Team 6

ORAL ARGUMENT SCHEDULED FOR MARCH 27, 2021

Civil Action No. 20-cv-099-TCF

IN THE

United States Court Of Appeals
For The Thirteenth Circuit

LIBERTE CHEN,

Appellant/Appellant,

vs.

NEW YORK MAIL, *et al.*,

Defendants/Appellees.

On Appeal from the
United States District Court for the District of Columbia
The Honorable Thomas C. Farnam, Presiding

BRIEF FOR APPELLEES

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February 26, 2021

TABLE OF CONTENTS

Table of Authorities iii

Jurisdictional Statement 1

Issues Presented 1

Statement of the Case 2

Statement of the Facts 2

Summary of the Argument 7

Argument 8

I. Appellant's Action Was Properly Dismissed by the District Court as Untimely Because the Plan's Contractual Six-Month Limitations Period is Reasonable and Appellant Had Notice of This Provision. 10

A. The Plan's six-month limitation period is reasonable. 11

B. Appellant had proper notice of the six-month limitation. 14

II. The District Court Properly Dismissed Appellant's Complaint Because Appellant Failed to State a Plausible Claim That the Mail Defendants Breached Any Fiduciary Duties and That the AIC Defendants were Fiduciaries. 17

A. The Mail Defendants prudently selected ARK as recordkeeper by following generally recognized procedures for selection and continuing to monitor its performance through an ongoing evaluation process. 18

1. The Mail Defendants inquired into ARK's qualifications and followed generally recognized procedures for selection. 19

2. The Mail Defendants had a competent process in place for evaluating ARK's services. 22

B. The AIC Defendants were not fiduciaries because they merely adhered to specific contractual terms and they did not take unilateral action respecting management of the Plan or its assets. 27

1. The AIC Defendants merely adhered to specific contractual terms. 29

2. The AIC Defendants did not take unilateral action respecting management of the Plan or its assets. 31

Conclusion 34

TABLE OF AUTHORITIES

CASES

Supreme Court

Aetna Health Inc. v. Davila,
542 U.S. 200 (2003). 10

[*]Ashcroft v. Iqbal,
556 U.S. 662 (2009). 9, 17, 18

Baldwin County Welcome Ctr. v. Brown,
466 U.S. 147 (1984). 16

**Bell Atlantic Corp. v. Twombly*,
550 U.S. 544 (2007). 18

Erickson v. Pardus,
551 U.S. 89 (2007). 17

**Heimeshoff v. Hartford Life & Accident Ins. Co.*,
571 U.S. 99 (2013). 9, 10, 11

Ingersoll-Rand Co. v. McClendon,
498 U.S. 133 (1990). 26

Irwin v. Dep't of Veterans Affairs,
498 U.S. 89 (1990). 15

Lockheed Corp. v. Spink,
517 U.S. 882 (1996). 26

Metro. Life Ins. Co. v. Taylor,
481 U.S. 58 (1987). 1

Pegram v. Herdrich,
520 U.S. 211 (2000). 27, 28

Circuit Courts of Appeals

**Allen v. Credit Suisse Sec. (USA) LLC*,
895 F.3d 214 (2d Cir. 2018). 28, 32, 33, 34

Bonte v. U.S. Bank, N.A.,
624 F.3d 461 (7th Cir. 2010). 17

[*] Authorities upon which Appellee chiefly relies are marked with asterisks.

Braden v. Wal-Mart Stores, Inc.,
588 F.3d 585 (8th Cir. 2009). 9, 18, 19

Coldesina, 407 F.3d at 1132; IT Corp. v. General Am. Life Ins. Co.,
107 F.3d 1415 (9th Cir. 1997). 31

Donovan v. Mazzola,
716 F.2d 1226 (9th Cir. 1983). 19, 20, 21

Dye v. Assocs. First Cap. Corp. Long-Term Disability Plan,
243 F. App'x 808 (5th Cir. 2007). 11

Ellis v. City of Sandiego,
176 F.3d 1183 (9th Cir. 1999). 10

Engers v. AT&T, Inc.,
466 Fed. App'x 75, 83 (3d. Cir. 2011). 15, 16

Eyler v. C.I.R,
88 F.3d 445 (7th Cir. 1996). 21

Hamilton v. Air Jamaica, Ltd.,
945 F.2d 74 (3d. Cir. 1991). 14

Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co.,
302 F.3d 18 (2d Cir. 2002). 29

Howell v. Motorola, Inc,
633 F.3d 552 (7th Cir. 2011). 23, 24

Hunter v. Caliber Sys., Inc.,
220 F.3d 702 (6th Cir. 2000). 21

I.V. Servs. of America, Inc. v. Inn Dev. & Mgmt., Inc.,
182 F.3d 51 (1st Cir. 1999). 15

Katsaros v. Cody,
744 F.2d 270 (2d Cir. 1984). 18

* *Lebahn v. Nat'l Farmers Union Unif. Pension Plan,*
828 F.3d 1180 (10th Cir. 2016). 28, 32, 33

Northlake Reg'l Med. Ctr. V. Waffle House Sys. Emp. Benefit Plan,
160 F.3d 1201 (11th Cir. 1998). 11, 12, 13

Pfeil v. State St. Bank & Tr. Co.,
806 F.3d 377 (6th Cir. 2015). 21

* *Rozo v. Principal Life Ins. Co.,*
949 F. 3d 1071 (8th Cir 2020). 27, 28, 29, 30, 31

Scharff v. Raytheon Co. Short Term Disability Plan,
581 F.3d 899 (9th Cir. 2009). 14, 16

Sweda v. Univ. of Pa.,
923 F.3d 320 (3d Cir. 2019). 22

Teets v. Great-West Life & Annuity Ins. Co.,
919 F.3d 1232 (10th Cir. 2019). 28, 29

District Court

Chen v. New York Mail,
Civil Action No. 20-cv-099-TCF, at *12 (D.D.C. Jan. 18, 2021). 2, 6

**Ctr. for Restorative Breast Surgery, L.L.C. v. Blue Cross Blue Shield of La.*,
Civil Action No. 11-806, 2016 WL 7468165 (E.D. La. May 6, 2016). 11, 12

Bilello v. JPMorgan Chase Ret. Plan,
607 F. Supp. 2d 586 (S.D.N.Y. 2009). 14

Dunn v. Bldg. Trades United Pension Tr. Fund,
Case No. 15-cv-0026, 2015 WL 7432846 (E.D. Wis. Nov. 23, 2015). 11, 12

Hakim v. Accenture United States Pension Plan,
656 F. Supp. 2d 801 (N.D. Ill. 2009). 14, 15

**Liss v. Smith*,
991 F. Supp. 278 (S.D.N.Y. 1998). 19, 20, 21

**Marshall v. Northrop Grumman Corp.*,
No. CV 16-06794 AB (JCx), 2017 WL 2930839 (C.D. Cal. Jan. 30, 2017)
22, 23, 24, 25

