Team 3

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.,

Appellant,

v.

Regal Consulting LLC, and Raul Demisay,

Appellee.

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

BRIEF FOR APPELLANT

Team 3
Counsel for Appellant

February 26, 2022

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JURISDICTIONAL STATEMENT

Participant, Renita Connolly, brought this claim pursuant to 29 U.S. Code § 1132. The United States District Court for the District of Columbia had jurisdiction of the case that is docketed 20-cv-599-TCF. The Honorable Thomas C. Farnman of the District of Columbia granted Defendant's, collectively "Regal Defendants" and "Fund Defendants", motions to dismiss on November 30, 2021. The matter was dismissed with prejudice pursuant to 29 U.S.C. § 1002, ERISA. This court has jurisdiction pursuant to 28 U.S.C. § 1291 as appellant Connolly filed a timely appeal in response to the final decision of lower court dated November 30, 2021.

ISSUES PRESENTED

Under 29 CFR § 2510.3-101 of ERISA, does the definition of "plan assets" include stolen participant data when the common law language and legislative history demonstrate participant data has inherent value?

Suggested Answer: Yes

Are Regal Defendants, by providing consulting, administration, and recordkeeping services, liable under ERISA for any loss suffered by the Fund and its participants?

Suggested Answer: Yes

STATEMENT OF THE CASE

On September 1, 2020, Ms. Renita Connolly ("Connolly") brought this civil action, on behalf of herself and all similarly situated participants, in the United States District Court for the District of Columbia. This civil action claim is against the Fund defendants, a multiemployer welfare benefit plan, The Board of Trustees of the National Laborers Holiday and Vacation Fund ("the Board") as the sponsor of the Fund, Letitia Beck and Joe Schlitz as the Fund's co-managers ("Managers"), which collectively are referred to as "Fund Defendants", as well as Regal

Consulting LLC ("Regal") and Raul Demisay, a retired employee of Regal, collectively known as "Regal Defendants". Connolly, et. al. v. Ntl. Laborers Holiday, et. al. No.: 20-cv-599-TCF, at 1 (D.D.C. Nov. 30, 2021) [hereinafter Op.]. Connolly brought this action under ERISA and the Plan alleging the Defendants had a breach of fiduciary duties in the obligations for the management of the Plan against all defendants and requesting that she be provided complete relief. Op at 6. Specifically, Connolly asserts the Fund breached the fiduciary duty of prudence in administering the Fund's assets, failing to safeguard and administer the assets, including the information and data. *Id*. Further, Connolly alleges this failure to safeguard and administer the assets ended in a data breach, ultimately resulting in her stolen identity and the contents of her bank account. Op at 5. As a result, Connolly requests to be rewarded equitable relief under Section 502(a)(3) and to have Regal replaced as the administrative services provider. Op at 6.

The Fund defendants and Regal defendants each filed motions to dismiss claims. Op at 6. These motions alleged Connolly had failed to demonstrate that Defendants are fiduciaries under ERISA. *Id.* The Fund Defendants alleged any loss suffered by the Fund and participants were as a result of actions or inaction by Regal and not the Fund. *Id*. Regal Defendants alleged the stolen participant data was not a "plan asset" under ERISA and their roles were merely ministerial, so the complaint did not rise to the level of "gross negligence, willful misconduct, knowing deviation from prudent practices or any violation of established standards of care". *Id*.

The lower court agreed with the defendants and granted the motions to dismiss, reasoning that neither of the Regal Defendants was a fiduciary under ERISA due to the language of the agreement making it impossible to conclude they had agreed to fiduciary duties. Op at 9. While the lower court held that the Fund was a fiduciary under ERISA, the court found that neither Regal defendant took unilateral action with respect to the Fund's operation. *Id*. Additionally, the lower

court found Connolly failed to allege Regal exercised fiduciary duties under 29 U.S.C. § 1104(a). Op at 10. The court stated that although Demisay and Regal had acted negligently, their conduct did not rise to the appropriate standard of "gross negligence and willful misconduct". Op at 12. Connolly timely appealed to the United States Court of Appeals for the Thirteenth Circuit. Plaintiffs and defendants entered in a Partial Global Settlement of the lawsuit following the appeal. Connolly now seeks an appeal on the issues of information and data as plan assets under ERISA and to hold Regal liable for the losses suffered by the Fund and participants.

STATEMENT OF THE FACTS

Renita Connolly deserves accountability for the devasting loss of her money and benefits. On February 21, 2020, Raul Demisay accessed his Regal work issued laptop on a free, public Wi-Fi network at a Panera Bakery chain. Op. at 2. Demisay was an employee of Regal, the company that worked with the Board on a multiemployer benefits plan that provided benefits to 1,321 participants and monitored $2,642,83.12 in assets. Op. at 2-3. Demisay made the decision to join the free, public Wi-Fi network after he could not access an AVR on his phone while he was going over proposed edits with a client. *Id.* Shortly after joining the unprotected network and not logging out of the Wi-Fi, Demisay's laptop was hacked and all of the protected client data was copied onto an unknown site on the dark web. Op. at 3. The events on February 21, directly lead to the loss of Connolly's benefits, identity, and all of the money in her bank account.

As a hardworking journeyman electrician for R.A. Grey Electric Company, Renita Connolly gratefully participated in several multiemployer plans, including the National Laborers Holiday and Vacation Fund, to aid in her planning for the future. Op. at 2. As part of the plan, each hour Ms. Connolly worked as a union employee, she would pay $1 into the Fund. Op. at 4. The Fund itself is comprised entirely of these contributions that are made by employers and the

earnings of their union employees. *Id.* On March 21 of each fiscal year, the Fund would then make cash distributions to each eligible participant of the balance in such eligible participant's bookkeeping account. *Id.* Ms. Connolly trusted the Fund, the fiduciaries, and the Board with her personal private information and relied on them to maintain the duties of prudence and loyalty required by ERISA.

