ORAL ARGUMENT SCHEDULED ON MARCH 26, 2022

No. 20-cv-599-TCF

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

RENITA CONNOLLY, ET. AL.

Petitioner-Appellant,

v.

NATIONAL LABORERS HOLIDAY AND VACATION FUND, BOARD OF TRUSTEES OF THE NATIONAL LABORERS HOLIDAY AND VACATION FUND, JOE SCHLITZ, LETITIA BECK, REGAL CONSULTING LLC, AND RAUL DEMISAY

Respondent-Appellees.

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

BRIEF FOR PETITIONER-APPELLANTS

Team 1
Counsel for Petitioner/Appellants

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over the parties and subject matter of this case pursuant to Employee Retirement Income Security Act, 29 U.S.C. § 1132(e) and 28 U.S.C. § 1331.[1] Pursuant to 28 U.S.C. § 1291, this Court has appellate jurisdiction as appealed from the final judgment of the district court below.

ISSUES PRESENTED

1. Under ERISA, does plan assets include personally identifiable information and other data entrusted to a third-party administrator when hackers specifically targeted both participant money and personally identifiable information during a cybersecurity attack?
2. Under ERISA, is a third-party administrator liable for losses suffered by the Fund and its participants when the third-party administrator violated their fiduciary duties deviated from prudent practices leading to their IT systems being hacked and the loss of both liquid and non-liquid plan assets?

STATEMENT OF THE CASE

This action arises out of Renita Connolly's ("Connelly") participation in the National Laborers Holiday and Vacation Fund (the "Fund").[2] On September 1, 2020, Connolly filed suit on behalf of herself and all similarly situated participants

[1] *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 59 (1987).
[2] R. at 2.

in the Fund, against the National Laborers Holiday and Vacation Fund, Joe Schlitz, and Letitia Beck (collectively the "Fund") and Regal Consulting LLC and Raul Demisay (collectively "Regal") seeking relief.[3]

The Fund and the Regal each moved to dismiss the complaint. Connelly filed Responses in Opposition to the Motions to Dismiss on February 27, 2021.[4] The District Court for the District of Columbia granted the Motions and dismissed the lawsuit on November 30, 2021.[5] Connelly now appeals to this Court.

STATEMENT OF THE FACTS

Renita Connolly is a participant in the National Laborers Holiday and Vacation Fund, which is a multiemployer welfare benefit plan ("the Plan") that provides benefits to 1,321 participants.[6] Despite its size and scope, the Fund has only four part-time employees.[7] The Board of Trustees of the National Laborers Holiday and Vacation Fund (the "Board") is the sponsor of the Fund and the named fiduciary.[8]

Regal Consulting LLC ("Regal") is a third-party service provider that provides all consulting, administration, and recordkeeping services to the Fund.[9] In

[3] R. at 5-6.
[4] R. at 1.
[5] R. at 13.
[6] R. at 2.
[7] *Id.*
[8] *Id.*
[9] R. at 2.

February 2020, Raul Demisay was employed by Regal as the principal consultant to the Fund.[10] Raul served in this capacity from 1998 to 2020 and had over 30 years of experience in his position.[11] On February 21, 2020, Raul was having lunch with a client at Panera Bakery when he received an email containing a report that he needed to download.[12] Unable to do so on cellular data, Raul joined the Panera free Wi-Fi on his Regal-issued laptop and downloaded the file.[13]

On the same day, at 12:32pm, Raul's Regal-issued laptop was hacked and all of the data on the laptop were copied to an unknown site on the dark web.[14] All of Raul's emails and contacts were compromised as a result.[15] Just over 30 minutes later, at 1:09pm, Joe Schlitz, one of the co-managers ("Managers") of the fund who serves alongside Letita Beck, received an email from Demisay.Raul@Reegal.com.[16] The email contained the following sentences and a computer link: "Dear Joe, I retire from Regal after 35 yrs: I am very much liking to keep with you. Please click the link below so we stay better friendly. VTY Raul."[17] Joe clicked the link, a new web page opened on his computer and the computer

[10] R. at 2.
[11] *Id.*
[12] R. at 2-3.
[13] *Id.*
[14] R. at 3.
[15] *Id.*
[16] *Id.*
[17] *Id.*

appeared to be "frozen."[18] Joe had to reboot his computer for it to be functioning again.[19]