Mull v. Motion Picture Indus. Health Plan,
937 F. Supp. 2d 1161 (C.D. Cal. 2012). 14

**In re Lehman Brothers Sec. & ERISA Litig.*,
113 F. Supp. 3d 745 (S.D.N.Y. 2015). 23, 24, 25, 26

Pfifer v. Sedgwick Claims Mgmt. Servs. Inc.,
414 F. Supp. 3d 1024 (S.D. Tex. 2019). 12

**Scalia v. WPN Corp.*,
417 F. Supp. 3d 658 (W.D. Pa. 2019). 22, 23, 25

Terraza v. Safeway, Inc.,
241 F. Supp. 3d 1057 (N.D. Cal. 2017). 20

Univ. of Wis. Hosp. & Clinics Auth. v. Sw. Cath. Health Network Corp., No. 14-cv-780-jdp, 2015 WL 402739 (W.D. Wis. Jan. 28, 2015). 12, 13

Wilson v. Std. Ins. Co.,
2014 WL 358722 (N.D. Ala. 2014). 15

STATUTES

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

29 U.S.C. § 1022 15

29 U.S.C. § 1102(a)(1) 14

* 29 U.S.C. § 1002(21)(A) 27, 28, 33, 34

29 U.S.C. § 1104 18

29 U.S.C. § 1104(a)(1)(B) 18

29 U.S.C. § 1104(c) 34

29 U.S.C. § 1113 10

29 U.S.C. § 1132(a) 10

29 U.S.C. § 1132(e) 1

29 U.S.C. §1133 15

REGULATIONS

* 29 C.F.R. § 2509.75–8 at D–2 32, 33

* 29 C.F.R. § 2509.75–8 at FR–17 22, 24

OTHER

Employee Benefits Security Administration of the U.S. Department of Labor, Advisory Opinion 2013–03A (July 3, 2013). 20

FRCP 8(a)(2) 17, 18

New Oxford American Dictionary (3d ed. 2010)). 28

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over these claims, arising under the Employee Retirement Income Security Act of 1974 ("ERISA"), which are "necessarily federal in character" and fall under the scope of 28 U.S.C. § 1331. *See Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 67 (1987). ERISA explicitly grants subject matter jurisdiction under 29 U.S.C. § 1132(e).

This Court has appellate jurisdiction. "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. This appeal is from the final judgment of a district court that disposes of all parties' claims.

ISSUES PRESENTED

1. Under ERISA, did the district court properly dismiss Appellant's claims as time-barred by the Plan's contractual statute of limitations provision?

Suggested Answer: Yes.

2. Under ERISA, did the district court properly dismiss Appellant's complaint because it failed to state a plausible claim (a) that New York Mail and New York Mail 401(k) Plan Administrative Committee breached any fiduciary responsibilities, and (b) that Andrews Record-Keeping, Inc., Andrews Investment Company, and Alina Oxmix Comey were fiduciaries?

Suggested Answer: Yes.

STATEMENT OF THE CASE

This action arises out of Liberte Chen's ("Appellant") participation in the New York Mail 401(k) Plan (the "Plan"), sponsored by New York Mail (the "Mail"). ECF No. 6[†]-1, 2. On December 15, 2020, Appellant filed suit in the United States District Court for the District of Columbia against the Mail, the New York Mail 401(k) Plan Administrative Committee ("Administrative Committee"), and the committee's individual members (collectively "Mail Defendants"), and against Andrews Record-Keeping, Inc. ("ARK"), Andrews Investment Company ("AIC"), and Alina Oxmix Comey ("AOC") (collectively "AIC Defendants"), seeking $537,191.06 in lost benefits, and that ARK and AIC be replaced as recordkeeper and investment custodian. EFC No. 6-27, 28.

The AIC Defendants (on December 16, 2020) and the Mail Defendants (on December 17, 2020) each moved to dismiss the complaint. ECF No. 6-29. On January 18, 2021 the United States District Court for the District of Columbia granted these motions and dismissed Appellant's complaint with prejudice. *Chen v. New York Mail*, Civil Action No. 20-cv-099-TCF, at *12 (D.D.C. Jan. 18, 2021). Appellant now appeals to this Court.

STATEMENT OF THE FACTS

The Mail is a newspaper located and published in New York City, with offices in Washington, D.C. and Los Angeles, California. ECF No. 6-2. The Mail sponsors a 401(k) plan for its employees, and is the Plan fiduciary. The Plan's Administrative

[†] Stipulated Facts, *Chen v. New York Mail*, Civil Action No. 20-cv-099-TCF, at *2 (D.D.C. Jan. 18, 2021).

Committee consists of King Westley, Samantha Ortiz, and LaBron Hastings. ECF No. 6-2, 3.

In 2001 the Mail grew concerned about the rate of fees it was paying to its then recordkeeper, Infidelity Investment Third-Party Administration ("Infidelity"). ECF No. 6-6. Though the Mail paid these fees directly, it was entitled to shift them to the Plan. *Id.* In the interest of Plan participants, the Administrative Committee began a process to replace Infidelity with a more affordable recordkeeper. *Id.* First, the Administrative Committee solicited bids from a number of recordkeepers. *Id.* ARK, a wholly-owned subsidiary of AIC—a mutual fund company with over $100 billion of assets under management—was selected from among the low bidders. ECF No. 6-5, 6. Before hiring ARK, the Administrative Committee sought the outside assessment of a financial advisor. ECF No. 6-6. After conducting a thorough analysis, the financial advisor determined ARK provided competent services. *Id.* Considering this advice, along with the results of the initial solicitation process, the Mail hired ARK as recordkeeper. *Id.*

AIC and ARK entered into an Administrative Services Agreement (the "Agreement") with the Plan. ECF No. 6-9. The Agreement specifies ARK will provide "(i) maintenance of records for the Plan, (ii) an interface that Plan participants can use to designate and change investments vehicles, and (iii) a phone-in service center in which Plan participants can request information concerning account balances and can provide instructions to ARK on designating and changing investment vehicles." *Id.* Section 5 of the Agreement, "Best

Execution," states: "AIC intends to provide *best execution reasonably practicable under the circumstances* for all Plan investment transactions." ECF No. 6-12 (emphasis added). Section 10 designates the Administrative Committee as "the Plan Administrator and named fiduciary," and Section 8 states "ARK and AIC are not and shall not be regarded as a fiduciary for purposes of ERISA." ECF No. 6-13, 15. The Plan complies with 29 U.S.C. § 1104(c). ECF No. 6-14.

The Mail has annually renewed its contract with ARK since 2001. ECF No.6-7. Prior to renewing the contract, the Mail seeks feedback from plan participants using a questionnaire, issued annually on October 31. *Id.* The rate of complaints has always remained below 1% of respondents and the record of complaints maintained by the Administrative Committee shows complaints are no greater than those under the previous recordkeeper, Infidelity. ECF No. 6-6, 7. On the first business day of each December the Administrative Committee meets with ARK to review the Plan, services, and fees. ECF No. 6-8.