The Defendant Fund is a multiemployer benefit plan with offices in Washington D.C., where Ms. Connolly resides. Op. at 2. The Board is a sponsor and named fiduciary of the Fund. *Id.* Regal provided consulting, administration, and recordkeeping services to the Fund. *Id.* The Fund and Regal had in place an Administrative Services Agreement that provided the terms of the services that Regal would provide. *Id.* The Agreement contained information on the "Contractual Duties" of Regal, the services that Regal shall provide, and the terms for which Regal shall be responsible for claims brought against the Fund.[1]

The aftermath of the breach of Demisay's laptop proceeded as follows. Merely half an hour later, Joe Schlitz, one of the Fund's co-managers, received an email from a suspicious email address. Op. at 3. Rather than investigate further, Schlitz clicked on the link from the unknown email address, causing his computer to freeze and reboot. *Id.* Not even ten minutes after Schlitz clicked on the email, an Excel spreadsheet containing every single participant of the Fund's name, address, email, Social Security number and designation of their employers was downloaded onto another untraceable site within the dark web. *Id.*

Within another 15 minutes, Schlitz's computer transferred the entirety of the money within the Fund's account, including the contributions Connolly had made through her union employment for her hours worked, to an account at Globobank. *Id.* The amount was $2,642,863.12. *Id.* The

[1]Full terms of the Fund's Administrative Services Agreement with Regal can be found at Op. 3-4

following morning, the transfer was complete, dispersing the money to other banking institutions and investing the assets of the account in Bitcoin. *Id.* When asked about the transfer, despite clicking on an unknown email link based on an emotional connection to a friend, Schlitz stated he had "no earthly clue" how the computer could have transferred all of the money and dispersed the participant's personal data. Op. at 5. Schlitz was placed on administrative leave on May 1, 2020. *Id.* Demisay retired on March 10. Op. at 3. Since that connection to the Panera Wi-Fi, approximately 126 different people have received emails such as the one Schlitz received. Op. at 5.

On March 31, 2020, despite having knowledge of the disbursement of personal data and the liquidation of the assets of the Fund, the Fund remained silent and did not make any distributions. Op. at 5. The Fund had no assets to distribute. *Id.* Having not received her expected benefits, and with no word from the Fund, on May 15, Ms. Connolly proactively sent a letter to the Board requesting the Fund pay her the benefits she had earned. *Id.* Sixteen days later, the Board replied with a letter stating they were having "banking issues" despite being aware of the cyberattack and leaked data. *Id.* Ms. Connolly's only information provided was that the distributions would be delayed indefinitely. *Id.*

In the following weeks, Ms. Connolly had her identity stolen. She had all of her hard-earned money transferred to an off-shore financial institution. She still had not received any of her benefits. *Id.* Ms. Connolly had not been given any information from the Board about the data breach. She sent a letter on July 1, notifying the Board of their responsibility for her stolen identity and the transfer of the entirety of her bank account. *Id.* Fourteen days later, the Board replied by letter stating they were denying any responsibility. *Id.*

Ms. Connolly filed a civil action on September 1, 2020, for herself and all of the participants who had their identities and money stolen. Op. at 5-6. She sued for accountability from the Fund for the stolen data, complete relief, and the Fund had failed in their duty to safeguard her assets. Op. at 6.

The District Court dismissed Connolly's lawsuit, claiming Demisay and Regal had not reached a level of "gross negligence and willful misconduct" and that, because Regal Defendants had poorly drafted their agreement, they could not be held liable for the data and monetary losses of the participants. *Id.* After Connolly appealed, Connolly and the Board entered into a Partial Global Settlement. *Id.* Ms. Connolly's appeal is now before the Thirteenth Circuit. *Id.* This Court should hold the Board accountable for their negligence and find that the stolen personal information was ERISA "plan assets" of the Fund and Regal is liable for losses suffered by the Fund and its participants. *Id.*

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit should reverse the district court's dismissal of Renita Connolly's complaint for relief under ERISA. 29 U.S.C. § 1002. Connolly's private participant information was a plan asset, negligently handled by the Defendants. Their incompetence as fiduciaries was a breach of duty that resulted in Connolly's stolen identity and liquidated bank account. Connolly's claims survive a Rule 12(b)(6) motion to dismiss because she asserted a plausible claim that her data is a plan asset under ERISA. Therefore, because Regal breached their fiduciary duties of loyalty and prudence in protecting Connolly's plan assets, Regal is liable under ERISA for the losses Connolly subsequently suffered.

The district court erred in finding Connolly's participant data is not a plan asset under ERISA for two reasons. The first is the statutory interpretation and legislative history requires

"plan assets" to be read broadly. ERISA's definitions of "plan assets" are defined by the Secretary of Labor, specifically 29 C.F.R. § 2510.3-101, and begin with the word "generally". Under canons of statutory interpretation, the intentional choice of words such as "generally" and "include" specifies the list is non-exhaustive. *United States v. S. Half of Lot 7 & Lot 8*, etc., 910 F.2d 488, 489 (8th Cir. 1990). Congress's intentional choice of words demonstrates a need for a broader reading of "plan assets". Additionally, Title I of ERISA specifically states the primary purpose of the statute is to protect plan participants. 29 U.S.C. § 1001 et seq. Courts should interpret statutory provisions by "reading the text in context and in light of the statutory purpose". *Gundy v. United States*, 139 S. Ct. 2116, 2119 (2019). The Department of Labor has stated plan assets should be defined as things, tangible or intangible, that have value under ordinary notions of property rights. Thus, Connolly's participant data had inherent, quantifiable value.

Second, Connolly's participant data should be protected as a plan asset by the high standards of fiduciary duties of loyalty and prudence required. 29 U.S.C. § 1104(a)(1). The Fund should be held responsible for participant data in situations where participant data is utilized egregiously. *Leventhal v. MandMarblestone Group LLC*, No. 18-cv-2727, 2020 U.S. Dist. LEXIS 92059, at *22 (E.D. Pa. May 27, 2020). Rather than being utilized to incur a profit, the Fund negligently mishandled Connolly's participant data, leading to an unaffiliated third party gaining her valuable information. Op. at 3. Therefore, under ERISA's high standards of prudence, the Fund mishandled the required control of Connolly's plan assets. This control and necessity for her participant data in order to have the Fund operate demonstrates her identifying information is a valuable plan asset. Because her participant data is a plan asset, Regal breached their fiduciary duties.

Regal Defendants are liable as fiduciaries under the multiemployer benefit plan for two reasons. First, Regal Defendants had discretionary authority and control over the plan assets of the Fund. Discretion is the standard for determining the fiduciary status, and Regal Defendants clearly exercised discretion over the plan assets. Regal Defendants were not bound to specific, set contractual terms and they had the ability to unilaterally make decisions for the Fund. Second, Regal Defendants had discretionary authority and responsibility in the overall administration of the plan. The tasks and services required of Regal Defendants were in no way ministerial and required discretion.