At 1:16pm, after Joe opened the malicious link from the Regal employee impersonator, an Excel spreadsheet containing all of the Fund participants' names, addresses, emails, Social Security numbers, and designation of employers was downloaded from Joe's computer to the dark web.[20] At 1:32pm, Joe's computer account at the Fund authorized a wire transfer of $2,642,863.12 to an account at GloboBank.[21] This depleted substantially all of the money in the Fund's account.[22] All the money was then immediately transferred to accounts at other banking institutions and invested in Bitcoin.[23] The Fund's assets consist entirely of contributions made by employers for employees' deferred compensation and earnings on those investments.[24] The over $2 million transferred out of the Fund had been accrued through investments by hard-working employees, like Connolly and all similarly-situated participants in the Fund.[25]

[18] R. at 3.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] R. at 3.
[23] *Id.*
[24] R. at 4.
[25] *Id.*

On March 31 of each year, the Fund is scheduled to make cash distributions to each Eligible Participant for the balance in their account.[26] On March 31, 2020, the Fund had no liquid assets to distribute and did not make any distributions.[27] Nearly 126 people in Demisay's contacts who received a similar email, contacted Regal inquiring about the legitimacy of the email and only nine of them made the decision Schlitz did to click on the link.[28] On May 1, 2020, Schlitz was placed on administrative leave and Alice Chalmers was named interim co-manager.[29]

On May 15, 2020, Connolly sent a letter to the Board demanding the Fund pay her the benefits she earned.[30] In a letter dated May 31, 2020, Chalmers informed Connolly that the Fund was undergoing an extensive audit of certain "banking issues" and would be delayed indefinitely in making distributions.[31] On July 1, 2020, Connolly sent a second letter to the Board notifying the Fund that her identity had been stolen and that all of the money in her bank account had been transferred to an off-shore financial institution.[32] Chalmers, on behalf of the board, replied by letter on July 15, 2020 disclaiming any responsibility for the theft.[33]

[26] *Id.*
[27] R. at 5.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] R. at 5.
[32] *Id.*
[33] *Id.*

The Fund has an Administrative Services Agreement (the "Agreement") with Regal which specifies contractual obligations.[34] Under Section 4.2, Regal is required to provide administrative services, including: "(i) maintenance of records for the Fund and (ii) a phone-in service center to which Fund participants can request information concerning account balances."[35]

The issues of appeal are: (1) whether the information and data that was stolen are ERISA "plan assets" of the Fund; and (2) whether Regal is liable under ERISA for the loss suffered by the Fund and its participants.[36]

SUMMARY OF THE ARGUMENT

ERISA is a protective statute that shields employee pensions and welfare benefits from fiduciary malfeasance. ERISA contains stringent regulations regarding the responsibilities of plan fiduciaries and other issues regarding plan administration. These regulations hold fiduciaries of employer-sponsored employee benefits plans to the highest standards "known to the law."[37] ERISA creates enforceable fiduciary obligations to ensure participants' deferred compensation is protected. As a direct result of the Regal's actions, Connelly's data

[34] R. at 3–4.
[35] R. at 4.
[36] Scheduling Order and Questions on Appeal at 1, *Connolly v. National Laborers Holiday and Vacation Fund*, et al (13th Cir. 2022) (No. 20-cv-599-TCF).
[37] *Howard v. Shay*, 100 F.2d 1484, 1488 (9th Cir. 1996); *see also Tibble v. Edison Int'l*, 729 F.3d 1110, 1133 (9th Cir. 2013).

was not adequately protected leading to liquid and non-liquid plan assets being stolen. Connelly is seeking to use the protective measures in ERISA to recoup the losses caused by Regal's failure in their fiduciary duty of prudence. Additionally, under the doctrine of contribution and indemnity, Regal should be a co-defendant in this matter and liable to Connelly and other plan participants.

Regal's breach resulted in harm to the Plan, Connelly and participants and should be held liable for any losses suffered.

