ORAL ARGUMENT SCHEDULED FOR MARCH 26, 2022
Civil Action No. 20-cv-599-TCF

IN THE

United States Court Of Appeals

For The Thirteenth Circuit

RENITA CONNOLLY, *et al.*,

Appellants

vs.

REGAL CONSULTING LLC AND RAUL DEMISAY,

Appellees.

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

BRIEF FOR APPELLEES

Team 2
Counsel for Appellees

February 26, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Other Authorities

JURISDICTIONAL STATEMENT

Appellants' claims arise under the Employee Retirement Income Security Act of 1974 ("ERISA"), which falls within the scope of federal question jurisdiction under 28 U.S.C. § 1331. ERISA additionally grants exclusive subject matter jurisdiction under 29 U.S.C. § 1132(e). Thus, the district court had subject matter jurisdiction over these claims. Under 28 U.S.C. § 1291, the courts of appeals have jurisdiction over appeals from all final decisions of district courts. On November 30, 2021, the district court entered a final judgment disposing of all parties' claims. Thus, this Court has appellate jurisdiction.

ISSUES PRESENTED

1. Is the information and data that was stolen defined as ERISA "plan assets" of the Fund?
2. Is Regal liable under ERISA for any loss suffered by the Fund and its participants?

SUMMARY OF THE ARGUMENT

To state a fiduciary breach claim against the Regal Defendants, the Fund Participants must establish that the Regal Defendants are either named or functional fiduciaries under ERISA, which they have failed to do. The language within the Agreement between Regal and the Fund renders it impossible to conclude that Regal voluntarily agreed to accept fiduciary responsibility for the

Fund, and a reading of the Agreement as a whole indicates that the parties did not intend Regal to be a named fiduciary. Additionally, Regal's purely ministerial role as a recordkeeper, DOL guidance, and legal precedent framing rights to personal data and information as privacy—not property—rights, as well as policy considerations, point to the fact that data and information are not "plan assets" under ERISA, and Regal is not a functional fiduciary either.

To state a Section 502(a)(3) claim, the Fund Participants must allege plausible facts that there is a remediable wrong and that the relief sought is "appropriate equitable relief." Though the complaint makes a conclusory statement that the Regal Defendants breached their fiduciary duty in violation of ERISA, it fails to allege any facts that support this claim because it fails to state that either Regal Defendant was acting in a fiduciary capacity when they took the action subject to the complaint or that their conduct fell below the standard of care required by ERISA with regard to plan assets. And even if they had, Regal cannot be held liable, as they are entitled to indemnification by the Fund.

STATEMENT OF THE CASE

This action arises out of Plaintiff Renita Connolly ("Ms. Connolly") and other similarly-situated participants' ("Fund Participants") participation in the

National Laborers Holiday and Vacation Fund ("Fund").[1] On September 1, 2020, the Fund Participants filed suit in the United States District Court for the District of Columbia against the Fund, the Board of Trustees of the Fund, the Fund's co-managers Joe Schlitz ("Mr. Schlitz") and Letitia Beck ("Ms. Beck") (collectively, "Fund Defendants"), Regal Consulting LLC ("Regal"), the Fund's third-party record keeper, and Raul Demisay ("Mr. Demisay"), Regal's principal consultant of the Fund at the time of the actions alleged in the complaint (collectively, "Regal Defendants").[2] The Fund Participants sought equitable relief under ERISA § 502(a)(3) and requested that Regal be replaced as a recordkeeper.[3]

The Fund Defendants and the Regal Defendants each moved to dismiss the complaint.[4] On November 30, 2021, the United States District Court for the District of Columbia granted both motions to dismiss with prejudice.[5] The Fund Participants now appeal to this Court.

The Fund is a multiemployer welfare benefit plan with offices in Washington, D.C.[6] It provides benefits to 1,321 participants, including Ms. Connolly and the other appellants in this action.[7] The Board of Trustees is the

[1] *Connolly, et al., v. Nat'l. Laborers Holiday and Vacation Fund, et al.,* Civil Action 20-cv-599-TCF, at *1 (D.D.C. Nov. 30, 2021).
[2] *Id.* at 5–6.
[3] *Id.* at 6.
[4] *Id.*
[5] *Id.* at 13.
[6] *Id.* at 2.
[7] *Id.*

Fund's sponsor and named fiduciary.[8] As the named fiduciary, the Board was responsible for appointing the Fund's Managers and for hiring and monitoring third-party service providers.[9] The Board appointed Ms. Beck and Mr. Schlitz as the Fund's co-managers.[10] The Board also hired Regal as a service provider.[11]

The Fund entered into an agreement ("the Agreement") with Regal, under which Regal provides administrative and recordkeeping services to the Fund in consideration of the Fund's payment of a per capita fee.[12] Specifically, under Section 4.2 of the Agreement, "Regal shall provide administrative services to include: (i) maintenance of records and (ii) a phone-in service center in which Fund participants can request information concerning account balances."[13] Section 4.1 of the Agreement was ambiguously drafted and provides as follows: "Regal [shall] [shall not] be regarded as fiduciary for purposes of ERISA."[14] Section 8 of the Agreement contained an indemnification clause that provided the following:

> The Fund agrees to indemnify and hold harmless Regal and any and all of its affiliates, subsidiaries, directors, officers, employees, agents, contractors, and former employees from any and all claims related to the administration or operation of the Fund and services provided to Fund participants; provided, however, that notwithstanding the above, Regal shall be responsible for all claims arising from gross negligence, willful misconduct, knowing deviation from prudent practices, or any violation of established standards of care.[15]

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[8] *Id.*
[9] *Id.*
[10] *Id.* at 4.
[11] *Id.* at 2.
[12] *Id.* at 3.
[13] *Id.* at 4.
[14] *Id.*
[15] *Id.*

Defendant Raul Demisay served as Regal's principal consultant to the Fund from 1998 until he retired on March 10, 2020.[16] On February 21, 2020, right before Mr. Demisay retired, he had lunch at a Panera Bakery in Washington D.C. with a client from a separate ERISA plan that Regal also provided services for.[17] In addition to the defendant Fund, Regal provides services to the National Laborers Pension Fund and the National Laborers Health and Welfare Fund.[18] During lunch, the client sent an email with proposed edits to an actuarial valuation report, but Mr. Demisay could not download the file to his phone using cellular service.[19] To access the file, Mr. Demisay joined the Panera Wi-Fi, and as soon as the file downloaded to his computer, immediately turned off the Wi-Fi.[20] On the same day, at 12:32 PM, Mr. Demisay's laptop was hacked.[21] All of the data on the laptop, including Mr. Demisay's email and contact list, were copied to an unknown site on the dark web, including the contact information of Joe Schlitz from the Fund.[22]

Shortly after, at 1:09 PM, Mr. Schlitz received an email to his Fund-issued email from "Demisay.Raul@Reegal.com" which contained a computer link and the following poorly worded message: "Dear Joe, I retire from Regal after 35 yrs: I

[16] *Id.* at 2.
[17] *Id.*
[18] *Id.*
[19] *Id.* at 2–3.
[20] *Id.* at 3.
[21] *Id.*
[22] *Id.*

am very much liking to keep with you. Please click the link below so we stay better friendly. VTY Raul."[23] Mr. Schlitz clicked on the link, which opened a new web page on his computer; his computer froze for a moment and then rebooted.[24] At 1:16 PM, an Excel spreadsheet downloaded from Mr. Schlitz's computer, containing all of the Fund participants' names, addresses, emails, Social Security numbers, and designation of employers was uploaded to an untraceable site on the dark web.[25]

At 1:32 PM, Mr. Schlitz's computer account at the Fund authorized a wire transfer of substantially all of the money in the Fund's account at the Union National Bank, totaling roughly 2.5 million dollars, to an account at Globo Bank, N.A.[26] At 9:19 AM the next day, February 22, 2020, the transfer was completed and immediately thereafter the money was transferred from the account at GloboBank to accounts at other banking institutions.[27] It is believed that the attack was committed by a notorious Russian cyber-criminal, Igor Olegovich Turashev, and an accomplice.[28]

[23] *Id.* at 3.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*

In May of 2020, following the data breach, the Fund placed Mr. Schlitz on an administrative leave, and he has not yet returned to his duties at the Fund.[29] Regal has received calls and texts from approximately 126 of the people in Mr. Demisay's contact list, asking about the legitimacy of emails similar to that which Mr. Schlitz received.[30] Of those who have reached out to Regal, only nine have reported having actually clicked on the link.[31]

On March 31 of each year, the Fund makes cash distributions to each eligible participant based on each individual's balance in his or her bookkeeping account as of the end of the previous fiscal year.[32] But the Fund did not make any distributions on March 31, 2020, as the Fund had no liquid assets to distribute on that date.[33] Consequently, on May 15, 2020, Ms. Connolly sent a letter to the Board demanding that the Fund pay her the benefits she earned.[34] On May 31, 2020, the Board replied by stating that the Fund was undergoing an extensive audit of certain "banking issues" and would be delayed indefinitely in making distributions.[35]

[29] *Id.* at 5.
[30] *Id.*
[31] *Id.*
[32] *Id.* at 4.
[33] *Id.* at 5.
[34] *Id.*
[35] *Id.*

In early July of 2020, Ms. 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.[36] In the letter, Ms. Connolly notified the Board that she holds the Board, the Fund, and everyone involved in the administration of the Fund responsible for the theft.[37] Later in July, the Board replied, expressing that they were sorry to learn about the theft of Ms. Connolly's identity and assets but that the Fund and the Board could not accept any responsibility for it.[38] The Fund Participants then filed this lawsuit on September 1, 2020, in the United States District Court for the District of Columbia.[39]

The Fund Participants allege that that each of the defendants are fiduciaries under ERISA and each failed in their duty to prudently administer and safeguard the Fund's plan assets, including its information and data.[40] The Regal Defendants immediately filed a motion to dismiss because Appellants failed to show that the Regal Defendants are fiduciaries under ERISA, the information that was stolen from the Fund did not constitute "plan assets," and the allegations in the Complaint do not rise to the level of "gross negligence, willful misconduct, knowing deviation

[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.* at 5–6.
[40] *Id.* at 6.

from prudent practices, or any violation of established standards of care."[41] For these reasons, the United States District Court for the District of Columbia, Honorable Thomas C. Farnam presiding, granted the Regal Defendants' motion and dismissed the matter with prejudice.[42] After filing the appeal to this Court, the Fund Participants and all defendants entered into a Partial Global Settlement, preserving for this appeal only the two issues set forth above.