Since Regal Defendants were functional fiduciaries under the Fund, they were required to meet the ERISA duty of prudence. Regal Defendants clearly breached the duty of prudence. Demisay acted without the care and expertise necessary when accessing his work issued laptop on a public, unverified Wi-Fi network. The lack of prudence was clear, and Regal Defendants did not meet the duty of prudence that is required under ERISA. For these foregoing reasons, Connolly is entitled to equitable relief for the breach of prudence under ERISA § 502(a)(3).

ARGUMENT

The Thirteenth Circuit should reverse the district court's dismissal of Renita Connolly's suit in accordance with Rule 12(b)(6). Under the intended broad reading of the definition, Connolly's stolen participant data was a plan asset under ERISA. The ERISA statute should be construed by the courts to effectuate the written purpose, which is to protect plan participants. ERISA's legislative history and statutory interpretation demonstrates the broad reading of plan assets to include intangible items of value, such as identifying information, in the world of advancing technology. Finally, ERISA's high standards of prudence and loyalty require the Fund to properly control and protect participant data as a plan asset. Because participant data is a plan

asset, Regal breached their fiduciary duties. Regal Defendants by exercising control and authority over plan assets and administration of the Fund were functional fiduciaries. As a fiduciary, Regal Defendants had to meet the ERISA duty of prudence. They did not meet this duty, and are liable for equitable relief under ERISA.

I. THE DISTRICT COURT ERRED IN GRANTING DEFENDANT'S MOTIONS TO DISMISS UNDER RULE 12(B)(6)

The district court erred in dismissing Renita Connolly's suit in accordance with Federal Rule 12(b)(6). Op at 7. The courts review a grant of a Rule 12(b)(6) motion to dismiss de novo and should not be granted unless the plaintiff can in no way prove their set of facts to support their claim for relief. *Directv, Inc., v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). On appeal, the court will construe the complaint in the light most favorable to the plaintiff and accept the allegations as true for their review of the dismissed complaint. *Id*. The court will also "consider the complaint in its entirety" which includes "documents incorporated into the complaint by reference". *Solo v. United Parcel Serv. Co.*, 819 F.3d 788, 794 (6th Cir. 2016). Under Rule 12(b)(6), Conolly submitted a pleading that contained more than "an unadorned, the-defendant-unlawfully-harmed-me accusation". *Ashcroft v. Iqbal*, 566 U.S. 662, 678 (2009). The Fund's egregious misuse of her plan asset crossed the threshold from conceivable to plausible under the appropriate standard. *Bell Arl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Additionally, Connolly was never given an opportunity to submit an amended complaint. F.R.C.P. 15(a). The issue of law regarding her participant data as plan assets under ERISA and the Fund's breach in their fiduciary duties plausibly stated a claim for which relief can be granted. *Iqbal*, 556 U.S. at 678.

II. THE DISTRICT COURT SHOULD BE REVERSED BECAUSE CONNOLLY'S STOLEN PARTICIPANT INFORMATION AND DATA ARE PLAN ASSETS UNDER ERISA

ERISA's definitions of plan asset are broad. 29 U.S.C. § 1002(42). The broadness was intentional; it allows the statute to encompass valuable plan assets among a changing environment. This flexibility is especially prevalent in the world of advancing technology.[1] In dealing with reading potentially ambiguous statutes in the face of specific, changing contexts, Courts have often utilized statutory canons to aid their interpretation. Courts often interpret statutes with listed, individualized examples, such as the definition section of "plan assets", as being non-exhaustive. *Id*., *S. Half of Lot 7*, 910 F.2d at 489. ERISA's statute uses words such as "generally" and "includes", indicating broad readings. *Id*. Additionally, the court uses other areas of common law to interpret ERISA. *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 24 (1983). The Supreme Court has approved common law trusts and contracts to aid in interpreting the meaning of ERISA definitions. *Id*. Under this common law frame, plan assets encompass valuable private participant data, necessary for the Fund to function appropriately. Op at 3. Because statutory interpretation and common law language require a broader reading of "plan assets", Connolly's participant data was a plan asset under ERISA.

Furthermore, the Department of Labor has asserted common notions of property law help determine inclusions of plan assets under ERISA. 29 C.F.R. § 2510.3-101. These assets typically hold intrinsic value. This value can be quantified to determine plan assets. *Id*. In many cases, plans used participant data to inappropriately acquire substantial wealth through selling the private information. *See e.g. Harmon v. Shell Oil Co.*, No. 3:20-cv-00021, 2021 LEXIS 66312 (S.D. Tex. Mar. 30, 2021). These fiduciaries advertised specific plans for extensive

profits, backed by the intimate knowledge from the participant data. *Id*. The Fund's control of Connolly's private data ended in an even more egregious manner; her data was stolen from the Fund as a result of extreme negligence. Op at 5. An unaffiliated third-party hacker was then able to steal the entirety of her bank account. *Id*. Her private identity and data was the key to her monetary assets. The necessity of this information for the theft shows there is applicable quantitative value to her participant data. This interpretation of plan assets conforms with the Department of Labor regulations, which have expanded to advise on cybersecurity attacks typically ending in the detriment of participants.[2] Because ERISA's main purpose is to protect plan participants, this includes protecting participant data as a plan asset.

Finally, ERISA duties of prudence and loyalty impose an incredibly high standard on those who manage and control participant data. 29 U.S.C. § 1104(a)(1). Because of this high standard, the Fund was required to protect Connolly's information as a plan asset. These standards of duty and loyalty from fiduciaries requires protection of this sensitive, private information. Therefore, Connolly's information was a plan asset under ERISA.

A. UNDER ERISA, THE STATUTORY INTERPRETATION, LEGISLATIVE HISTORY AND COMMON LAW LANGUAGE COLLECTIVELY DEMONSTRATE PARTICIPANT DATA IS A PLAN ASSET

At the time ERISA was enacted in 1974, Congress did not have any accurate concept of the incredible progression of technologic advancements. Therefore, the concept of protection for cybersecurity hacks and data breaches could not be explicitly written into the statute. However, Congress' purpose and intent behind ERISA required extensive protections for participants' private data. 29 U.S.C. 1001 et seq. Courts should interpret and construe statutes to execute the written legislative purpose. *Gundy*, 139 S. Ct. at 2119. While many sections of ERISA are incredibly detailed regarding procedure and application, the scope of "plan assets" is broad. 29

U.S.C. § 1002(42). This allows room for interpretation. In response to ambiguous ERISA definitions, federal common law language aids the court in clarifying the proper definition. *Franchise Tax Bd.,* 463 U.S. at 24. The Supreme Court has approved the use of federal common law for ERISA statutory interpretation. *Id*. The Court reinforced the broad power Congress intentionally granted to the federal courts in interpreting ERISA. *Id*. These obligations in interpreting the federal common law of ERISA must be consistent with ERISA's purpose, even if the obligations are not written out in ERISA's statute. *Id*. Because ERISA has statutory gaps, the courts have looked to the common law of trusts. *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980). Additionally, the court in *Bellino v. Schlumberger Technologies*, *Inc.* extended these common law definitions to include contract common-law when ERISA is silent or ambiguous on an issue. 944 F.2d 26, 27 (1st Cir. 1991).