In March 2020, ARK's hourly-paid employees went on strike. ECF No. 6-18. The Mail published a "series of stories about" the strike. *Id.* To continue providing services, ARK assigned executives and salaried employees to staff the phone centers and keep the online interface operational. *Id.* The strike lasted three months, and it is "generally agreed that ARK's ability to keep providing services to its client plans was an important factor in ending the strike on terms generally favorable to ARK." *Id.*

During March 2020 ARK's online interface went down, generating an "unusual number" of calls to the phone center, and causing some mistakes and delays in processing investment instructions. ECF No. 6-19. On March 15, 2020 Appellant, a Plan participant, attempted to transfer her entire account balance from the money market fund to the stock index and technology stock funds. ECF No. 6-22. After finding the online interface down, Appellant called the ARK phone center and spoke with AOC, who worked as a replacement staff during the strike. ECF No. 6-21. During the call, Appellant provided investment instructions to AOC. ECF No. 6-22. As trained, AOC asked Appellant "to repeat the instructions on the recorded line, transcribed them, and then read them back to [Appellant], who confirmed them." *Id.* AOC advised Appellant she would receive written confirmation of the trade within seven business days. *Id.* However, as a result of the high call volume, AOC did not forward Appellant's investment instructions to AIC. *Id.*

Appellant did not receive confirmation of the transaction within seven days, and the March 31, 2020 benefit statement, which Appellant received April 10, 2020, indicated the instructed investment had not been made. ECF No. 6-22, 23. Despite not receiving confirmation of the transaction, Appellant did not did not follow up with ARK until April 2020. ECF No. 6-23. Appellant did not contact the Plan until May 15, 2020, when she sent a letter demanding the Plan "make this right," and pay $537,201.54 Appellant alleges she would have gained if her investment instructions were followed. ECF No. 6-24, 25. The Plan replied May 31, 2020 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." ECF No. 6-26.

Section 12 of the Plan, added in 2018, includes a statute of limitations provision reading "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 a claim." ECF No. 6-17. Appellant was notified of this amendment through a Summary Plan Description ("SPD") issued to Plan participants on April 30, 2020. *Id.* Appellant waited more than six months after receiving the Plan's response to file this lawsuit on December 15, 2020, in the United States District Court for the District of Columbia. ECF 6-27.

Appellant alleges the Mail Defendants acted imprudently in selecting ARK as a recordkeeper and failing to monitor its performance, and that ARK failed to adequately train its employees and staff the call center during the strike. *Id.* The AIC Defendants (on December 16, 2020) and the Mail Defendants (on December 17, 2020) each immediately filed motions to dismiss because the suit was untimely and because Appellant failed to show that the Mail Defendants breached a fiduciary duty or that the AIC Defendants are fiduciaries. ECF No. 6-29. For these reasons, the United States District Court for the District of Columbia, Honorable Thomas C. Farnam presiding, granted the Appellees' motions and dismissed the matter with prejudice. *Chen*, No. 20-cv-099-TCF, at *12. Appellant now appeals to this Court.

SUMMARY OF THE ARGUMENT

Appellant's complaint was properly dismissed for being untimely, and for failure to state a plausible claim that the Mail Defendants breached any fiduciary duty or that the AIC Defendants were fiduciaries. The Plan's contractual six-month limitations period should be enforced because it was reasonable and Appellant had notice of this provision. Appellant cannot plausibly show either that the Mail Defendants acted imprudently in selecting and continuing to monitor ARK, or that the AIC Defendants did more than merely adhere to specific contractual terms or took unilateral action respecting management of the Plan or its assets.

The six-month limitations period was reasonable because it did not end before the claim accrued, the limitations period was clearly stated in the SPD, and Appellant had sufficient time to bring her claim within the six-month period. Appellant had notice of the provision because it was included in the SPD issued to Plan participants.

Appellant cannot show the Mail Defendants violated any fiduciary duties where they prudently inquired into ARK's qualifications and followed generally recognized procedures for selection by seeking bids from other recordkeepers, hiring ARK from among the low bidders, and obtaining the advice of an outside financial advisor. Actions by ARK nearly twenty years after its selection in no way reflect the prudence of the Mail Defendants' initial hiring decision. The Mail Defendants prudently monitored ARK's performance to ensure its compliance with the terms of the plan through annual reviews, maintaining a record of complaints, and receiving

input from participants through an annual questionnaire. Further, the Mail Defendants were not on notice of any potential breach by ARK and Appellant has not suggested any actions the Mail Defendants could take to avoid Appellant's alleged injury.

Likewise, Appellant cannot show that the AIC Defendants are fiduciaries where they adhered to specific contract terms within the Agreement that did not grant discretionary authority. By following the terms of the Agreement they did not exercise discretion and therefore are not fiduciaries. Further, the AIC Defendants only performed their duties, of receiving and transmitting investment instructions of Plan participants, in accordance with these instructions.

Employers are not required to provide employee benefit plans. In passing ERISA, Congress manifested an interest in minimizing the administrative and financial burdens of sponsoring a Plan. Not enforcing the contractual time limitations of the Plan, or holding the Mail liable for the ministerial actions of its recordkeeper, will discourage other employers from sponsoring plans and unsustainably increase administrative costs.

ARGUMENT

Appellant's complaint was properly dismissed, and thus the decision of the district court should be affirmed. First, Appellant's complaint was untimely under the contractual terms of the Plan. Second, Appellant failed to state a plausible claim that the Mail breached its fiduciary duties, and that the AIC Defendants are fiduciaries under ERISA.

The district court properly dismissed Appellant's claim as untimely. Under ERISA the court must give effect to the Plan's limitations provision so long as the Plan is reasonable and "no controlling statute" prevents the limitations provision from taking effect. *Heimeshoff v. Hartford Life & Acc. Ins. Co.,* 571 U.S. 99, 110 (2013). The Plan's contractual six-month statute of limitations is reasonable and there is no controlling statute preventing the limitations provision from taking effect. Appellant filed this action more than six months after the Plan's determination of her claim. Since Appellant's lawsuit is untimely, dismissal was proper and this Court need not evaluate the matter further.

Even if Appellant's suit was timely, the district court properly dismissed for failure to state a claim. To state a claim under ERISA a plaintiff must make a "prima facie showing that the defendant acted as a fiduciary, breached its fiduciary duties, and thereby caused a loss to the Plan." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009). Appellant has failed to show several essential elements of her claim—that the Mail breached its fiduciary duty when selecting ARK as recordkeeper or failed to monitor its performance, and that the AIC Defendants were acting as fiduciaries. "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). For these reasons, this Court should affirm the district court's judicious decision to dismiss this matter.