ARGUMENT

I. Standard of Review

The district court's decision to dismiss the Fund Participants' Complaint for failure to state a claim is reviewed *de novo.*[43] To survive a motion to dismiss, a complaint must allege "enough facts to state a claim to relief that is plausible on its face."[44] Additionally, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."[45] Determining plausibility is a "context-specific task that requires the reviewing court to draw on its juridical experience and common sense."[46] "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

[41] *Id.* at 6.
[42] *Id.* at 9–12.
[43] *Paulsen v. CNF Inc.*, 559 F.3d 1061, 1071 (9th Cir. 2009).
[44] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).
[45] *Id.*
[46] *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

Plan."[47] The Fund Participants have failed to make the requisite showing, and the district court's decision should be affirmed.

II. The Fund Participants cannot establish that Regal is either a named fiduciary under the Agreement or a functional fiduciary under ERISA, and therefore, the district court's decision should be affirmed and claims against Regal should be dismissed.

To state a fiduciary breach claim against the Regal Defendants, the Fund Participants must establish that the Regal Defendants are fiduciaries under ERISA. Simply stated, Appellants' argument fails at the threshold because they cannot plausibly allege that Regal is a named, nor a functional fiduciary under ERISA. The language within the Agreement between Regal and the Fund renders it impossible to conclude that Regal voluntarily agreed to accept fiduciary responsibility for the Fund, and a reading of the Agreement as a whole indicates that the parties did not intend Regal to be a named fiduciary. Additionally, Regal's purely ministerial role as a recordkeeper, DOL guidance, and legal precedent framing rights to personal data and information as privacy—not property—rights, as well as policy considerations, point to the fact that data and information are not "plan assets" under ERISA, and Regal is not a functional fiduciary.

A. The language within the Agreement between Regal and the Fund is ambiguous and indicates that the parties did not intend Regal to be a named fiduciary.

[47] *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594–95 (8th Cir. 2009) *citing Pegram v. Herdrich*, 530 U.S. 211, 225–26 (2000); *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 917 (8th Cir. 1994).

The Fund Participants must establish that Regal is a fiduciary of the Fund in order to state a sufficient claim.[48] "There are two types of fiduciaries under ERISA. First, a party that is designated 'in the plan instrument' as a fiduciary is a 'named fiduciary.'"[49] An employee benefit plan must be established and maintained pursuant to a written agreement that provides for one or more "named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan."[50] Named fiduciaries may also be, "pursuant to a procedure in the plan, [] identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly."[51]

"Since ERISA does not contain a body of contract law to govern the interpretation and enforcement of [plan documents], appropriate state contract law should apply . . . unless the application of state law. . . would be contrary to the provisions of ERISA."[52] A contract is ambiguous "where the contract is susceptible

[48] *See Pegram v. Hedrich*, 520 U.S. 211, 226 (2000).
[49] *Bafford v. Northrop Grumman Corp.*, 994 F.3d 1020, 1026 (9th Cir. 2021) citing *Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643, 653 (9th Cir. 2019).
[50] 29 U.S.C. § 1102(a)(1).
[51] 29 U.S.C. § 1102(a)(2).
[52] *Rockney v. Blohorn*, 877 F.2d 637, 643–44 (8th Cir. 1989) (citing *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1501–02 (9th Cir. 1985); *Helms v. Monsanto, Inc.*, 728 F.2d 1416, 1420 (11th Cir. 1984).

of more than one meaning."[53] When language is ambiguous within a contract clause, courts look to the contract as a whole for interpretation of its meaning.[54]

The language within the Agreement between Regal and the Fund is ambiguous and makes it impossible to conclude that the parties intended Regal to be a named fiduciary. Section 4.1 of the Agreement provides that "Regal [shall] [shall not] be regarded as a fiduciary for purposes of ERISA."[55] This clause is, as the district court recognized, "extremely poor[ly]" drafted, and open to two different interpretations: that Regal was intended to be a fiduciary of the Fund, or that Regal was not intended to be a fiduciary of the Fund.[56]

Looking to other provisions within the contract, Section 8 indicates that the parties did not intend Regal to be a named fiduciary. Section 8 of the Agreement provides that

> The Fund agrees to indemnify and hold harmless Regal and any and all of its affiliates, subsidiaries, directors, officers, employees, agents, contractors, and former employees from any and all claims related to the administration or operation of the Fund and services provided to Fund participants; provided, however, that notwithstanding the above, Regal shall be responsible for all claims arising from gross negligence, willful misconduct, knowing deviation from prudent practices, or any violation of established standards of care.[57]

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[53] *Sumitomo Mach. Corp. of Am., Inc. v. AlliedSignal, Inc.*, 81 F.3d 328, 332 (3d Cir. 1996).
[54] Restatement (Second) of Contracts § 202 (1981).
[55] *Connolly, et al., v. Nat'l. Laborers Holiday and Vacation Fund, et al.*, Civil Action 20-cv-599-TCF, at *4 (D.D.C. Nov. 30, 2021).
[56] *Id.* at 9, 12.
[57] *Connolly*, Civil Action 20-cv-599-TCF, at *4 (2021).