The common law meaning of "plan asset" at the time ERISA was enacted should be used to assist in interpreting this definition to include Connolly's participant data. Many of the "plan assets" under common law trusts encompassed a broad range of valuable assets. *Sec'y United States DOL v. Koresko*, 646 F. App'x 230, 232 (3d Cir. 2016). The use of common law of trusts demonstrates the need to read the term "asset" broadly. That interpretation includes items of value, such as participant data. At the time of ERISA's enaction, common law definitions of "plan assets" meant the data included intimate knowledge of financial and personal information. *Grindstaff v. Green*, 133 F.3d 416, 430 (6th Cir. 1998). When combined with the insider knowledge only fiduciaries possess of participant data, this private information, such as Connolly's identity, constitutes plan assets. Private information is intrinsically tied to the plan and necessary to keep the Fund operating appropriately. Fiduciaries of the plan can exploit participant data to their own advantage, gaining profit. Hackers can steal entire bank accounts using participant data. Op at 5.

This creates the type of quantifiable value included in the broad interpretation Congress intended for the definition of plan assets. This court should appropriately use the common law language of ERISA at the time the enactment, supported by the common law of trusts and contracts to determine Connolly's participant data was a plan asset.

1. **Plan assets have inherent, quantifiable value, making them a plan asset under the broad definition in ERISA**

Even though ERISA does not specifically define "plan assets", specifications of plan assets can be derived from Secretary of Labor's regulations on interpreting ERISA. 29 C.F.R. § 2510.3-101(a)(2). These regulations provide examples of different types of categories for plan assets. *Id*. Some of these categories include investments. *Id*. However, the listing under this specified statute is non- exhaustive. *Id*. Referring to the language of ERISA, the statute itself begins by utilizing the word "generally". 29 U.S.C. § 1002(42). This type of general opening indicates that, in accordance with statutory canons of interpretation, this list does not encompass everything that can be defined as a plan asset. *Gundy*, 139 S. Ct. at 2119. The statute reads on to state "the plan's assets include its investments". Many courts have commonly interpreted the word "include" in statutes to indicate only some examples, not a complete list. *S. Half of Lot 7*, 910 F.2d at 489. Congress is intentional with their choice of language; intentionally using both the words "generally" and "include" demonstrates the construction and definitions of the statute was intended to be broadly interpreted. *Id*.

Furthermore, the Department of Labor has stated "in situations outside the scope of the plan assets-plan investments regulation (29 C.F.R. § 2510.3-101), the assets of a plan generally are to be identified on the basis of ordinary notions of property rights under non-ERISA law." *See*, *e.g.*, Advisory Opinion 1993-14A. Under this notion, courts have commonly held plan assets, by definition, is anything of value to the plan. *Health Cost Controls v. Bichanich*, 968 F. Supp. 396

(N.D. Ill. 1997). Even under ordinary notions of property rights, participant data intrinsically and inherently has value. Participant data has value with regards to privacy and a person's security. Beyond these intangible notions of value, participant data has quantifiable, monetary value. An unaffiliated third-party stole the entirety of Connolly's bank account because of her misused identifying information. This third-party theft of her account demonstrates a concrete quantification of the value of her participant data. This type of quantification is even beyond the exploitation for valuable profits in *Harmon*. No. 3:20-cv-00021, 2021 LEXIS 66312. Connolly's participant identify can be quantified by the threat to her identity and invasion of privacy, as well as the value of the entirety of her bank account. Op at 8. Therefore, Connolly's personal identity and data has value, protecting this information as a plan asset under ERISA.

Many courts have employed the notion of this property test by assessing if the asset has inherent value, is capable of the assignment of value, or might be the subject of market forces. *Grindstaff,* 133 F.3d at 425. Several cases have come to the conclusion, and demonstrated through this property test, participant information is inherently valuable. *Id*. The court in *Cassell v. Vanderbilt University* resulted in a proposed settlement negotiation which required the university pay $14.5 million due to inappropriate use of participant data to market specific items to other participant. No. 3:16-cv-02086, (M.D. Tenn.). The court further specified the recordkeeper was no longer able to utilize the participant's to continually incur significant profits, demonstrating the value in this particular information. *Id*. The court in *Kelly v. Johns Hopkins University* reached a similar settlement, stressing the value of protecting participant data. No. 1:16-cv-2835-GLR, 2020 LEXIS 14772, at *1 (D. Md. Jan. 28, 2020).

Though settlements are not statements of law, these provisions provide important insight into the need to protect participant data because of its value. The district court in *Divane v.*

Northwestern Univ., though it dismissed the suit due to the nature of the TIAA, stated it had "no doubt that a compilation of the information TIAA has on participants has some value". No. 16 C 8157, 2018 LEXIS 87645, at *38 (N.D. Ill. May 25, 2018). Participant data is often utilized in an incredibly competitive market to obtain profits. *Id*. However, unlike the mere passive collection of data in *Patient Advocates, LLC v. Prysunka*, Connolly's information was specifically used for their inherent value. 316 F. Supp. 2d 46, 49 (D. Me. 2004). Her information provided the only key needed to transfer all of her money from her personal bank account to an off-shore location. Op at 5. Effectively, the value of her identity cost her the entirety of her bank account. *Id*. Her identity was worth protecting with the same level of vigilance as other valuable assets of the Fund. Therefore, this private data has intrinsic value as a plan asset under ERISA.