I. Appellant's Action Was Properly Dismissed by the District Court as Untimely Because the Plan's Contractual Six-Month Limitations Period is Reasonable and Appellant Had Notice of This Provision.

This Court reviews de novo a district court's determination that the Plan's contractual limitations period barred Plaintiff's suit as untimely. *Ellis v. City of Sandiego*, 176 F.3d 1183, 1188 (9th Cir. 1999). ERISA provides a "remedial scheme" for plan participants under 29 U.S.C. § 1132(a). *Aetna Health Inc. v. Davila*, 542 U.S. 200, 204 (2003). No actions "with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part" may be commenced:

> after the earlier of—(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation.

29 U.S.C. § 1113.

However, this Court must give effect to the Plan's contractual limitations provision so long as it is reasonable and "no controlling statute" prevents the limitations provision from being enforced. *Heimeshoff*, 571 U.S. at 110. Appellant has not identified, and the court has not found, any such controlling statute. *Chen*, No. 20-cv-099-TCF, at *9. Therefore, this Court need only determine whether the contractual limitations period is "reasonable". *See Heimeshoff*, 571 U.S. at 100.

A. The Plan's six-month limitation period is reasonable.

An ERISA plan is nothing more than a contract, in which parties as a general rule are free to include whatever statute of limitations they desire so long as the period is reasonable. The principle that contractual limitations provisions ordinarily should be enforced as written is particularly appropriate when enforcing an ERISA plan, because the plan is at the center of ERISA. *Heimeshoff*, 571 U.S. at 110. Reasonableness turns on a determination of whether the contractual limitations period gives the claimant a chance to investigate the claim and exhaustive remedies before the time limitation has run. *Ctr. for Restorative Breast Surgery, L.L.C. v. Blue Cross Blue Shield of La.*, Civil Action No. 11-806, 2016 WL 7468165, at *13 (E.D. La. May 6, 2016).

Indeed, this Court has already upheld six-month contractual limits on ERISA claims, and less, as reasonable. *See Dye v. Assocs. First Cap. Corp. Long-Term Disability Plan*, 243 F. App'x 808, 809 (5th Cir. 2007) (upholding a four-month limitations period); *Northlake Reg'l Med. Ctr. v. Waffle House Sys. Emp. Benefit Plan*, 160 F.3d 1301, 1304 (11th Cir. 1998) (finding a ninety day limitations period reasonable). In *Dunn v. Bldg. Trades United Pension Tr. Fund*, Case No. 15-cv-0026, 2015 WL 7432846, at *1 (E.D. Wis. Nov. 23, 2015), the administrative appeals process ended sometime in February 2012, when the plaintiff received the defendant's final denial of her request for benefits. The plaintiff had almost fourteen months after the completion of her administrative appeal to file suit. *Id.* at *2. The contractual limitations period was reasonable because it provided "more than

enough" time to file suit. *Id.* In *Univ. of Wis. Hosp. & Clinics Auth. v. Sw. Cath. Health Network Corp.*, No. 14-cv-780-jdp, 2015 WL 402739, at *6 (W.D. Wis. Jan. 28, 2015), the court found nothing unreasonable in expecting plaintiffs to pursue ERISA actions within six months of an adverse decision. *See also Pfifer v. Sedgwick Claims Mgmt. Servs. Inc.*, 414 F. Supp. 3d 1024, 1034 (S.D. Tex. 2019) (finding a six-month contractual limitations period reasonable).

A time limit is "unreasonable" if the limitations period ends before the claim would have accrued, or the length of the administrative appeals process leaves the applicant with an unreasonably short period of time between the final appeal decision and the end of the limitations period. *Dunn*, 2015 WL 7432846, at *2. In *Ctr. for Restorative Breast Surgery* the court stated that a contractual limitation period expiring before the issuance of a final denial of benefits is unenforceable. 2016 WL 7468165, at *12.

The Eleventh Circuit has found a ninety day limitations period to be reasonable where: (1) there was no suggestion in the record the "limitations period was a subterfuge to prevent lawsuits"; (2) the "limitations period [was] commensurate with other plan provisions that were designed to process claims with dispatch," such as the requirement that a covered person's request for review be decided upon within sixty days; and (3) the limitations period "did not begin to run after the last stage of the administrative process, the plan trustee's decision on review." *Northlake*, 160 F.3d at 1304.

Here, the contractual limitations provision should be enforced as written because six months was a reasonable amount of time for Appellant to file suit. Appellant was given notice of the final determination of her claim on May 31, 2020. ECF No. 6-26. However, Appellant did not file suit until almost seven months later, on December 15th, 2020. ECF No. 6-27. Appellant was given the same amount of time to file suit as in *Univ. of Wis.*, where the court found six months a reasonable amount of time for plaintiffs to pursue ERISA actions. *See* 2015 WL 402739, at *6.

The *Northlake* factors further support the district court's finding that the Plan's six-month contractual provision was not unreasonably short. *See id.* First, nothing in the record suggests that the Plan's limitations period was a subterfuge to prevent lawsuits. *See id.* at 1304. The limitations period was plainly described in the SPD as follows:

> 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 final determination regarding such claim. ECF No. 6-17.

This language plainly states that any participant must file suit within six months after the Plan administrator's final determination. Next, there is nothing in the Plan to suggest that the limitations period is not commensurate with other plan provisions. *See Northlake*, 160 F.3d at 1304. Lastly, the Plan's limitation period did not begin to run until after the Committee's final determination letter on May 31, 2020. *See id.*; ECF No. 6-26.

This Court should affirm the decision of the district court to dismiss Appellant's claim as untimely because the contractual limitations period is reasonable. The limitations period did not end before the claim accrued, the limitations period is clearly stated in the SPD, and Appellant had sufficient time to bring her claim within the six-month period.

B. Appellant had proper notice of the six-month limitation.

The requirement that all ERISA plans be written prevents an unwritten amendment from being an enforceable part of an ERISA plan. *Hamilton v. Air Jamaica, Ltd.*, 945 F.2d 74, 77 (3d. Cir. 1991); *see also* 29 U.S.C. § 1102(a)(1)**.** The SPD plays a central role in communicating a plan's terms to participants—just as employees may rely on the terms of the plan described in the SPD, so may a clear description in the SPD put them on notice of the plan's terms. *Mull v. Motion Picture Indus. Health Plan*, 937 F. Supp. 2d 1161, 1176 (C.D. Cal. 2012); *see also Bilello v. JPMorgan Chase Ret. Plan*, 607 F. Supp. 2d 586, 593 (S.D.N.Y. 2009).