ERISA prohibits, "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part."[58] The courts have interpreted this provision as indicating that Congress' established minimum standards of care appropriate for ERISA fiduciaries are not subject to modification, recognizing that "a contract exonerating an ERISA fiduciary from fiduciary responsibilities is void as a matter of law" and "any interpretation of [a] Plan which prevents individuals acting in a fiduciary capacity from being found liable as fiduciaries is void."[59]

Section 8 effectively indemnifies Regal from liability arising out of claims related to the administration or operation of the Fund. If the parties intended for Section 4.1 to name Regal as a fiduciary, Section 8 would be meaningless, as it would, in turn, be void under Section 410(a) of ERISA.

Additionally, if the parties intended that Section 4.1 designate Regal as a named fiduciary, including language in Section 8 that states "Regal shall be liable for . . . knowing deviation[s] from prudent practices, or any violation of established standards of care"[60] would be redundant and unnecessary. If Regal was a named fiduciary, then it would not be logical to include the Section 8 language that, as the district court theorized, may have "intended to invoke the ERISA duty of

[58] ERISA § 410(a).
[59] *IT Corp. v. Gen. Am. Life Ins. Co.*, 107 F.3d 1415, 1418 (9th Cir. 1997).
[60] *Connolly,* Civil Action 20-cv-599-TCF, at *4 (2021).

prudence,"[61] when those fiduciary duties automatically arise if the fiduciary is named in the contract. Therefore, the inclusion of the Section 8 indemnification clause suggests that Regal and the Fund did not intend that Regal be a named fiduciary under Section 4.1 of the Agreement.

As the district court properly concluded, based on the language in the Agreement, it is "impossible" for a court to "find that the Regal Defendants voluntarily undertook ERISA fiduciary duties."[62] The terms of the Agreement do not explicitly name Regal as a fiduciary. The plain terms of the Agreement are—at best—ambiguous, and the Agreement, when read as a whole, supports the conclusion that Regal is not a named fiduciary. Therefore, this Court should affirm the district court's conclusion that Regal is not a named fiduciary.

B. Regal is not a functional fiduciary because it is a mere recordkeeper who performs ministerial tasks, and data and information are not "plan assets" under ERISA.

Because Regal is not a named fiduciary under the Agreement, the Fund Participants must establish that the Regal Defendants acted as functional fiduciaries,[63] which they have failed to do. Under § 1002(21)(A), the Regal defendants can be a functional fiduciary only if they "(i) exercised discretionary authority or discretionary control respecting management of the Fund or exercised

[61] *Id.* at 12.
[62] *Id.* at 9, 12.
[63] *See Bafford*, 994 F.3d at 1026 (2021).

any authority or control respecting management or disposition of the Fund's assets, or (ii) had discretionary authority or discretionary responsibility in the administration of such Fund."[64]

It is well established that where a person or entity merely performs ministerial, no fiduciary status arises.[65] However, "a third-party administrator performing the [ministerial] tasks described in the DOL regulation can nevertheless acquire fiduciary status where, in addition to its other actions, it exercises control over plan assets."[66] The Eighth and Tenth Circuits have adopted a two-part test to determine when a service provider, such as Regal, acts as a fiduciary.[67] Under this test, 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.'"[68]

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[64] 29 U.S.C. § 1002 (21)(A).
[65] *See* 29 C.F.R. § 2509.75–8 at D-2. *See also Gomez-Gonzalez v. Rural Opportunities, Inc.*, 626 F.3d 654 (1st Cir. 2010) (employer receiving ERISA disability benefits claims, completing employer portion of the form, and passing on forms to the plan administrator for determination was not a fiduciary under ERISA); *Pacificare v. Martin*, 34 F.3d 834 (9th Cir. 1994) (third party administrators merely performing ministerial functions, including preparation of financial reports, are not ERISA fiduciaries); *Pohl v. Nat'l. Ben. Consultants*, 956 F.2d 126, 129 (7th Cir. 1992) (insurance companies engaging in the performance of their normal contractual claims handling responsibilities are not fiduciaries).
[66] *Briscoe v. Fine*, 444 F.3d 478, (6th Cir. 2006).
[67] *Teets v. Great-West Life & Annuity Ins. Co.*, 921 F.3d 1200 (10th Cir. 2019); *Rozo v. Principal Life Ins. Co.*, 949 F. 3d 1071 (8th Cir. 2020).
[68] *Rozo*, 949 F. 3d at 1071 (2020) (quoting *Teets*, 921 F.3d at 1200 (2019)) (emphasis added).

Because entities or persons who have discretion to manage or invest plan assets may incur fiduciary responsibilities in handling those assets, the definition of a plan asset is a key to imposing fiduciary responsibility.[69] However, with the exception of plan investments and participant contributions—neither of which are at issue here—ERISA does not explicitly define the term "plan assets."[70] Instead, ERISA's definition of "plan assets" states the following: "the term 'plan assets' means plan assets as defined by such regulations as the Secretary [of Labor] may prescribe."[71]

When interpreting ERISA, this Court must look at the plain language first.[72] A fundamental canon of statutory construction is that words generally should be interpreted as taking their ordinary, contemporary, common meaning at the time Congress enacted the statute.[73] Additionally, "a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration."[74] Accordingly, this Court should give deference to the guidelines of the Department of Labor ("DOL"), as the enforcing agency of ERISA, in understanding ERISA's intent.