ARGUMENT

I. Standard of Review

The district court's grant of a Rule 12(b)(6) motion is reviewed *de novo* by this court.[38] The court accepts the complainant's allegations as true and construes the facts in favor of the complainant.[39]

Connelly's complaint was improperly dismissed, and the decision of the District Court should be reversed. First, the information and data that was stolen from the Fund should be found to constitute plan assets. Second, Regal should be found to constitute a fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA) 29 U.S.C. § 1132 and therefore should be held liable for breach of fiduciary duties required by ERISA §404.[40]

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[38] *Solers, Inc. v. Doe*, 977 A.2d 941, 947 (D.C. 2009); Fed. R. Civ. P. 12(b)(6).
[39] *Solers, Inc. v. Doe*, 977 A.2d 941, 947 (D.C. 2009) (quoting *In re Estate of Curseen*, 890 A.2d 191,196 (D.C. 2006)).
[40] 29 U.S.C. § 1104.

Even if the plan data and information is not found to be a plan asset, the District Court still improperly dismissed the claim because Regal is a fiduciary under ERISA and is therefore required to act with prudence and loyalty.

II. Issue One: The District Court Erred in Finding that Participant Data Cannot be Considered a Plan Asset

The participant information and data stolen in the security breach on February 21, 2020 by online cyber criminals includes plan participants' names, addresses, emails, social security numbers, and designation of employers.[41] ERISA provides that "the term 'plan assets' means plan assets as defined by such regulations as the Secretary [of Labor] may prescribe."[42] While ERISA does not provide any further guidance within its text regarding what constitutes a plan asset, regulations promulgated by the Department of Labor ("DOL"), read in combination with the legislative intent of ERISA and general notions of property rights, should be interpreted to include data.

A. Finding the data to constitute a plan asset is consistent with the intent of ERISA and 29 C.F.R. § 2510.3-101.

The DOL has promulgated two regulations pertaining to the definition of "plan assets." The first is 29 C.F.R. § 2510.3-101, which provides that

[41] R. at 2.
[42] 29 U.S.C. § 1002(42).

> "Generally, when a plan invests in another entity, the plan's assets include its investment, but do not, solely by reason of such investment, include any of the underlying assets of the entity. However, in the case of a plan's investment in an equity interest of an entity that is neither a publicly-offered security nor a security issued by an investment company registered under the Investment Company Act of 1940 its assets include both the equity interest and an undivided interest in each of the underlying assets of the entity, unless it is established that – (i) The entity is an operating company, or (ii) Equity participation in the entity by benefit plan investors is not significant. Therefore, any person who exercises authority or control respecting the management or disposition of such underlying assets, and any person who provides investment advice with respect to such assets for a fee (direct or indirect), is a fiduciary of the investing plan."[43]

While courts have thus far been reluctant to interpret this regulation as including plan data, the Courts have refused to do so merely based on the lack of guidance by the DOL in this area.[44] Further, the DOL has issued

[43] 29 C.F.R. § 2510.3-101.
[44] *Harmon v. Shell Oil,* Case No. 3:20-cv-00021, 2021 BL 126207 (S.D. Tex. March 30, 2021).

express guidance expressing the need to protect ERISA plan data and funds. The guidance issued by the DOL puts ERISA fiduciaries on notice of the risk of possible cybersecurity threats and emphasizes the value that exists in both plan funds and plan participant data.[45]

Per the DOL, Responsible plan fiduciaries have an obligation to ensure proper mitigation of cybersecurity risks.[46] In the case at bar, Connelly and participants have all been subject to theft of personal information and loss of significant funds because of failure to follow the best practices outlined by the DOL. Regal has not taken any of the twelve "best practices" outlined in the guidance to mitigate the risks of a cybersecurity attack. Further, once the attack occurred, Regal was dismissive of responsibility and did not take any action to rectify the harm to the Connelly and other plan participants.