A plan amendment included in the SPD is sufficient to notify a plan participant of changes made to a contractual limitations period. In *Scharff v. Raytheon Co. Short Term Disability Plan,* 581 F.3d 899, 903 (9th Cir. 2009), the Plan included a one-year statute of limitations, but the plaintiff filed suit beyond the one-year period. However, the plaintiff argued the plan administrator had a "duty to inform" her of the limitations provision. *Id.* The Ninth Circuit held that a plan administrator was not required to separately inform participants in final denial letters of time limits already contained in the SPD. *Id*; *see also Hakim v.*

Accenture United States Pension Plan, 656 F. Supp. 2d 801, 820 (N.D. Ill. 2009) (stating a clear description in the SPD may put plan beneficiaries on notice of the plan's terms even where a beneficiary does not receive direct notice of a plan amendment).

A plaintiff who fails to investigate basic issues that are relevant to her claim, or to proceed in a reasonably prompt fashion, is not reasonably diligent. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 94 (1990); *see also Wilson v. Std. Ins. Co.*, No. 4:11–CV–02703–MHH, 2014 WL 358722 (N.D. Ala. Jan. 31, 2014), aff'd, 613 F. App'x 841 (11th Cir. 2015). Under 29 U.S.C. § 1133 all plans must "provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied." A plan's § 1133 violation cannot create a per se bar against application of ERISA's statute of limitations. *Id.* A claimant with actual knowledge of his internal appeals rights under a plan could not contend that a benefits denial was non-final simply because the plan did not remind him of these rights. *I.V. Servs. of America, Inc. v. Inn Dev. & Mgmt., Inc.*, 182 F.3d 51, 53 (1st Cir. 1999) (finding critical the fact that claimants had actual knowledge of the accrual of their cause of action).

Under 29 U.S.C. § 1022, the SPD "shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." In *Engers v. AT&T, Inc.,* 466 Fed. App'x 75, 83 (3d. Cir. 2011), plan participants claimed that AT&T violated ERISA

notice and disclosure requirements by failing to adequately explain provisions in the plan. The court held that participants had sufficient notice because the disputed information was contained in the SPD and was not intentionally withheld. *Id.*

Appellant was given proper notice of the amended limitations period because the information was included in the SPD. In *Scharff* and *Enger* the court found the SPD reasonable to apprise participants and beneficiaries of their rights and obligations under the plan. *See Scharff*, 581 F.3d at 903; *Engers*, 466 Fed. App'x at 81. Likewise, Appellant was notified of the plan's terms because the SPD containing the six-month limitations period was issued on April 30, 2020. ECF No. 6-17. The fact the amendment was not included in the Plan's final denial letter provides no weight to Appellant's argument where, like *Scharff*, the plan administrator was not required to inform Appellant of the plan's terms in the final denial letter when those terms have been listed in the SPD. *See* 581 F.3d at 903.

Appellant was not reasonably diligent because she failed to investigate the basic issues and terms relevant to her claim. *See Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984) (stating one who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence). Appellant was notified of the six-month limitations provision in the SPD issued on April 30, 2020. ECF No. 6-17. Appellant was notified of the Plan's final determination rejecting her claim in the May 31, 2020 letter. ECF No. 6-26. This provided Appellant more than enough time to be familiar with the Plan's six-month limitations provision, and to gather important information regarding her claim.

The district court properly dismissed Appellant's claim as untimely because Appellant had notice of the Plan's six-month limitations provision, through the SPD issued to Plan participants on April 30, 2020. Appellant's failure to familiarize herself with the terms of the Plan and diligently pursue her claim should not be held against the Plan.

II. The District Court Properly Dismissed Appellant's Complaint Because Appellant Failed to State a Plausible Claim That the Mail Defendants Breached Any Fiduciary Duties and That the AIC Defendants were Fiduciaries.

This Court should affirm the decision of the district court granting the AIC and the Mail Defendant's motions to dismiss because Appellant has not plausibly claimed that the Mail Defendants acted imprudently in selecting and monitoring ARK, and that the AIC Defendants were acting as fiduciaries.

This Court reviews the grant of a district court's motion to dismiss de novo. *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 463 (7th Cir. 2010). "When ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89 (2007). However, this does not extend to legal conclusions. *Iqbal*, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

"A pleading that states a claim for relief must contain . . . a short and plain statement of the claim *showing that the pleader is entitled to relief*." FRCP 8(a)(2)

(emphasis added). The Supreme Court holds this to require "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The court must "draw on its judicial experience and common sense" to determine "whether a complaint states a plausible claim for relief." *Iqbal*, 556 U.S. at 679.

"In order to state a claim under [29 U.S.C. § 1104], a plaintiff must make a prima facie showing that the defendant acted as a fiduciary, breached its fiduciary duties, and thereby caused a loss to the Plan." *Braden*, 588 F.3d at 594. Appellant has not plausibly made such a showing.

A. The Mail Defendants prudently selected ARK as recordkeeper by following generally recognized procedures for selection and continuing to monitor its performance through an ongoing evaluation process.

The Mail Defendants acted prudently in selecting ARK as recordkeeper and continuing to monitor its performance. The duty of prudence requires fiduciaries to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a character and with like aims." 29 U.S.C. § 1104(a)(1)(B). "Prudence is measured according to the objective 'prudent person' standard developed in the common law of trusts." *Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir. 1984).

1. The Mail Defendants inquired into ARK's qualifications and followed generally recognized procedures for selection.

The Mail Defendants prudently selected ARK as recordkeeper because they inquired into ARK's qualifications and followed generally recognized procedures for selection. "In evaluating whether a fiduciary has acted prudently, we therefore focus on the process by which it makes its decisions rather than the results of those decisions." *Braden*, 588 F.3d at 585. The fiduciary must "exercise his own judgment in the light of the information and advice which he receives." *Donovan v. Mazzola*, 716 F.2d 1226, 1234 (9th Cir. 1983) (citation omitted).

Prudent selection of appointees requires "inquir[ing] into [the appointee's] qualifications" and "follow[ing] the generally recognized procedures for selection." *Id.* "At the very least, trustees have an obligation to (i) determine the needs of a fund's participants, (ii) review the services provided and fees charged by a number of different providers and (iii) select the provider whose service level, quality and fees best matches the fund's needs and financial situation." *Liss v. Smith*, 991 F. Supp. 278, 300 (S.D.N.Y. 1998). In *Donovan*, the appointing fiduciary acted imprudently by not inquiring into the qualifications of an appointee during the hiring process, never discussing the appointee "with any consultants or experts," and not "interview[ing] or solicit[ing] bids from other potential consultants." 716 F.2d at 1233. Similarly, in *Liss*, the appointing fiduciary breached its duty by "never engag[ing] in any comparative shopping or the solicitation and consideration of other bids." 991 F. Supp. at 300.