2. **Even if the statutory language of ERISA does not explicitly include private data, legislative history establishes private information as protected plan assets under ERISA**

In the midst of the intensifying cybersecurity issues, the Supreme Court has yet to issue a definitive ruling on whether private information and data is a plan asset under ERISA. The district court relied on only two district court dismissals, with incredibly different fact patterns, when they erred in dismissing Connolly's suit. *See Divane,* No. 16 C 8157, 2018 LEXIS 87645*, Harmon,* No. 3:20-cv-00021, LEXIS 66312. The defendants in *Harmon* voluntarily abused participant data for their own benefit. *Id*. The defendants obtained substantial revenue from using this private information through the sale of a variety of different types of accounts, including retirement accounts and life insurance accounts. *Id*. The court in *Harmon* erred in finding this substantial revenue did not amount to the level of value to constitute a plan asset under ERISA. *Id*. But regarding the participants' data, the defendants in *Harmon* would not have been able to acquire these extensive profits without the participant data. *Id*. This necessity makes participant data a

plan asset. The Fund did not voluntarily exploit Connolly's private information in the same manner. Instead of selling this information to affiliates, such as the selling of data in *Harmon* and *Divane*, Connolly's information was egregiously stolen and used to her detriment by an unrelated third party. Op at 5. This stolen data had inherent value, intrinsically tied to the hackers obtaining the entirety of her bank account. *Id*. The Funds misuse of her private data allowed hackers to gain the valuable information, leading to Connolly's stolen identity and the entirety of her monetary account. *Id*.

Moreover, the Seventh Circuit in *Divane* affirmed the motion to dismiss by stating that participant data was not a plan asset because "TIAA access to participants' information as necessary to serve as a record keeper". No. 16 C 8157, 2018 LEXIS 87645. Allowing a school access to view personal information is vastly different from Connolly's assertion for security in her personal identity from cyber-attacks. *Id*. The value of her personal identity is further emphasized from the detrimental resulting consequence, the entire liquidation of her bank account. Op at 5. In addition, the plaintiffs in *Divane* were able to file an amended complaint, sought to file a second amended complaint, and unduly delayed bringing claims. No. 16 C 8157, 2018 LEXIS 87645. The motion to dismiss in *Divane* and the exploitation of participants in *Harmon* should not be the deciding factors in Connolly's claims that her participant data was a plan asset, especially when she was not granted the opportunity to submit an amended complaint. *Id*. The misuse of her secure data highlights the importance of protecting the participant data as a plan asset.

When the Supreme Court reviewed the fee issue on appeal in *Divane*, the Court utilized the word "asset" to include individual accounts, regular account statements, and participants' informational and accessibility services that must be responsible protected by recordkeepers. *Hughes v. Nw. Univ*., 142 S. Ct. 737, 211 (2022). This broad notion of the word "asset" by the

Supreme Court demonstrates that participant data, which is necessarily included in individual accounts and statements, is a plan asset under ERISA. Connolly's identifying information stolen from her was intrinsically tied to her individual account and required for the Fund to operate, making it a plan asset.

The two district court opinions used by the District Court for the District of Columbia hold little authority over how the Thirteenth Circuit should view participant data as a plan asset. Neither the district court nor the Defendants provided any comprehensive argument as to why Connolly's information was not a plan asset, relying solely instead on two district court opinions. These courts have merely claimed that no court has recognized participant information as a plan asset. Yet, the Supreme Court and most Circuit courts also have not definitively held that participant information is **not** a plan asset. With the changing landscape of technology and the growing trend of requiring personal data protection, the Thirteenth Circuit should find participant data is a plan asset under ERISA.

Furthermore, even if the statutory language of ERISA does not definitively state private information is a plan asset, this court should find the data is a plan asset in viewing the trends of current legislative history and advisory opinions. With the current advancements of technology moving at such a rapid pace, the courts are unable to keep up in terms of court precedent to help ensure private information is protected as a plan asset under ERISA. Title I explicitly states ERISA's primary goal is to remain vigilant to protect plan participants. 29 U.S.C. 1001 et seq. ERISA's finalized regulation in the 1990s defining plan assets focused primarily on tangible assets found in securities and bonds. *Id*. However, this 1990 regulation left the definition broad, and following advisory opinions stated assets include property that is "tangible or intangible, in which the plan has a beneficial ownership interest". Advisory Opinion 13-03A (July 3, 2013). These

assets can include participant data inextricably tied to these plans, especially if they are necessary to carry out the operation and management of the plan. The growing trend has shown a prevalent need to protect participant data as a plan asset among advancing technology.

In 2011, the ERISA Advisory Council spent extensive time studying privacy and security issues, acknowledging breaches resulting in leaked personal information that would affect plans. 2011 ERISA Advisory Council Reports. Ultimately, the Advisory Council recommended that the Department of Labor (DOL) "issue guidance on the obligation of plan fiduciaries to secure and keep private the personal identifiable information of plan participants and beneficiaries." *Id*. The 2016 ERISA Advisory Council again focused on protecting participant information from cyber-attacks, demonstrating the massive issue facing ERISA. 2016 ERISA Advisory Council Reports. The council even offered the DOL draft materials to support fiduciaries in protecting plan data assets from these potential data breaches. *Id*. On April 14, 2021, the U.S. Department of Labor's (DOL's) Employee Benefits Security Administration (EBSA) issued first-ever guidance for protecting participant data from cyber-attacks, showing the current trend in having participant data be viewed as a protected plan asset.[3]

B. **ERISA'S PLAIN LANGUAGE DUTIES OF PRUDENCE AND LOYALTY REQUIRE PRIVATE PERSONAL INFORMATION TO BE PROTECTED AS A PLAN ASSET**

ERISA's high standard of prudence requires protection of personal data as a plan asset. Section 404(a)(1) of ERISA specially outlines the duties owed by a fiduciary to the beneficiaries of a plan. Within the four standards of conduct outlined in Section 404(a)(1)(B) of ERISA, the legislatures ensured there must be an incredibly high standard of loyalty and prudence owed to the participants of a plan. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1).

These duties of loyalty under ERISA specifically state plan fiduciaries must carry out their duties "solely in the interest of the participants and beneficiaries". *Id*. In addition, Section 404(a)(1)(B) of ERISA requires fiduciaries to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man would use in the conduct of an enterprise of a like character with like aims." Although not statutorily outlined by ERISA, this duty of prudence requires fiduciaries to protect sensitive personal information necessary to carry out the plan. *Id*. In assessing these standards of prudence and loyalty, this court should find personal information is a protected piece of "planned assets" covered by ERISA.

Often, courts will view these high standards as requiring fiduciaries to actively protect their participants. The court in *Tibble et al. v. Edison International et al.*, quoted § 90 of the Third Restatement of the Law of Trusts in deciding a case of fiduciary duties under ERISA. No. CV 07-5359 SVW, 2017 U.S. Dist. LEXIS 130806, at *34 (C.D. Cal. Aug. 16, 2017). This restatement provision, which utilizes concepts from the area of trusts, recognizes a fiduciary's duty to preserve the confidentiality and privacy of participants' private information. *Id*.