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[69] Barry Salkin, *Guide to ERISA Fiduciary Duties, 200. Investment Considerations, Chapter 30. Fiduciary Standards: What Is a Plan Asset?*
[70] *See* 29 C.F.R. § 2510.3–101, 3–102.
[71] 29 U.S.C. § 1002.
[72] *See Duncan v. Walker*, 533 U.S. 167, 172 (2001).
[73] *See Wisconsin C. Ltd. v. U.S.*, 138 S. Ct. 2067 (2018).
[74] *N.L.R.B. v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 274–75 (1974).

The DOL has published a series of advisory opinions stating that assets of the plan are generally to be identified on the basis of ordinary notions of property rights under non-ERISA law, and may include any property in which the plan has a beneficial ownership interest.[75] Agency interpretations in opinion letters are "entitled to respect" to the extent they have the "power to persuade,"[76] and most circuit courts have accepted these advisory opinions as persuasive in interpreting ERISA's definition of "plan assets."[77]

Regal is a purely ministerial service provider, operating entirely in line with the specific terms set out in its arm's-length agreement with the Fund. Regal is merely a third party recordkeeper that performs the following functions: "(i) maintenance of records for the Fund and (ii) a phone-in service center in which Fund participants can request information concerning account balances."[78] It is well-settled that the wholly administrative services Regal provides to the Fund do not warrant transformation into the role of a functional fiduciary. None of the

[75] *See, e.g.,* U.S. Dep't of Labor, Advisory Op. No. 93–14A (May 5, 1993).
[76] *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).
[77] *See The Depot, Inc. v. Caring for Montanans*, 915 F.3d 643 (9th Cir. 2019); *Gordon v. Cigna Corp.*, 890 F.3d 463, 472 (4th Cir. 2018); *Merrimon v. Unum Life Ins. Co.*, 758 F.3d 46, 56 (1st Cir. 2014); *HiBox Controls, Inc. v. BCBS of Mich.*, 751 F.3d 740, 745 (6th Cir. 2014); *Tussey v. ABB, Inc.*, 746 F.3d 327, 339 (8th Cir. 2014); *In Re: Luna*, 406 F.3d 1192, 1199 (1st Cir. 2005); *Faber v. Metro Life Ins. Co.*, 648 F.3d 98, 105–06 (2d Cir. 2011); *Edmonson v. Lincoln Nat'l. Life Ins. Co.*, 725 F.3d. 406, 427 (3d Cir. 2013).
[78] *Connolly, et al., v. Nat'l. Laborers Holiday and Vacation Fund, et al.*, Civil Action 20-cv-599-TCF, at *4 (D.D.C. Nov. 30, 2021).

terms within the Agreement between Regal and the Fund give Regal discretion to manage "plan assets." However, Appellants allege that simply because Regal maintains participant data and information, it exercises discretion over ERISA "plan assets." This broad-sweeping definition of "plan assets" has consistently been rejected by other courts, and with good reason. Holding that data and information are ERISA "plan assets" not only contradicts DOL guidance, but will result in adverse consequences to the future of third party administrators.

Black's Law Dictionary defines the term "asset" as "an item that is owned and has value."[79] While data and information may have value, none of the DOL's regulations defining "plan assets" supports the claim that data and information constitute ERISA plan assets. In fact, there is not a single case to support this claim. Not one. To the contrary, there are *multiple* cases that dismiss the theory that data and information are considered plan assets under ERISA.[80]

Following the DOL's guidance that assets of the plan are generally to be identified on the basis of ordinary notions of property rights, several courts have

[79] *Asset*, Black's Law Dictionary (11th ed. 2019).
[80] *See Harmon v. Shell Oil Co.*, No. 3:20-CV-00021, 2021 WL 1232694, at *3 (S.D. Tex. Mar. 30, 2021) (holding that "participant data are not plan assets under ERISA"); *Patient Advocates, LLC v. Prysunka*, 316 F. Supp. 2d 46, 49 (D Me. 2004) (holding that "data or information that a plan administrator accumulates in the course of administering a plan are certainly not conventional 'plan assets.'"); *Walsh v. Principal Life Insurance Co.*, 266 F.R.D. 232, 248 (S.D. Iowa 2010) (holding that "while it may be improper under certain circumstances for a service provider to use confidential information for its own benefit, such an act is not a basis to conclude that the service provider is a fiduciary for purposes of ERISA.").

concluded that while rights to data and information may be constitute privacy rights, they do not constitute property rights. In *Divane v. Northwestern University*, the court dismissed claims alleging that a plan sponsor violated its fiduciary duty by permitting the plan's recordkeeper to market products using participant data and information.[81] The court recognized that while data and information have value, it could not "conclude that [participant data and information] is a plan asset under ordinary notions of property rights" and that "[i]t does not appear that courts have recognized a property right in such information."[82] In *Remijas v. Neiman Marcus*, hackers stole credit card information from Neiman Marcus customers, who in turn brought suit against the luxury department store, arguing that the stolen personal information was a property right.[83] The Seventh Circuit declined to assert that protection of personal information is a recognized property right, noting that the argument "assumes that federal law recognizes such a property right."[84]