B. General notions of property and trust law also support the qualification of data as a plan asset.

ERISA does not have a provision expressly defining "plan assets," but rather, points to the DOL for guidance. The Department has been clear that "in situations outside the scope of the plan assets… the assets of a plan generally are to

[45] Employee Benefits Security Administration, *Cybersecurity Program Best Practices*, DEP'T OF LABOR, https://www.dol.gov/sites/dolgov/files/ebsa/key-topics/retirement-benefits/cybersecurity/best-practices.pdf.
[46] *Id.*

be identified on the basis of ordinary notions of property rights under non-ERISA law."[47] Under such ordinary notions, participant data constitutes a plan asset. Under ordinary notions of property rights, personal information, "like all information, is property."[48] Applying such notions in the past, the DOL has found that the assets of a plan include property in which the plan has a "beneficial ownership interest".[49] In the case at bar, the data in question was provided by plan participants as a requirement for participating in the plan. Additionally, the data and personal information collected by the Plan was "for the exclusive purpose of administering the Plan and providing benefits to participants."[50] The DOL, when identifying plan assets under this test also considers the plan documents and any other legal documents or contracts between the parties, as well as gives consideration to the actions of the parties.

The DOL has also noted that consideration should be given to the application of ERISA's trust requirement.[51] Section 403(a) of ERISA provides that "all assets of an employee benefit plan shall be held in trust by one or more

[47] Dep't of Labor Adv. Op. 92-02A (January 17, 1992).
[48] Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 GEO. L. J. 2381, 2383–84 (July 1996).
[49] Dep't of Labor Adv. Op. 1992 24(A) (November 11, 1992).
[50] This is the standard that establishes a fiduciary duty under ERISA. 29 U.S.C. § 1132.
[51] Dep't of Labor Adv. Op. 1992 24(A) (November 11, 1992).

trustees." When the participants transfer their personal information to the Fund, they do so in trust.[52]

While no court has yet to hold that data constitutes plan assets, no court has found that "plan assets" cannot be inclusive of data. Significantly, the Court in *Shell Oil*, and others with similar questions before them, have reached their decisions largely because the DOL has not yet promulgated a rule expressly addressing the status of data as a plan asset.[53] In the absence of definitive legal authority, courts have been forced to look to other areas of the law which do not take into consideration the legal intent behind ERISA. The legislative intent behind ERISA has always focused on protecting plan participants and with the rise in litigation concerning participant data,[54] there is a clear need for this issue to be addressed by the Court.

While the need to protect participant data may not have been prevalent in 1986, at the time the DOL promulgated 29 C.F.R. § 2510.3-101, that does not mean data should be left unprotected. Additionally, it cannot be said that data is valueless.[55] The stolen data in this case resulted in a loss of nearly $3 million to the

[52] Dep't of Labor Adv. Op. 1992 24(A) (November 11, 1992).
[53] *Harmon v. Shell Oil*, Case No. 3:20-cv-00021, 2021 BL 126207 (S.D. Texas March 30, 2021).
[54] Employee Benefits Security Administration, *History of EBSA and ERISA*, DEP'T OF LABOR, https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/history-of-ebsa-and-erisa.
[55] R at 11. The data breach in this case resulted in the identity theft of many plan participants and financial loss of over $2 million.

Fund and deprived participants from benefits that were duly owed to them under the Plan.

Due to the nature of the information compromised in this case and the legal rationale for protecting ERISA beneficiaries and property in general, the Court should find the data to constitute a plan asset. Classified as a plan asset, the data should be protected by the fiduciary duty imposed on "any person who exercises authority to control respecting the management or disposition of such underlying assets" under 29 C.F.R. § 2510.3-101.

III. Issue Two: The District Court Erred in Finding Regal was not a Fiduciary and Therefore Could not be Held Liable for Plan and Participant Losses.

The lower court improperly dismissed the case on the basis that Regal was not a fiduciary and therefore not liable. Regal is a fiduciary under ERISA definitions and their actions as a consultant for the fund. Their actions were a breach of their fiduciary duty of prudence to Connelly and the fund participants. As a result of their breach, there was harm to the fund and participants including Connelly. Under ERISA 29 U.S.C. § 1104, Connelly has pleaded a prima facie case of fiduciary breach and under contribution and indemnity Regal should be a defendant to this case and liable for the harm caused.

A. Regal is a fiduciary under ERISA and failed in their duty of prudence resulting in detrimental harm to the Plan and its participants.