In contrast, the Mail Defendants followed a rigorous selection procedure before hiring ARK. First, the Mail "determine[d] the needs of [the] fund's participants," when deciding its current recordkeeper, Infidelity, was charging too much in fees. *See id.*; ECF No. 6-6. "[T]o comply with their fiduciary duties under ERISA, 'the responsible plan fiduciaries must assure that the compensation the plan pays directly or indirectly to [the service provider] for services is reasonable, taking into account the services provided to the plan as well as all fees or compensation received by [the service provider] in connection with the investment of plan assets, including any revenue sharing.'" *Terraza v. Safeway, Inc.*, 241 F. Supp. 3d 1057, 1081 (N.D. Cal. 2017) (quoting Employee Benefits Security Administration of the U.S. Department of Labor, Advisory Opinion 2013–03A (July 3, 2013)). Though the Mail paid recordkeeping fees directly, it was entitled to shift these fees to the Plan. ECF No. 6-6. By selecting a more affordable recordkeeper, the Mail controlled costs that could potentially be passed on to plan participants.

Next, the Mail Defendants "review[ed] the services provided and fees charged by a number of different providers." *See Liss*, 991 F. Supp. at 300. The Mail Defendants solicited bids from other recordkeepers, and ARK was selected from among the low bidders. ECF No. 6-6. Following this process, the Administrative Committee hired an outside financial advisor to conduct an analysis of ARK. *Id.* The financial advisor determined ARK provided competent services. *Id.* While relying on advice "is but a single factor to be weighed in determining whether a fiduciary has breached her duty," the financial advisor's determination was only the final step in

the Mail Defendants' multi-tiered process. *See Eyler v. C.I.R*, 88 F.3d 445, 456 (7th Cir. 1996). The Mail Defendants "exercise[d] [their] own judgment in the light of the information and advice which [it] receive[d]." *Donovan*, 716 F.2d at 1234. By taking these steps, the Mail Defendants "select[ed] the provider whose service level, quality and fees best matche[d] the fund's needs and financial situation." *See Liss*, 991 F. Supp. at 300.

The prudence or imprudence of a fiduciary's conduct must be evaluated as of "the time it occurred," not "post facto." *Pfeil v. State St. Bank & Tr. Co.*, 806 F.3d 377, 387 (6th Cir. 2015) (quoting *Hunter v. Caliber Sys., Inc.*, 220 F.3d 702, 722 (6th Cir. 2000). ARK was selected as the plan recordkeeper in 2001, and served adeptly in that position until the events giving rise to Appellant's complaint. ECF No. 6-6. Allegations against ARK's conduct in 2020 do not impeach the Mail Defendant's original selection process.

Appellant has not stated a plausible claim for relief because the Mail Defendants prudently inquired into ARK's qualifications and followed generally recognized procedures for selection by seeking bids from other recordkeepers, hiring ARK from among the low bidders, and obtaining the advice of an outside financial advisor. Actions by ARK nearly twenty years after its selection in no way reflect the prudence of the Mail Defendants' initial hiring decision.

2. *The Mail Defendants had a competent process in place for evaluating ARK's services.*

The Mail Defendants prudently monitored ARK's performance because there was a competent process in place for evaluating appointees. The Department of Labor has elaborated on this responsibility:

> At reasonable intervals the performance of trustees and other fiduciaries should be reviewed by the appointing fiduciary in such manner as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan.

29 C.F.R. § 2509.75–8 at FR–17. While "[n]o single procedure will be appropriate in all cases," *id.*, the assessment is one of "process rather than results." *Sweda v. Univ. of Pa.*, 923 F.3d 320, 329 (3d Cir. 2019). A fiduciary's process for monitoring appointees "must bear the marks of loyalty, skill, and diligence expected of an expert in the field," *id.*, though "[t]he duty to monitor does not carry with it the duty to review an investment fiduciary's every decision." *Scalia v. WPN Corp.*, 417 F. Supp. 3d 658, 671 (W.D. Pa. 2019). Additionally, "a fiduciary's obligation to act is triggered when it has notice of the appointee's misconduct or has information available to it from which the misconduct would be apparent." *Id.*

Fiduciaries must have a process in place for evaluating appointees' performance and "ensuring it has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan." 29 C.F.R. § 2509.75–8 at FR–17. In *Marshall v. Northrop Grumman Corp.*, No. CV 16-06794 AB (JCx), 2017 WL 2930839, at *11 (C.D. Cal. Jan. 30, 2017), relied on in the decision of the district

court below, allegations the appointing fiduciary failed to (1) "evaluate their appointees' performance, or to have a system in place for doing so," (2) "ensure that the monitored fiduciaries had a prudent process in place for evaluating the Plan's administrative fees and ensuring that the fees were competitive," and (3) "remove appointees whose performance was inadequate," were sufficient to state a claim for failure to monitor. In *Howell v. Motorola, Inc.*, 633 F.3d 552, 578 (7th Cir. 2011), duty to monitor was satisfied by annual review of appointees, periodic reports from appointees, and outside auditing.

"An appointing authority is not exposed to liability unless something put them on notice of possible misadventure by their appointees." *Scalia*, 417 F. Supp. 3d at 671 (internal quotations omitted). The duty to monitor is one of "prudence not prescience." *Id.* at 670. In *Scalia*, an appointee defied explicit instructions from the appointing fiduciary to diversify investments. *Id.* at 672. The appointing fiduciary was only notified of the breach after receiving a routine report. *Id.* The court granted summary judgment for the appointing fiduciary, finding it did not breach its duty to monitor because it did not have notice of the breach. *Id.* at 672–73.

In *In re Lehman Brothers Sec. & ERISA Litig.*, 113 F. Supp. 3d 745, 748 (S.D.N.Y. 2015), plan beneficiaries alleged a failure to monitor investments in Lehman Brothers' employee stock ownership plan prior to the company's collapse during the 2008 financial crisis. The court held that the beneficiaries failed to state a plausible claim because the collapse was "abrupt," and not "in public view such that any observer could have foretold its collapse." *Id.* at 756. Further, the

beneficiaries "allege[d] no facts" to suggest a review of the investments "would have averted the injury that ultimately occurred when Lehman later collapsed. . . . [I]t would be pure speculation to say that a meeting or other review by the Plan Committee would or should have resulted in the slightest change of course or otherwise prevented the consequences." *Id.* at 757–58.

Here, the Mail Defendants had a prudent process in place for evaluating ARK's performance and "ensuring it has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan." *See* 29 C.F.R. § 2509.75–8 at FR–17. Unlike the appointing fiduciary in *Marshall*, which failed to "evaluate their [appointees'] performance, or to have a system in place for doing so," the Mail reviews ARK's performance annually. *See* 2017 WL 2930839, at *11; ECF No. 6-7. First, a questionnaire is issued to Plan participants on October 31st. ECF No. 6-7. Then, the Administrative Committee meets with ARK on the first business day of December to review the Plan. ECF No. 6-8. These steps are taken before renewing ARK's contract on January 1st, as the Mail has deemed prudent to do each year since 2001. ECF No. 6-7. Alongside this annual review, the Administrative Committee maintains a record of complaints from participants. ECF No. 6-6. Incorporation of the annual review and reporting factors discussed in *Howell* further support the finding that the Mail Defendants followed a prudent evaluation process. *See* 633 F.3d at 578.