Like the Fund, defendants in *Leventhal v. MandMarblestone Group LLC* carelessly utilized personal emails, resulting in a hack leading to stolen personal data. No. 18-cv-2727, 2020 U.S. Dist. LEXIS 92059, at *22 (E.D. Pa. May 27, 2020). The plaintiffs survived a motion to dismiss because the fiduciaries exercised actual control over plan assets. *Id*., *see also Bartnett v. Abbott Labs.*, 2020 LEXIS 182645, at *18-19 (N.D. Ill. Oct. 2, 2020). However, the court in *Walsh v. Principal Life Ins. Co*. held the defendant, who utilized participant data to persuade investment decisions, did not have actual control over the plan assets at issue. 266 F.R.D. 232, 250 (S.D. Iowa 2010). This lack of control negated their responsibility for the distribution of these plan assets. Like the defendants in *Leventhal*, the Fund actively controlled and used Connolly's participant

data. No. 18-cv-2727, LEXIS 92059. Therefore, in accordance with the high standard of prudence, the Fund was required to protect this data as a plan asset.

The high standards under ERISA and the necessity of the participant data demonstrate a need to hold fiduciaries accountable for misusing valuable plan assets. Connolly's information was on Raul's Regal-issued laptop as well as an Excel spreadsheet Op at 2-3. The participant data was collected by the Fund for the exclusive purpose of administering Connolly's plan and providing benefits to Connolly and the other participants. Op at 3. Therefore, the data is part of the plan. Her information was in the Fund's control to be protected as a plan asset. The need for accountability for the negligent control over participant data, such as in *Leventhal*, highlights the importance of fiduciaries in upholding the high standards of prudence and loyalty, especially in the face of advancing technology. No. 18-cv-2727, LEXIS 92059. Like the court in *Leventhal*, this court should hold the Fund accountable for the misuse of Connolly's valuable participant data as a plan asset under ERISA. *Id*

III. THE DISTRICT COURT'S DECISION SHOULD BE REVERSED BECAUSE REGAL DEFENDANTS BREACHED THE ERISA DUTY OF PRUDENCE AS A FUNCTIONAL FIDUCIARY AND CONNOLLY IS ENTITLED TO EQUITABLE RELIEF FOR THE BREACH

The District Court's decision should be reversed in favor of the appellant Connolly, because Regal Defendants are a fiduciary of the Fund, they breached the ERISA duty of prudence, and they are liable for equitable relief for this breach of prudence. Regal Defendants were functional fiduciaries under this plan because they exercised discretionary authority and responsibility over the plan assets and the administration of the plan. The careless actions of Regal Defendants breached the ERISA duty of prudence and the terms of Section 8 of the Administrative Service Agreement with the Fund. Equitable relief is the appropriate remedy to properly compensate Connolly for the substantial harm that resulted from Regal Defendants breach of prudence.

A. REGAL DEFENDANTS ARE FIDUCIARIES OF THE FUND

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. 29 U.S.C. § 1002(21)(A). Section (ii) of U.S.C. § 1002(21)(A) is not applicable to this case, but (i) and (iii) directly apply to the defendants. A fiduciary need not be named a fiduciary in the plan and can be a functional fiduciary if they are exercising their own discretion over the plan. Regal Defendants acted as a fiduciary by exercising discretion and responsibility over the plan assets and the administration of the multiemployer benefit plan.

1. Regal Defendants exercised discretionary authority over the Funds plan assets

The threshold question in every case charging breach of ERISA fiduciary duty is whether that person was taking action, performing a fiduciary function, when taking the action subject to the complaint. *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000). Discretion is clearly the benchmark for fiduciary status under ERISA. *Rozo v. Principal Life Ins. Co.*, 949 F.3d 1071, 1072 (8th. Cir. 2020) (citing *Maniace v. Commerce Bank of Kansas City, N.A.*, 40 F.3d 264, 267 (8th Cir. 1994). Discretion is the freedom to decide what should be done in a particular situation. *New Oxford American Dictionary*(3d ed. 2010). As stated under issue two, the Fund's data that was breached qualified as ERISA plan assets. Regal Defendants acted as a functional fiduciary by exercising authority and discretion of these Fund plan assets.

In *Rozo*, the court used the two prong test from *Teets* that determined 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." *Rozo*, 949 F.3d at 1073 (Citing *Teets v. Great-West Life & Annuity Ins. Co.*, 921 F.3d 1200, 1206 (10th Cir. 2019). This test aligns with the principles under 29 U.S.C. § 1002(21)(A), because if the provider (1) conforms to specific contract terms or (2) a plan and participant can freely reject it, then the provider is not acting with "authority" or "control. *Id*. at 1074. Step one requires that when a contract grants an insurer discretionary authority, even though the contract itself is the product of an arm's length bargain, the insurer may be a fiduciary. *Id*. Step two requires that they have the unimpeded ability to reject the service provider's action. *Id*.

In determining the status of a functional fiduciary, fiduciary liability is not absolved just due to contractual terms of a service agreement. Whether or not an individual is an ERISA fiduciary must be determined by the functions that the individual performs rather than the title held. *Blatt v. Marshall & Lassmant*, 812 F2d 810, 812 (2d Cir. 1987) (see *Amaro v. Western Union International, Inc.*, 773 F.2d 1402, 1416-17 (2d Cir. 1985). Although Section 4.1 of the service agreement provides that "Regal [shall not] be regarded as a fiduciary for purposes of ERISA," this does not mean that Regal is not a fiduciary for the plan. Under 29 U.S.C. 1002(21)(A), a fiduciary is anyone who exercises discretionary control or authority over the plan's management, administration, or assets. This standard still applies even if in the agreement the provider is not listed as a fiduciary. Since Regal is a functional fiduciary, the terms of Section 4.1 of the Agreement are not binding to this case and do not apply to the fiduciary status of the defnedants. Op. at 4.