ERISA imposes strict fiduciary duties.[56] Under ERISA, a person with fiduciary responsibility is an individual who

> "(i) 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) 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. Such term includes any person designated under section 1105(c)(1)(B).[57]

The test to determine whether someone is a fiduciary is a functional test focused on those with authority and control over the plan.[58] Plan provisions

[56] 26 U.S.C § 1002(21)(A).
[57] *Id.*
[58] 81 C.F.R. 20945 at 20990. See also *Mertens v. Hewitt Associates*, 508 U.S. 248, 262 (1993) (distinguishing traditional trust law under which only the trustee had fiduciary duties from ERISA which defines "fiduciary" in functional terms); *Smith v. Provident Bank*,170 F.3d 609, 613 (6th Cir. 1999) (definition of fiduciary is "intended to be broader than the common-law definition and does not turn on formal designations or labels"); *Beddall v. State Street Bank & Trust Co.*, 137 F.3d 12 (1st Cir. 1998) ("the statute also extends fiduciary liability to functional fiduciaries"); *Acosta v. Pacific Enterprises*, 950 F.2d 611, 618 (9th Cir. 1991) (fiduciary status is determined by "actions, not the official designation").

purporting to relieve a fiduciary of liability for breaches of duty are deemed void as against public policy and will therefore have no effect.[59]

Under ERISA, a plan fiduciary has six core affirmative duties, including the duty to act prudently.[60] The duty of prudence applies the "prudent man rule" which states that

> "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries" and must 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."[61]

"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."[62]

Section 4.1 of the Agreement is vague because it states that Regal "[shall][shall not] be regarded as a fiduciary for purposes of ERISA."[63] It is unclear if the Agreement was intended to include Regal as a fiduciary. However, this is not

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[59] 29 USC § 1110(a).
[60] 29 U.S.C. § 1104(a)(1).
[61] 29 U.S.C. § 1104(a). *Tibble v. Edison Int'l*, 729 F.3d 1110, 1133 (9th Cir. 2013).
[62] *Rozo v. Principal Life Ins. Co.*, 949 F.3d 1071 (8th Cir. 2020) (quoting *Teets v. Great-West Life & Annuity Ins. Co.*, 941 F.3d 1200 (10th Cir. 2019.))
[63] R. at 14.

dispositive that Regal has been relieved of any fiduciary duties. Section 4.1 is silent as to whether Regal is a fiduciary, thus review must be made of Regal's contractual and actual duties. Section 4.2 states Regal's duties include "(i) maintenance of records for the Fund and (ii) a phone-in service center in which participants can request information concerning account balances."[64] Regal also exercises control over participant information and data (personally identifiable information). Personally identifiable information is a plan asset because it is used to track accounts and make payments to interested parties, such as the plan participants and the government in the form of taxes. Over it is used to determine the allocation of the funds within the plan. Applying a functional test, Regal is a fiduciary of the plan because of the control they have over plan assets.

Moreover, any ambiguity in the contract between the Fund and Regal is not one that should be held to the detriment of Connolly because both the Fund and Regal are responsible for ensuring that the terms of their agreement are clear and unmistakable. Any ambiguity in the agreement should be held against them. Thus, Regal is a fiduciary of the plan.

Even if it is found that Regal is not a fiduciary, they should still be held liable under the terms of the agreement. Section 8 of the agreement includes an indemnification clause which states "Regal shall be responsible for all claims

[64] R. at 15.

arising from gross negligence, willful misconduct, knowing deviation from prudent practices, or any violation of established standards of care."[65]

If it is considered that Regal is a fiduciary, then Regal breached their duty to Connolly and others by allowing their money and personal data to be stolen from the Fund. Bad actors then used the stolen personal data to apply for credit. A fiduciary can attempt to limit their liability via indemnification; however, ERISA specifically prohibits a fiduciary from obtaining a release from liability resulting from a fiduciary breach.[66] Thus, allowing Regal to shield itself by using an indemnification clause would be "void as against public policy."[67] Regal's agent not only violated established standards of care by accessing the free Wi-Fi at Panera Bakery, he also took a unilateral action without the plan or the participants having the opportunity to reject his decision.[68]

The Employee Benefits Security Administration ("EBSA") has released cybersecurity best practices to "assist plan fiduciaries in their responsibilities to manage cybersecurity risks."[69] This guidance reinforced industry standards to protect information from unauthorized access and malicious acts. The EBSA stated