In addition to legal precedent, the language in the DOL's Form 5500 reinforces the fact that the DOL has never considered data and information to be a plan asset under ERISA. Form 5500 requires disclosure of information concerning

[81] *Divane v. Nw. Univ.*, No. 16 C 8157, 2018 WL 2388118, at *1, (N.D. Ill. May 25, 2018), *aff'd*, 953 F.3d 980 (7th Cir. 2020), *vacated and remanded on other grounds sub nom. Hughes v. Nw. Univ.*, 142 S. Ct. 737 (2022).
[82] *Id.* at *12.
[83] *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688 (7th Cir. 2015).
[84] *Id.* at 695. *See also Sexton v. Runyon*, No. 1:03-CV-291-TS, 2005 WL 2030865, at *8 (N.D. Ind. Aug. 23, 2005 ("the law does not frame [private personal information] as property rights.")

an ERISA plan assets.[85] Significantly, Form 5500 does not identify confidential data and information as assets. Instead, the DOL's form defines "assets" as cash, receivables, general investments, employer-related investments, real estate, and other property used in plan operations.[86] None of these assets are remotely related to confidential data and information.

From a policy standpoint, defining data and information as "plan assets" would lead to a multitude of problems inconsistent with the purpose of ERISA. Transforming third-party recordkeepers into fiduciaries simply because they have access to participant data and information would add an additional complexity to what is already complex plan administration. This kind of precedent would adversely impact third party administrators' ability to provide services to plans, which will ultimately be born by fund participants and beneficiaries in the form of higher administrative costs. To be sure, imposing this kind of fiduciary liability on third party administrators will also reduce the number of entities that are willing to provide such services. Additionally, defining data and information as plan assets would preclude plan fiduciaries from sharing participant data with consultants and state governments, which plays a significant role in improving ERISA as a whole.

[85] *See* 29 U.S.C. § 1023(a)(1)(A).
[86] U.S. Dep't of Labor, Schedule H (Form 5500), https://www.dol.gov/sites/dolgov/files/EBSA/employers-and-advisers/plan-administration-and-compliance/reporting-and-filing/form-5500/2021-schedule-h.pdf.

III. Even if Regal were a fiduciary, they are still not liable under ERISA because they did not breach their fiduciary duty and they are entitled to indemnification by the Fund.

The Fund Participants assert their claims under Section 502(a)(3) of ERISA, which allows a plan "participant" to bring an action for "appropriate equitable relief" to enjoin any act that violates the terms of the plan or any provision or ERISA or to obtain "appropriate equitable relief" to redress such violations. Thus, to state a Section 502(a)(3) claim, the Fund Participants must allege plausible facts that there is a remediable wrong and that the relief sought is "appropriate equitable relief." Though the complaint makes a conclusory statement that the Regal Defendants breached their fiduciary duty in violation of ERISA, it fails to allege any facts that support this claim. And even if they had, Regal cannot be held liable, as they are entitled to indemnification by the Fund.

A. The Regal Defendants did not breach their fiduciary duty under ERISA.

Though the district court was correct in finding that Regal was not a fiduciary, it was incorrect in concluding that if Regal was a fiduciary, they breached the ERISA duty of prudence because the complaint failed to allege facts necessary for establishing such a breach.

There is no "nexus" between the wrongdoing alleged in the Complaint and Regal's performance of fiduciary functions for the Fund.

The threshold question for every case charging breach of ERISA fiduciary duty is "not whether the actions of some person employed to provide services

under a plan adversely affected a plan beneficiary's interest, but whether that person was acting as a fiduciary (that is, was performing a fiduciary function) *when taking the action subject to complaint*."[87] This is so regardless of whether the party is a named or functional fiduciary.

Under ERISA white, a functional fiduciary owes a fiduciary duty only "to the extent" that they exercise discretion or control over management of a plan or its assets, render investment advice for compensation, or enjoy discretionary authority or responsibility in administration of the plan.[88] The phrase "to the extent" has led courts to interpret this provision as "requiring a 'nexus' between the alleged basis for fiduciary responsibility and the wrongdoing alleged in the complaint."[89] And even in actions against named fiduciaries, courts have held that "the alleged wrong must occur in connection with the performance of a fiduciary function to be cognizable as a breach of fiduciary duty."[90]

Implicit in these holdings is the requirement that the party be acting as a fiduciary of the specific plan involved in the litigation. And though a party may be

[87] *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000) (emphasis added).
[88] 29 U.S.C. § 1002(21)(A).
[89] *McCaffree Fin. Corp. v. Principal Life Ins. Co.*, 811 F.3d 998, 1002 (8th Cir. 2016) (quoting *Santomenno ex rel. John Hancock Tr. v. John Hancock Life Ins. Co.*, 768 F.3d 284, 296 (3d Cir. 2014)).
[90] *Bafford v. Northrop Grumman Corp.*, 994 F.3d 1020, 1028 (9th Cir. 2021); *see also Livick v. Gillette Co.*, 524 F.3d 24 (1st Cir. 2008); *Dawson-Murdock v. Nat'l Counseling Grp., Inc.*, 931 F.3d 269, 278 n.13 (4th Cir. 2019) ([T]here is no liability for breach of fiduciary duty if the challenged conduct . . . is not fiduciary in nature, as there can be no breach of a nonexistent fiduciary duty.").