Regal Defendants clear status as a functional fiduciary is further supported by the terms of the agreement for the multiemployer benefit plan. Exercising actual control and discretion of plan assets is acting as a fiduciary. *Blatt*, 812 F.2d at 812 (holding that the defendants were functional fiduciaries by exercising discretion over plan assets). The District Court erred in ruling that the Regal Defendants did not voluntarily undertake ERISA fiduciary duties. Op. at 12. An entity need not have absolute discretion to still be considered a fiduciary. *Id.* Under Section 4.2 of the agreement Regal's administrative services included: (i) maintenance of records for the fund and (ii) a phone-in service center in which Fund participants can request information concerning account balances. Op. at 4. The services provided by Regal were not limited, and included consulting, administration, and recordkeeping services. Op. at 2. The services provided by Regal satisfy both prongs of the test set forth in *Teets* that would qualify them as a functional fiduciary. Under the first prong the terms of this contract are not merely specific. Regal had the discretion to consult clients directly, handle the records and account balances within the plan. Op. at 2. Similar to *Rozo*, a contract can still contain provisions that give a service provider discretionary authority, even though the contract itself was the product of an arm's length bargain. *Id*. at 1074. The terms of the service agreement here were broad and the duties assigned to Regal were discretionary in nature. Op. at 4. This contract was not specific and it gave Regal fiduciaries duties under 29 U.S.C. 1002(21)(A). The second prong of the *Teets* test was also met. While not overly specified under the Service Agreement, Regal was contractually working with the Fund on the plan. Op. at 3. It is not stated in the opinion or the agreement how a plan or participant would freely reject the services that Regal was providing. Since the terms of the Agreement were broad and nonspecific, under a 12(b)(6) motion the court should construe this complaint in a light most favorable to the plaintiff. *DirecTv, Inc.*, 487 F.3d at 476. Regal Defendants had discretionary duties that gave them

responsibility for the plan and the participants. Construing this complaint in a light most favorable to the plaintiff would lead to the conclusion that Regal Defendants had the ability to perform unilateral action in relation to the plan. Regal's actions and responsibility satisfied both prongs of the *Teets* test, showing that they had discretionary authority as functional fiduciaries over the plan. Regal Defendants voluntarily entered into the agreement with the Board and carried out their fiduciary duties.

The discretion over the plan assets, along with the authority and control Regal Defendants had over plan assets met the ERISA standard for a functional fiduciary.

2. Regal Defendants had discretionary authority and responsibility in the administration of the plan

Under a multiemployer benefit plan, fiduciaries are not only the persons named under the plan, but anyone else who exercises discretionary control or authority over the plan's management, administration, or assets is an ERISA fiduciary. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993). Fiduciary duties include a number of detailed duties and responsibilities, including, "the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest. *Mertens*, 508 U.S. at 251 (citing *Massachusetts Mut. Life Ins. Co v. Russell*, 473 U.S. 134, 142-143, 87 L. Ed. 2d 96, 105 S. Ct. 3085 (1985). A fiduciary under ERISA differs from the common law definition; courts have recognized that Congress's intent was for ERISA's definition of fiduciary to be broadly construed. *Frommert v. Conkright*, 433 F.3d 254, 271 (2d Cir. 2006) (see *LoPresti v. Terwillinger*, 126 F.3d 34, 40 (2d Cir. 1997)).

The actions of Regal Defendants effectively exercised discretionary authority and control over the plan, and they were not purely ministerial functions. Under 29 CFR § 2509.75, a person who performs purely ministerial functions for an employee benefit plan within a framework of policies, interpretations, rules, practices and procedures made by other persons is not a fiduciary

because such person does not have discretionary authority or control respecting the plan. In *Lebahn*, the court concluded that the calculation and reporting of benefits based on preset formulas do not involve acts of discretion. *Lebahn v. Nat'l Farmer Union Unif. Pension Plan*, 828 F.3d 1180 (10th Cir. 2016) (holding that calculating benefits at a participant's request was purely ministerial and does not meet the discretion for fiduciary status). The actions of Regal Defendants here differ substantially from the ministerial functions in *Lebahn*. At lunch with the client Demisay was going over proposed edits to an actual valuation report with the client. Op. at 2. Demisay was using his discretion in going over the edits directly with the client. *Id*. These responsibilities of Regal rise above the pure computation of numbers that the administrators in *Lebahn* conducted. Regal Defendants had clear responsibilities that were not purely ministerial functions, but actions that apply to a functional fiduciary under ERISA. While it is not explicitly mentioned whether this report was for the multiemployer benefit plan here, the court should draw this fact in light of the plaintiff under a F.R.C.P. 12(b)(6) motion. *DirecTv, Inc.*, 487 F.3d at 476. As the court in *Frommert* recognized, fiduciary is a term that is construed broadly. Regal provided consulting, administration, and recordkeeping services. The actions of Regal Defendants were well above purely ministerial actions, and the terms in the agreement with the fund represented actions that were clearly discretionary.

Regal Defendants had tasks that were not purely ministerial, and by exercising discretion over the administration of the plan they are a fiduciary and as such have breached the ERISA duty of Prudence.

B. **AS A FIDUCIARY REGAL DEFENDANTS BREACHED THE ERISA DUTY OF PRUDENCE**

29 U.S.C. § 1104(a)(1)(B) authorizes that a fiduciary shall discharge his duties with respect to a plan 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. Regal Defendants breached this duty of prudence and failed to exercise the duties required under ERISA of a fiduciary when employee Demisay accessed the plans report on an unverified, public Wi-Fi server. The District Court correctly held that if Regal Defendants are a fiduciary under ERISA, they have breached the ERISA duty of prudence. Op. at 12.

ERISA demands that fiduciaries act with the "care, skill, prudence, and diligence under the circumstances" not of a lay person, but of one experienced and knowledgeable with a plan, and they must act exclusively in the interest of the beneficiaries. *Tibble*, 729 F.3d at 1133 (citing 29 U.S.C. § 1104(a)(1)(B), 29 U.S.C. § 1104(a)(1). The content of prudence turns on the circumstances at the time the fiduciary acts and the appropriate inquiry into the fiduciary actions will be context specific. *Hughes*, 142 S. Ct. at 742 (see *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 415*)*. The circumstances that face an ERISA fiduciary implicate difficult tradeoffs, and the court gives due regard to the range of reasonable judgements a fiduciary may make based on their experience and expertise. *Hughes*, 142 S. Ct. at 742. Breach of this standard is dependent on the facts of the case and the level of prudence observed by the fiduciary at the time of the breach.

A fiduciary breach of prudence can be caused by carelessness in relation to cybersecurity. *Leventhal,* No. 18-cv-2727, 2020 BL 197040, at 5. In *Leventhal*, the plaintiffs' allowed their employee to work remotely and use her personal email for her employment duties. *Id*. at 5. The account was hacked and used to commit fraud. *Id*. The court concluded that the Plaintiffs had breached the ERISA duty of prudence, and that the own carelessness of the Plaintiffs' and their employment policies were the most substantial contributing factor in the occurrence of the cyber-fraud. *Id*. This decision not only emphasized the carelessness of the employee, but also the faulty

policies and procedures that the employer had in place for their computer/IT systems. *Id*. Employee actions, company policies, and company procedures all play a factor in determining the level of prudence and care that a fiduciary takes under ERISA.