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[65] R. at 16.
[66] 29 U.S.C. § 1110 (stating that this type of provision would be "void as against public policy.")
[67] 29 U.S.C. §1110.
[68] R. at 7.
[69]Employee Benefits Security Administration, *Cybersecurity Best Practices*, DEP'T OF LABOR, https://www.dwt.com/-/media/files/blogs/privacy-and-security-blog/2021/04/us-dol-ebsa-cybersecurity-best-practices.pdf

that "free Wi-Fi networks, such as the public Wi-Fi available at…coffee shops pose security risks that may give criminals access to your personal information" and in this case, that is exactly what happened. The actions of Regal's agent at the bakery led a bad actor to steal his contact list and send targeted malicious emails resulting in Connolley's identity being stolen.[70] This was a unilateral decision to risk the participant's information by accessing public Wi-Fi. It is not likely that either the participants or the Plan would have decided to access strictly confidential information on a public Wi-Fi, where it is highly likely that the data will be targeted by malicious actors.

Regal's agent's actions are directly traceable to the loss of plan assets: from the agent accessing the public Wi-Fi at the bakery; to the malicious email targeting the fund; and then to the liquid and non-liquid plan assets being stolen. Applying agency law, Regal is liable for the actions of its agents therefore Regal is liable for violating established standards of care and taking unilateral actions which the Plan nor its participants would have approved due to their inherent danger.

B. Regal is liable for any losses suffered as a result of their breach.

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,

[70]Employee Benefits Security Administration, *Cybersecurity Best Practices*, DEP'T OF LABOR, https://www.dwt.com/-/media/files/blogs/privacy-and-security-blog/2021/04/us-dol-ebsa-online-security-tips.pdf

and thereby caused a loss to the Plan."[71] In accordance with the aforementioned section, Regal is a fiduciary and Regal breached its fiduciary duty by a lack of prudence in conducting business by allowing employees to access the internet with company equipment at places where there is a significant risk of a data breach which could, as is the case here, result in a loss of plan assets. The last element to make a prima facie case is to demonstrate that there was a loss to the Plan resulting from their breach.

In this case, the loss was twofold: (1) the Plan's liquid assets in the amount of $2,642,863.12 were stolen using the agent's account, and (2) "participants' names, address, emails, Social Security numbers…" were downloaded from the agent's computer and uploaded to a site on the dark web.[72] This personally identifiable information on the dark web was used to steal participant's identities by applying for loans or credit cards under the participant's name.[73] This is precisely what happened to Connelly; not only was her money stolen, but her identity was stolen as well due to Regal's imprudent actions.

[71] *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009).
[72] R. at 10, 11.
[73] Dan Patterson & Graham Kates, *We Found Our Personal Data on the Dark Web. Is Yours There Too?*, CBS NEWS (Mar. 25, 2019, 12:09 PM), https://www.cbsnews.com/news/we-found-our-personal-data-on-the-dark-web-is-yours-there-too/

Connelly has met the prima facie case; therefore, this Court should reverse the decision of the district court.

C. Under the doctrine of contribution and indemnity, and Regal's breach of fiduciary duty of prudence, Regal should be a defendant in this matter and liable to Connelly and plan participants.

The District Court for the Eastern District of Pennsylvania recently held that a co-fiduciary to the benefits plan contributed to the cybersecurity breaches and are liable as a co-fiduciary and can proceed in the ERISA context.[74] Under the doctrines of contribution and indemnity, Regal should be a defendant in addition to the fund in this action because their actions clearly contributed to the cybersecurity breach.

The defendants in *Levanthal* are Nationwide and MandMarblestone Group ("MMG"); Nationwide was considered the custodian of the plan while MMG was the consulting firm hired to "design, administer, and consult" on the plan.[75] Nationwide and MMG brought counterclaims against the plaintiff in the action. The Plaintiff, Levanthal Sutton & Gornstein 401k Profit Sharing Plan, allowed one of their employees to use her personal email for official employment duties and work remotely from Texas.[76] The court found the defendants successfully pled

[74] *Levanthal v. MandMarblestone Group*, 2020 WL 2745740 *5 (May 27, 2020).
[75] *Id*. at *1.
[76] *Id.* at *2.

their counterclaim, that Plaintiff's actions also breached their fiduciary duty of prudence, "'ERISA imposes upon a fiduciary the duty 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 like character and with like aims."""[77]

The court elaborated that the plaintiffs' actions ``with respect to employees, their computer/IT systems, and employment policies facilitated was the most substantial contributing factor in the occurrence of the cyber-fraud."[78] This reasoning is easily applicable to Regal's actions as their policies or lack thereof led to Raul Demisay accessing the Panera Wi-fi, risking the plan assets and breaching the fiduciary duty of prudence.