a fiduciary of multiple plans, "'each plan is a separate entity' and a fiduciary's duties run separately to each plan."[91]

The facts alleged in the complaint belie a finding that Regal breached their fiduciary duty. The "wrongdoing" or "action subject to complaint" was the brief use of a public Wi-Fi network by Regal's then-principal consultant, Mr. Demisay. But when Mr. Demisay joined the Wi-Fi network, he was not performing a fiduciary function for the Fund. Rather, he was meeting with an entirely separate client from a different ERISA plan, and he used the Wi-Fi network to download edits to a report from that client. Perhaps Mr. Demisay was a fiduciary to that plan, and perhaps he was acting as a fiduciary to that plan when he took the action subject to this complaint. But his fiduciary duties to that plan are entirely separate from any duties he would have had to the Fund, if he was indeed a fiduciary to the Fund. Thus, even if Regal had been a named or functional fiduciary to the Fund, the wrongdoing alleged by the Fund Participants in the complaint lacks any connection to Regal's performance as a Fund fiduciary.

The Complaint fails to assert that the alleged wrongs committed by the Regal Defendants amounted to a breach of their fiduciary duties.

Assuming, *arguendo*, that the complaint had alleged that Mr. Demisay was acting as a fiduciary for the Fund when he joined the public Wi-Fi network, it still

[91] *Peterson on behalf of E v. UnitedHealth Grp. Inc.*, 913 F.3d 769, 776 (8th Cir. 2019) (quoting *Standard Ins. Co. v. Saklad*, 127 F.3d 1179, 1181 (9th Cir. 1997)).

failed to allege that such an action was a breach of duty under ERISA. ERISA imposes on fiduciaries duties of loyalty, prudence, diversifying investments, and acting in accordance with plan documents.[92] The duty of prudence encompasses the requirement that fiduciaries 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."[93] "A fiduciary's duty of prudence traditionally arises in the context of making investments on behalf of an ERISA plan."[94] And while the duty of prudence has been found to also apply to a general duty of care[95], courts have noted that no case has ever held the release of confidential information or the failure to safeguard data and prevent scams to constitute a breach of fiduciary duty under ERISA.[96]

Even if this Court were to find that participant data is a plan asset and that Regal, if they were a fiduciary, had a duty to safeguard such data and affirmatively prevent its release and protect it from scams, such measures need only meet the so-called "Prudent Man" standard outlined in ERISA. In determining what is prudent

[92] 29 U.S.C. § 1104(a).
[93] *Id.* § 1104(a)(1)(B).
[94] *Bartnett v. Abbott Lab'ys*, 492 F. Supp. 3d 787, 797 (N.D. Ill. 2020) (citing *Tibble v. Edison International*, 575 U.S. 523 (2015)).
[95] *See Pension Ben. Guar. Corp. ex rel. St. Vincent Cath. Med. Centers Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 716 (2d Cir. 2013).
[96] *See, e.g.*, *Divane v. Nw. Univ.*, 2018 WL 2388118, at *12 (E.D. Ill. May 25, 2018), *aff'd on other grounds*, 953 F.3d 980 (7th Cir. 2020); *Bartnett*, 492 F. Supp. 3d at 797.

regarding the safeguarding of assets and protection of information, the recently released Department of Labor (DOL) guidance on best practices in cybersecurity can be illuminating. The guidance recommends many protective and preventative measures such as implementing a cybersecurity program, conducting risk assessments, encrypting data, providing cybersecurity training, etc.[97]

The Fund Participants make no allegations that Regal did not have a cybersecurity program, did not conduct risk assessments, did not provide training, did not encrypt their data, or in any way did not act as a prudent fiduciary would under the prevailing standards of care. Their only allegations in regard to the Regal defendants are that (1) Mr. Demisay joined a public Wi-Fi network using his company-issued laptop and (2) Regal did not retrieve the laptop in a timely manner. It is far from certain that these alleged wrongs fall below the standard of prudence required under ERISA.

But perhaps most importantly, the Fund Participants allege in their complaint that Regal "failed in their duty to prudently administer and safeguard [the Fund's] assets."[98] Yet the facts incorporated into the complaint offer no support for that claim. Taken as true that the Fund beneficiaries' information and

[97] U.S. Dept. of Labor, Emp. Benefits Sec. Admin., *Cybersecurity Program Best Practices* 1 (2021).
[98] *Connolly, et al., v. Nat'l. Laborers Holiday and Vacation Fund, et al.*, Civil Action 20-cv-599-TCF, at *1 (D.D.C. Nov. 30, 2021).

data is an asset; and taken as true that the Regal Defendants owe a fiduciary duty; and taken as true that Mr. Demisay and Regal fell below the ERISA standard of prudence in joining a public Wi-Fi network and failing to timely recover the laptop, respectively, the complaint does not allege "enough facts to state a claim to relief that is plausible on its face"[99] for the simple reason that it fails to state anywhere that such actions pertained to *the Fund's assets* (i.e., Fund data).

