated its duty in retaining the company fund because before doing so it sought outside legal advice and appointed a non-company fiduciary to assist with the decision. *Id.* at 421. *Contra. Marshall,* U.S. Dist. LEXIS 174203 at *5-*6 (finding that a committee breached its fiduciary duty when it failed to comply with the terms of the Administrative Services Agreement).

Here, unlike the defendant-fiduciaries in *Difelice,* the Mail Defendants failed to engage in a reasoned decision-making process. Like U.S. Airways struggled financially after 9/11 in *Difelice,* here, ARK struggled procedurally when its employees went on strike. ECF No. 6, 12. The Mail Committee, like the Committee in *Marshall* who failed to uphold the Administrative Service Agreement, failed to ensure that AIC upheld the Agreement Section 5 provision to transmit investment instructions in a "timely manner." *Id.* In *Difelice*, a decision needed to be made by the fiduciaries about whether or not to retain a company fund as an investment option, here a decision needed to made about whether or not to retain ARK, AIC's subsidiary, as recordkeeper. In *Difelice*, U.S. Airways sought outside legal advice and appointed a non-affiliated fiduciary to make its fund-related decision, here NY Mail implemented no review process of ARK following the strike other than its standard evaluation. *Id.* at 26. While the court in *Difelice* found that U.S. Airways engaged in a prudent decision-making process, this Court should do no such thing. Not only did the Mail Defendants fail to remove ARK when it performed inadequately, they failed to utilize a reasoned decision-making process about the question altogether.

The Mail Defendants breached their duty of prudence by failing to monitor the AIC Defendants. The Mail Defendants failed to evaluate the AIC Defendants performance, failed to

ensure the competitiveness of the Plan’s fees, and failed to remove ARK when it performed inadequately.

B. The AIC Defendants owed a fiduciary duty under ERISA § 404 because they were required to exercise discretionary authority rather than perform purely ministerial tasks.

ERISA imposes fiduciary duties on those responsible for plan management and administration.” *Teets v. Great-West Life & Annuity Ins. Co.*, 921 F.3d 1200, 1206 (10th Cir. 2019) (citing ERISA §§ 404, 406, 29 U.S.C. §§ 1104, 1106). ERISA "provides that not only the persons named as fiduciaries by a benefit plan, see 29 U.S.C. § 1102(a), but also anyone else who exercises discretionary control or authority over the plan's management, administration, or assets, see 29 U.S.C. § 1002(21)(A), is an ERISA 'fiduciary.'" *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993). Here, the AIC Defendants are not named fiduciaries, but rather fiduciaries based on their actions. However, Plaintiffs concede AOC was not a fiduciary. *Teets* determines that a service provider acts as a fiduciary: if (1) it “did not merely follow a specific contractual term set in an arm's-length negotiation” and (2) it “took a unilateral action respecting plan management or assets without the plan or its participants having an opportunity to reject its decision. *Teets*, 921 F.3d at 1206. This inquiry is functional, not formal. Regardless of whether a plan labels the AIC Defendants as fiduciaries, “to the extent” it wields “any discretionary authority or discretionary control” over the plan or its assets, it owes fiduciary duties with respect to that action. *See Pegram* 530 U.S. at 225–26. Both AIC and ARK are fiduciaries.

1. AIC Defendants did not merely follow a specific contractual term set in an arm's-length negotiation when they staffed the phone centers with untrained staff during the strike.

A service provider can be a fiduciary if it does not follow a specific set of contractual terms. *Rozo v. Principal Life Ins. Co.*, 949 F.3d 1071, 1074 (8th Cir. 2020). For example, in *Rozo* , a contract empowered the Service Provider to set the guaranteed rate of return. *Id.* However, the Court found that the rate is not a "specific term of the contract" and therefore, the setting of the rate was discretionary. *Id.*

Here, in staffing the phone centers during the company strike, ARK did not follow any specific contract terms and acted with discretion. During the strike, ARK staffed the phone centers with salaried, untrained employees. ECF No.6, 18. This was a discretionary act by ARK that was not in the Agreement. AOC's action while working for ARK further demonstrates the type of impact ARK's discretionary actions holds. By failing to execute Chen's actions, AOC and ARK cost her half a million dollars. *Id.* at 24. AIC acted as a fiduciary as well. Like in *Rozo*, where setting the actual number of the rate was discretionary and not a term of the Agreement, here ARK was required by the contract to provide the best execution and did not abide by this term once the strike was happening. *Id.* at 5. Even if the events were out of the company's control, the Agreement requires that AIC provide the best execution "including but not limited to transmitting any investment instructions to the appropriate investment manager(s) in a timely manner." *Id.* AIC knew there would be difficulty in receiving instructions during the strike, and this required them to act with care and discretion to ensure receipt of instructions. Accordingly, AIC and ARK did not merely follow specific contractual terms.

2.. ARK took a unilateral action respecting the Plan without the Plan or its participants having an opportunity to reject its decision.

A service provider can be a fiduciary if the service provider took a unilateral action respecting plan management or assets without the plan or its participants having an opportunity to reject its decision. *Teets*, 921 F.3d at 1212.

If a participant does not have a meaningful opportunity to reject a provider's decision, then the provider is often acting as a fiduciary. *Id.*; *Rozo*, 949 F.3d at 1074. For example, in *Rozo*, the Service Provider set a guaranteed rate of return every six months. 949 F.3d 1073. If Plan Participants disagree with the new rate, their only option is to leave the plan. *Id.* at 1074. The Court found that the Service Provider was a fiduciary because the participants had no opportunity to reject the decision other than leaving the plan. *Id.*

Here, Chen could not reject AOC's inaction with regard to the Plan and potential earnings because of this decision. Furthermore, because of the strikes and the failure of ARK to maintain the call center, Chen could not reach the call center to question what was happening with her account. ECF No.6, 23. Without a way to access ARK and change the action, ARK took a unilateral action. AIC's similar lack of action during the strike prevented Chen from getting her instructions to them in a timely manner so she could profit from her investment decisions.

Therefore, Chen has sufficiently alleged that AIC Defendants acted as fiduciaries.

CONCLUSION

The Plan's six-month contractual time limitation is unenforceable because the time period was unreasonable and it was preempted by a controlling statute to the contrary; therefore, Chen's December 15 filing was not untimely. In addition, Chen sufficiently pled that the Mail Defendants breached their fiduciary duty, and the AIC Defendants owed a fiduciary duty.

For the foregoing reasons, this Court should reverse the District Court decision.