The District Court in *Levanthal* was persuaded by the Second and Seventh Circuit for the counterclaims of contribution and indemnity as both circuits have "permitted co-fiduciaries to assert claims for contribution and indemnity in ERISA actions".[79] Under § 502(a)(3), a participant may enjoin a violation of ERISA to obtain appropriate equitable relief, Connelly asks this court to follow the legal reasoning set forth by the Second and Seventh circuits and set out in *Levanthal* in

[77] *Levanthal v. MandMarblestone Group*, 2020 WL 2745740 *5 (May 27, 2020) (citing to *Srein v. Frankford Trust Co.*, 323 F.3d 214, 223 (3d Cir. 2003) (quoting 29 U.S.C. § 1104(a)(1)(B)).
[78] *Id.* at *5.
[79] *Id.* at *4.

the Eastern District of Pennsylvania and find that Regal should be held liable for their breach of fiduciary duty under contribution and indemnity.[80]

D. Contribution and Indemnity can be applied to ERISA claims through trust law and federal common law.

The Second Circuit considered whether contribution or indemnity is recognized under ERISA as it is in trust law and more specifically, "whether such a right can be recognized either by implication from the statute, or as part of federal common law."[81] In *Chemung Canal Trust Co. v. Sovran Bank/Maryland*, the Second Circuit ruled that traditional trust law applies to ERISA law and contribution and indemnity is therefore a legal doctrine under ERISA.[82] The Defendant in *Chemung Canal Trust Co. v. Sovran Bank/Maryland* recognized that although "ERISA does not explicitly provide for contribution and indemnity" it is a part of the fundamental principles of trust law that employee benefits law was founded on and "should be incorporated into the federal common law of ERISA."[83] The Second Circuit therefore held that "federal courts have been authorized to develop a federal common law under ERISA and in doing so, are to be guided by

[80] 29 U.S.C. § 1132(a)(3).
[81] *Chemung Canal Trust Co. v. Sovran Bank/Maryland*, 939 F.2d 12, 15 (2nd Cir. 1991).
[82] *Id.* at 16.
[83] *Id.* at 15.

the principles of traditional trust law" because "[t]here is no reason why a single fiduciary who is only partially responsible for a loss should bear its full brunt."[84]

More recently, the Seventh Circuit in *Chesemore v. Fenkell* agreed with the Second Circuit in *Chemung Canal Trust Co.* that district courts are charged with the ability under remedial authority under ERISA to apply traditional equitable remedies under the law of trusts, specifically under ERISA § 1105(b)(1)(B), these remedies being indemnification and contribution.[85] The Court concluded trust law provides for indemnification and contribution under appropriate circumstances and that the courts have the power to decide how to make an injured plan whole while equitably apportioning the damages among wrongdoers.[86]

This Court should find that the trust law doctrines of contribution and indemnity are sufficiently established in ERISA through federal common law and this Court is empowered by federal common law to apply this standard to Regal.

E. Regal under the principles of Contribution and Indemnity should be held liable.

[84] *Chemung Canal Trust Co.*, 939 F.2d at 16 (citing to *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987)).
[85] *Chesemore v. Fenkell*, 829 F.3d 803, 811-12 (7th Cir. 2016) ("The Supreme Court has explained that 'appropriate equitable relief' here means 'those categories of relief that, traditionally speaking (i.e., prior to the merger of law and equity) were typically available in equity.'" (quoting *CIGNA Corp. v. Amara*, 563 U.S. 421, 439 (2011))).
[86] *Chesemore*, 829 F.3d at 812 (citing to *Free v. Briody*, 732 F.2d 1331 (7th Cir. 1984)).