To ensure "a prudent process [was] in place for evaluating the Plan's administrative fees and ensuring that the fees were competitive," the services ARK

provides and corresponding fees are reviewed annually at the December meeting. *See Marshall*, 2017 WL 2930839, at *11; ECF No. 6-8.

Finally, the Mail Defendants have demonstrated willingness to "remove appointees whose performance was inadequate." *See Marshall*, 2017 WL 2930839. The Plan's previous recordkeeper, Infidelity, was removed by the Mail Defendants following a determination that the service it provided was inadequate in comparison to the fees it charged. ECF No. 6-6. "The duty to monitor does not carry with it the duty to review . . . every decision," and finding the Mail Defendant's practices insufficient "would defeat the purpose of hiring" ARK as a recordkeeper in the first place. *See Scalia*, 417 F. Supp. 3d at 671.

The Mail Defendants were not on notice of any potential breach by ARK. Like the appointing fiduciary in *Scalia*, which was only notified of an appointee's breach through routine reporting, Appellant has not provided facts to demonstrate the Mail Defendants were aware of any breach by ARK prior to receiving Appellant's May 15, 2020 letter. *See id.* at 672; ECF No. 6-25. The Mail Defendants cannot be required to have "prescience" of ARK's internal company crisis. *See Scalia*, 417 F. Supp. 3d at 670. The strike at ARK lasted only three months, during which ARK reportedly continued to provide overall capable services. ECF No. 6-18. Only in March, while the on-line interface was down, did ARK have difficulty processing the "unusual number" of phone calls. ECF No. 6-19. ARK's difficulty handling phone calls during this month was "abrupt" and "not in public view." *See In re Lehman Brothers*, 113 F. Supp. at 756. Although Appellant may point to stories about the strike reported in

the Mail's newspaper, it cannot be argued that the Mail Defendants breached a duty to monitor by failing to read the newspaper. Further, Appellant cannot point to possible actions the Mail Defendants should have taken during the strike. "[I]t would be pure speculation" to claim a re-evaluation of ARK's services during this period would have avoided Appellant's alleged injury. *See id.* at 757–58.

"Nothing in ERISA requires employers to establish employee benefits plans." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). Additionally, Congress has an interest in "minimiz[ing] the administrative and financial burden" of sponsoring a plan. *See Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990). Subjecting the Mail Defendants to liability for the ministerial actions of its recordkeeper will discourage employers from sponsoring plans and unsustainably increase administrative costs.

Appellant has not stated a plausible claim for relief because the Mail Defendants prudently monitored ARK's performance to ensure its compliance with the terms of the plan through annual reviews, maintaining a record of complaints, and receiving input from participants through an annual questionnaire, and the Mail Defendants were not on notice of any potential breach by ARK. Further, Appellant has not suggested any actions the Mail Defendants could take to avoid Appellant's alleged injury.

B. The AIC Defendants were not fiduciaries because they merely adhered to specific contractual terms and they did not take unilateral action respecting management of the Plan or its assets.

Appellant failed to plead with sufficient particularity that the AIC Defendants were fiduciaries. Even if Appellant were to revise her complaint, she would not be able to establish the AIC Defendants are fiduciaries because they were merely following specific contractual terms and did not take unilateral action in administering or managing the Plan.

For appellant to claim the AIC Defendants breached a fiduciary duty, she must first demonstrate the service providers are fiduciaries. *Pegram v. Herdrich*, 520 U.S. 211, 226 (2000). Fiduciary duties may be owed by services providers who are not named as fiduciaries in a plan if they are functional fiduciaries. *See* 29 U.S.C. § 1002(21)(A).

> [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, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

Id.

A service provider is not acting as a fiduciary if (1) it merely follows a specific contractual term set in an arm's-length negotiation and (2) did not take "unilateral action respecting plan management or assets without the plan or its participants having an opportunity to reject its decision." *Rozo v. Principal Life Ins. Co.*, 949 F.

3d 1071, 1073 (8th Cir 2020). A service provider takes unilateral action if they have discretionary control, authority, or responsibility in reference to the Plan. *See id.*; 29 U.S.C. § 1002(21)(A). A service provider does not qualify as having "discretionary" control, authority, or responsibility if they do not have "the freedom to decide what should be done in a particular situation." *Lebahn v. Nat'l Farmers Union Unif. Pension Plan*, 828 F.3d 1180, 1184 (10th Cir. 2016) (quoting "Discretion," New Oxford American Dictionary (3d ed. 2010)). When a service provider acts with authority or control beyond the contract's specific terms, the service provider may be a fiduciary. *Teets v. Great-West Life & Annuity Ins. Co.*, 919 F.3d 1232, 1245 (10th Cir. 2019).

Fiduciary status only exists to the extent the service provider acted as a fiduciary when taking the specific action subject to complaint. *See Pegram*, 530 U.S. at 226. Appellant's complaint addresses AIC's duty to manage the transfer of investment account funds, and ARK's duty to receive and transmit investment instructions. ECF No. 6-9, 12, 22. Though it may be argued that the AIC Defendants did not properly execute these responsibilities, this has no bearing on fiduciary status since "wrongdoing in performing non-fiduciary services does not transform the alleged wrongdoer into a fiduciary." *See Allen v. Credit Suisse Sec. (USA) LLC*, 895 F.3d 214, 225 (2d Cir. 2018). Appellant has failed to state a plausible claim that the AIC Defendants are fiduciaries because she has not shown the actions at issue exceeded the terms of their respective contracts or involved taking unilateral action.

1. The AIC Defendants merely adhered to specific contractual terms.

When a service provider adheres to a specific contract term that is the product of arm's-length negotiation, the service provider is not a fiduciary. *Teets v. Great-West Life & Annuity Ins. Co.*, 919 F.3d 1232, 1244 (10th Cir. 2019). A service provider that merely follows a specific contract term does not exercise discretion and is not a fiduciary because, by following these terms, it is barred from the grant of discretionary authority. *Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co.*, 302 F.3d 18, 29 (2d Cir. 2002). Where a contract specifically grants discretionary authority, the service provider may be considered a fiduciary. *Id.*

When a service provider's actions do not conform with a specific term within its contract with the plan, it is acting as a fiduciary. *See Rozo v. Principal Life Ins. Co.*, 949 F. 3d 1071, 1074 (8th Cir 2020). In *Rozo* a plan participant claimed the service provider setting the Composite Crediting Rate ("CCR") breached a fiduciary duty. *Id.* While the service provider's contract authorized it to set the CCR, there was no specific term in the contract controlling the rate. *Id.* The court found that by setting the rate, absent a specific term controlling the rate, the service provider was acting with discretionary authority rather than merely following a specific contractual term, making it a fiduciary. *Id.*

Here, ARK and AOC were merely providing services in accordance with the clear terms of the Agreement by receiving and transmitting instructions from Plan participants. ECF No. 6-9. The fiduciary action alleged within Appellant's complaint

is ARK and AOC's reception of investment instructions through ARK's phone center. ECF No. 6-27. Unlike the service provider in *Rozo* who acted with discretionary authority by setting the CCR without a controlling, specific contract term, ARK followed the specific, clear terms of the Agreement by providing a phone in center for "Plan participants [to] request information concerning account balances and [] provide instructions to ARK on designating and changing investment vehicles." *See* 949 F. 3d at 1074; ECF No. 6-9. By providing the phone center and staffing it with employees to receive and transmit instructions from Plan participants like Appellant, ARK adhered to these specific contract terms. Unlike the contract in *Rozo*, the terms of the Agreement did not grant ARK discretionary authority, since they were specific and left no room for discretion. *See* 949 F. 3d at 1074. AOC, a clerical employee of ARK, strictly adhered to the instructions provided to her by her employer to answer phones and forward Plan participant instructions. ECF No. 6-22. These instructions did not allow her any discretionary authority over the Plan or its assets.