Nowhere do the Fund Participants allege that plan data was on Mr. Demisay's computer. Rather, the facts of the complaint state only that Mr. Demisay's personal email and contacts were stolen. The plan data was taken directly from the Fund, not from either Regal Defendant. And any argument that the Fund Participants may make that the loss of the Fund's data stemmed from Regal's failure to retrieve the laptop is contradicted by the incorporated Audit Report. Mr. Demisay's laptop was hacked at 12:32 p.m. on February 21, 2020. The Fund data was stolen from Mr. Schlitz's computer 44 minutes later. The complaint fails to state at what time Regal became aware that Mr. Demisay's laptop had been hacked, but it is certainly not plausible that they could have been aware of the hack, known what information had been taken, and acted to alert any of Mr. Demisay's contacts of a potential scam in 44 minutes.

[99] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Thus, the claim that Regal failed to prudently safeguard plan assets is not plausible on its face because no facts allege that, *in regard to plan data*, the Regal Defendants acted in any way other than with the care, skill, and diligence that a prudent man in like circumstances would use.

B. Regal should be indemnified by the Administrative Services Agreement.

Even if this Court were to find that the Regal Defendants are fiduciaries and breached their duty of prudence under ERISA, they are entitled to indemnification from the Fund because the loss of plan assets is substantially, if not entirely, the fault of the Fund. And if the Regal Defendants are not considered fiduciaries, they still cannot be held liable to the Fund under the terms of the Agreement because their actions do not rise to the level of gross negligence or willful misconduct.

1. Because the Fund is substantially more at fault than Regal, Regal is entitled to indemnity.

While it is true that under certain circumstances, ERISA allows liability to attach to one fiduciary for the actions of a co-fiduciary,[100] many courts (including the district court in this case) have also found that ERISA allows for claims of contribution and indemnity.[101] In doing so, the courts have grounded their decisions in principles of trust law.[102] The Restatement (Second) of Trusts states

[100] 29 U.S.C. § 1105(a).
[101] *See, e.g.*, *Leventhal v. MandMarblestone Grp. LLC*, No. 18-CV-2727, 2020 WL 2745740, at *4 (E.D. Pa. May 27, 2020); *Free v. Briody*, 732 F.2d 1331, 1338 (7th Cir. 1984).
[102] *Leventhal*, 2020 WL 2745740, at *4.

that "where two trustees are liable to the beneficiary for a breach of trust, each of them is entitled to contribution from the other, except that (a) if one of them is *substantially more at fault than the other*, he is not entitled to contribution from the other but *the other is entitled to indemnity from him*."[103]

Thus, even if this Court were to find that Regal could be liable as a co-fiduciary or that Regal in some way breached a fiduciary duty themselves, they still cannot be liable to the Fund because the Fund Defendants are substantially more at fault. As explained above, the only negligent action taken by Mr. Demisay was in briefly joining a public Wi-Fi network. But the plan data was not taken from Mr. Demisay's laptop. The Fund Participants have made no allegations that Regal had faulty cybersecurity measures or were not in total compliance with prevailing DOL regulations regarding plan data. And Regal's delay in retrieving Mr. Demisay's laptop cannot be argued to have contributed to the loss because the events unfolded far too quickly for them to initiate preventative action.

In contrast, Mr. Schlitz clicked on a link from a fairly obvious scam email. He did not immediately alert anyone after he clicked the link and his computer froze. Clicking the link enabled hackers to download plan data and authorize a wire transfer of money in the Fund's account. All of this supports a conclusion that the Fund was not in compliance with the DOL regulations on cybersecurity, as it

[103] Restatement (Second) of Trusts § 258 (1959) (emphasis added).

seems doubtful that Mr. Schlitz had received cybersecurity training or that the Fund had encryptions or protections that would have prevented a hacker from being able to completely control Mr. Schlitz's computer from merely opening a link. But even if they had, it is clear that the data loss is substantially the fault of Mr. Schlitz and the Fund and that Regal should thus be entitled to indemnity.

2. Raul Demisay and Regal's actions do not rise to the level of gross negligence or willful misconduct.

If this Court finds that Regal is not a fiduciary, it still cannot be liable to the Fund under the terms of the Administrative Services Agreement because neither of the Regal Defendants acted with gross negligence or willful misconduct. And to the extent that the language in the Agreement regarding prudent practices and established standards of care invokes the ERISA duty of prudence, we have already shown that Regal did not breach that duty, even if they were a fiduciary.

"Gross negligence" has been defined in many ways by many courts, but what is clear is that it is a substantially higher standard than ordinary negligence.[104] Black's Law Dictionary defines it as "[a] conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party."[105] It defines willful misconduct with an even higher standard—as a violation of duty "committed voluntarily and intentionally."[106]

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[104] *See Negligence*, Black's Law Dictionary (11th ed. 2019).
[105] *Id.*
[106] *Misconduct*, Black's Law Dictionary (11th ed. 2019).

There can be no serious argument that either Regal Defendant acted with gross negligence or willful misconduct. Mr. Demisay, though perhaps negligent in using a public Wi-Fi network, did not connect to the network with the intent or even knowledge that doing so would result in his laptop being hacked. And previously stated, Regal's delay in retrieving the laptop did not contribute to the loss, but even if it had, such delay certainly was not taken in reckless disregard of their duty to the Fund or the consequences that might result. Thus, under Section 8 of the Agreement, Regal cannot be held liable for the losses incurred by the Fund.

CONCLUSION

For the reasons set out above, this Court should affirm the district court's decision to dismiss the Fund Participants' claims.

Respectfully submitted,
/s/ Team 2
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