Regal's actions are the first contributing factor to this occurrence of cyber-fraud, as their employee Raul did not act with care when he accessed Panera public wi-fi while using his work email.[87] Similarly to the Plaintiff's in *Levanthal*, Regal contributed to the loss plan funds and was a "substantial factor" in the cyber-security breach within the fund.[88] This subsequently led to an email from a hacker posed as Raul sent to one of the fund's board members and they were able to hack the list of personal identifiable information and steal money from Connelly and the fund.[89] The lower court decision holds one party responsible for breaches made by multiple parties, the first breach being made by Regal. Under the doctrine of contribution and indemnity as applied to ERISA, Regal should be added as a co-fiduciary in this action.

The Regal will argue that under *Kim v. Fujikawa* and *Travelers Casualty and Surety Company of America, v. Iada Services, Inc.* that the court should not apply trust law to this case because there is no right of contribution under ERISA, as these two cases held.[90] *Travelers Casualty* mentions that there is no right to contribution under ERISA because the Supreme Court has not recognized "federal common-law right of contribution in three other statutes".[91] We argue this

[87] R. at 2.
[88] *Levanthal v. MandMarblestone Group*, 2020 WL 2745740 *5 (May 27, 2020).
[89] R. at 3.
[90] *Kim v. Fujikawa*, 781 F.2d 1427 (9th Cir. 1989); *Travelers Casualty and Surety Company of America, v. Iada Services, Inc.*, 407 F.3d. 862 (8th Cir. 2006).
[91] *Travelers Casualty and Surety Company of America*, 407 F.3d. at 864.

statement lacks context. Similarly, the Ninth Circuit argued that there is no indication in the legislative history that congress wanted to soften the blow on joint wrongdoers but cite to a case in which the Supreme Court held there was no right to contribution under antitrust law.[92] The statutes that did not include a right of contribution as cited by the Eighth and Ninth Circuits are not ERISA and do not share the specific relationship ERISA has with trust law. Congress specifically wanted federal courts to develop federal common law under ERISA and the development of ERISA has been guided by the common law of trusts.[93] The common law of trusts is the substantive backbone of ERISA law, the equitable remedies provided in trust law can be applied through the federal common-law actions of the courts.

In both *Kim v. Fujikawa* and *Travelers Casualty*, the courts argue that under Russell and § 409 of ERISA the right of action of equitable apportionment of fault between co-fiduciaries is supported.[94] The court specifically says "We thus agree with the ninth circuit that section 409(a) 'cannot be read as providing for an equitable remedy of contribution in favor of a breaching fiduciary.'"[95]

[92] *Kim*, 781 F.2d at 1433.
[93] *Firestone Tire and Rubber Co. v. Burch*, 489 U.S. 101, 110-11 (1989).
[94] 29 U.S.C. § 1109.
[95] *Travelers Casualty and Surety Company of America*, 407 F.3d. at 866 (citing to *Kim v. Fujikawa*, 781 F.2d 1427 (9th Cir. 1989)).

The Eighth and Ninth Circuit's rely on *Massachusetts Mut. Life Ins. Co. v. Russell* to argue that these remedies are not available under the Supreme Courts ruling. However, *Russell* is distinguishable from *Levanthal* and Connelly's claims because *Russell* was trying to recover for mental and emotional damage for denying disability disbursements from the plan when the plan fiduciaries did not act within a reasonable time to process the claim.[96] *Russell's* lawsuit could not go forward because the Supreme Court held that § 409(a) of ERISA does not provide cause of action for extra-contractual damages to a beneficiary.[97] The only relief provided under § 409(a) is for the plan itself.[98]

The remedy sought by Connelly is a loss to the Plan resulting from Regals fiduciary breach, not for extra-contractual damages. Under §409(a) and *Russell's* holding, Connelly is entitled to relief and able to bring this action. Additionally, the Second and Seventh Circuit holdings provide sufficient reason for this Court to utilize its powers under federal common law in ERISA granted by the Supreme Court and apply the doctrine of contribution to Regal.

[96] *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 134 (1985).
[97] *Russell*, 473 U.S. at 134.
[98] *Russell*, 473 U.S. at 135.

CONCLUSION

For the reasons stated herein, this Court should reverse the district court's decision dismissing Connelly's claims and find that ERISA plan assets include the personally identifiable information of our clients and Regal, as the plan's fiduciary, is liable for any loss suffered by the Fund and its participants due to the loss of plan assets.

Respectfully submitted,
/s/ Team 1
Team 1
Attorneys for Appellants

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