Since AIC never received Appellant's investment instructions from ARK, it cannot be a fiduciary in relation to Appellant's complaint. Regardless, following investment instructions does not grant fiduciary status. The Agreement specified AIC would reasonably execute "all Plan investment transactions, including but not limited to transmitting any investment instructions to the appropriate investment manger(s) in a timely manner." ECF No. 6-12. This term requires AIC to execute transactions requested by Plan participants to the best of its ability. However,

because the ARK phone center was overwhelmed by the unusual number of calls coming in on March 15, 2020, AIC did not receive the instructions to transfer Appellant's funds. ECF No. 6-22. Unlike the service provider in *Rozo* setting the CCR without any specific contractual guidelines, following investment instructions conforms to a specific contract term and does not give AIC discretionary authority over Plan assets. *See* 949 F. 3d at 1074.

The district court properly dismissed Appellant's complaint because it cannot show the AIC Defendants were fiduciaries where they adhered to specific contract terms within the Agreement that did not grant discretionary authority.

2. The AIC Defendants did not take unilateral action respecting management of the Plan or its assets.

A service provider who cannot exercise discretionary authority or control in plan management without the plan or its participants having an opportunity to reject its decision is not a fiduciary because it cannot take unilateral action. *See Coldesina*, 407 F.3d at 1132; *Rozo*, 949 F.3d at 1073. The power of free decision and individual choice is required for a service provider to hold fiduciary status. *See Rozo*, 949 F.3d at 1075. Service providers that perform non-discretionary or ministerial functions are not fiduciaries because these functions do not require individual decision and do not qualify as unilateral action. *See Coldesina,* 407 F.3d at 1132; *IT Corp. v. General Am. Life Ins. Co.,* 107 F.3d 1415, 1419 (9th Cir. 1997).

A service provider is not acting with unilateral authority over the management of the plan or its assets when it facilitates transactions between funds

based on customer or management requests or calculates and reports pension benefits. *See Allen*, 895 F.3d at 224; *Lebahn*, 828 F.3d at 1184. The Department of Labor has specified "maintenance of participants' service and employment records . . .; Calculation of benefits . . .; [and] Collection of contributions and application of contributions as provided in the plan" are purely ministerial functions. 29 C.F.R. § 2509.75–8, at D–2.

In *Lebahn* the court held a plan consultant was not a fiduciary because she had not taken unilateral action with respect to plan assets when she miscalculated a participant's monthly retirement pension. *See* 828 F.3d at 1183. The court found that conducting routine computation does not require discretion. *Id.* at 1184. Without more, calculating and reporting pension benefits is a ministerial function and does not establish fiduciary status. *Id.* Therefore, the consultant's tasks were merely ministerial and she was found not to be a fiduciary because she lacked discretionary authority in administering the plan. *Id.* at 1183. In *Allen*, banks executed transactions pursuant to direction from Plan managers, and were found not to be fiduciaries because they lacked authority to exercise control unilaterally over the plan's assets. 895 F.3d at 220, 224. The transactions at issue were initiated at the discretion of the plan's independent investment managers, not the banks themselves, so the banks did not have discretionary control over the plan's assets. *Id*. at 224. The banks merely "match[ed] customer's desires . . . with available inventory," rather than controlling "management or disposition of [the Plan's]

assets," meaning they did not have fiduciary status. *See id.*; 29 U.S.C. § 1002(21)(A)(i).

ARK and AOC's role in receiving and transmitting instructions from the appellant were purely ministerial functions that do not give either service provider the power to make unilateral decisions about the administration of the Plan or its assets. ECF No. 6-9. These functions are contained within the Department of Labor's description of ministerial functions in 29 C.F.R. § 2509.75–8, at D–2. ARK's reception and transmission of instructions from plan participants is analogous to the *Labahn* consultant's role of calculating and reporting retirement pensions to plan participants. 828 F.3d at 1183. Both service providers only interacted with their respective plans to the extent requested by plan participants, and had no more power over the plan than reporting and forwarding information. *See id.* Like the *Labhan* consultant, ARK's ministerial functions prevented ARK from having any sort of discretionary authority over the Plan. *See id.* at 1184. AOC does not have any unilateral control over the Plan or its assets because she is only a clerical employee of ARK performing a non-discretionary function.

AIC is not a fiduciary because it did not exercise unilateral control over Plan assets. AIC never received the appellant's investment instructions, so it could not have transferred appellant's funds and did not have discretionary control over her assets. ECF No. 6-22. The Agreement specifies that AIC will transfer funds at the request of Plan participants. ECF No. 6-14. Even if AIC had transferred Appellant's funds as requested, it would not be a fiduciary. Like the *Allen* defendants, AIC

merely "matche[s] customer's desires . . . with available inventory" rather controlling "management or disposition of [the Plan's] assets." *See* 895 F.3d at 224; 29 U.S.C. § 1002(21)(A)(i). AIC did not have unilateral authority over the management of Plan assets because it only transfers assets at the request of Plan participants. Therefore, AIC is not a fiduciary.

Even if ARK or AIC were considered fiduciaries, 29 U.S.C. § 1104(c)(1)(A) precludes liability by stating "no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control." This provision of ERISA applies to both ARK and AIC. ECF No. 6-10, 14. Appellant has discretionary authority over her own Plan assets. ECF No. 6-22. Her funds are only transferred between investments upon her request. ECF No. 6-21, 22. AIC and ARK cannot be held liable for Appellant's decisions.

The AIC Defendants did not have discretionary authority over the Plan or its assets because they only performed their respective actions subject to the current complaint when instructed to by a Plan participant. Because the AIC Defendants did not have unilateral control over any part of the Plan, they are not fiduciaries.

CONCLUSION

For the reasons stated herein, this Court should affirm the district court's decision to dismiss Appellant's claims.

Respectfully submitted,
_/s/ Team 6___________
Team 6
Attorneys for Appellees

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