Recently the DOL weighed in on the issue of cybersecurity by issuing guidance for plan fiduciaries on best practices for maintaining cybersecurity, that included tips on how to protect the benefits of a plan.[2] In the guidance the DOL advised that a sound cybersecurity program identify and assess internal and external cybersecurity risks that may threaten stored nonpublic information.[3] The DOL recognized that employees are often the weakest link for cybersecurity and advised a comprehensive awareness program that sets clear cybersecurity expectations for all employees and educates employees to help prevent cyber-related incidents.[4]

Here, Regal Defendants clearly breached the duty of prudence. Regal employee Raul Demisay carelessly accessed the AVR on an unverified, free Wi-Fi at a Panera Bakery restaurant. Op. at 3. Demisay could not access the AVR on his phone, so he decided to download the file to his laptop while on the unverified Wi-Fi. *Id*. Similar to *Leventhal*, Demisay demonstrated no care or diligence by downloading the documents on a public Wi-Fi. ERISA requires reasonable judgments a fiduciary may make based on expertise on the matter. *Hughes*, 142 S. Ct. at 742. Any reasonable employee, acting with even the lowest diligence possible would understand the problems that would arise out of accessing a file in relation to a plan that provided benefits to 1,321 participants on a public Wi-Fi. Op. at 2. The Fund was responsible for $2,642,863.112. Op. at 3. Even a lay person would understand the risks that come with downloading files on a public Wi-Fi.

2See, *Cybersecurity Program Best Practices, United States Department of Labor*, https://www.dol.gov/sites/dolgov/files/ebsa/key-topics/retirement-benefits/cybersecurity/best-practices.pdf (April 14, 2021).
[3]*Id.*
[4]*Id.*

Demisay not only failed to exercise the basic prudence that a lay person would but failed to exercise prudence that an employee with access to a fund with 1,321 participants and $2,642,863.12 in assets would. *Id*.

Furthermore, in the Fund's Administrative Services Agreement with Regal, Section 8 provided that 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. Op. at 4. The District Court correctly recognized that these provisions invoke the same principles as the ERISA duty of prudence. By including these provisions in the agreement, the Fund essentially wrote in Regal Defendants as a plan fiduciary. By assigning the equivalent of the ERISA duty of prudence to Regal, the Fund recognized that Regal was a fiduciary and is open to indemnification for any breach of their duty of prudence. These terms also authorize that Regal is liable even if they are not held to be a fiduciary by this court. Given the terms of Section 8 of this agreement, even if the court does not find that Regal Defendants are a functional fiduciary, they are still open to indemnity and harm for damages under the terms of the agreement with the Fund. *Id*.

Regal Defendants clearly breached the duty of prudence necessary under ERISA and is liable for damages that resulted from this breach.

C. **Regal Defendants are liable for damages for breach of fiduciary duty**

Section 502 of ERISA sets forth a civil enforcement scheme that defines the types of civil actions that can be brought and the parties that are entitled to seek relief under the act. *Bell v. Pfizer, Inc.*, 626 F.3d 66, 73 (2d Cir. 2010). 29 U.S.C. § 1132 (a) empower persons to bring a civil action to recover benefits due to him under the terms of his plan to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan. 29 U.S.C. §

1132 (a)(3) allows a participant to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan to obtain appropriate equitable relief to redress such violations. Section 502(a)(3) allows plan beneficiaries to bring individual actions arising from an employer's fiduciary breach. *Varity Corp v. Howe*, 516 U.S. 489, 507 (1996). The plaintiffs request to be awarded equitable relief under 1132(a)(3) and have Regal Defendants replaced as an administrative services provider. The district court correctly held that the plaintiff can be awarded for any breach of fiduciary duty of prudence by the Regal Defendants under Section 502(a)(3) of ERISA. Op. at 12-13.

"Appropriate equitable relief" under § 502(a)(3) has referred to 'those categories of relief' that, traditionally 'were available inequity.' *Cigna Corp. v. Amara*, 563 U.S. 421, 439 (2011) (citing *Sereboff v. Mid Atl. Med. Servs.*, 547 U.S. 356, 361 (2006)). The purpose of equitable estoppel is to place the person entitled to its benefits in the same position they would be in if the representation had been true. *Cigna*, 547 U.S. at 441. To obtain relief under § 502(a)(3), the plaintiff must show a breach of duty, harm, and causation. *Id*. at 444. *Cigna*, represented a shift in the Court that now allows for monetary and other forms of equitable damages under ERISA § 502(a)(3).

Regal Defendants must award Connolly equitable relief and they must be replaced as an administrative services provider. Regal Defendants had a duty to Connolly, they breached that duty, and as the cause of that breach caused harm to Connolly. Regal, acting as an administrative services provider, lost all benefits owed to Connolly under the plan. Op at 5. They proceeded to lie to Connolly that on May 31, 2020, the Fund was undergoing certain "banking issues" which was a lie to cover for their own failures and negligence. On July 1, 2021, Connolly had her identity and all of the money in her bank account stolen as a result of breach of the fund. *Id.* Equitable

relief is the only appropriate remedy to place Connolly in the appropriate position she was in before the plan. Regal Defendants had a duty to prudently administer the plan, they failed to do this. Regal Defendants directly harmed Connolly by losing all her benefits under the plan, and not properly securing the plaintiffs information leading to the theft of her identity and bank account. Regal Defendants were the direct cause for the loss of Connolly's benefits, assets, and money. The District Court correctly held that under the ERSIA context, the contribution and indemnity to Regal Defendants is appropriate, and equitable relief should be provided under § 502(a)(3) of ERISA.

If the court rules in favor of the Fed. R. Civ. P. 12(b)(6) motion to dismiss, the court should still entitle Connolly to amend the complaint. If a complaint has been dismissed under a 12(b)(6) motion, a plaintiff whose complaint has been dismissed should be given at least one opportunity to amend the complaint. *Runnion ex rel. Runnion v. Girl Scouts of Greater Chi. & Nw. Ind.*, 786 F.3d 510, 519 (7th Cir. 2015). Dismissal is appropriate when it is clear from the face of the complaint that the amendment would be futile. *Runnion*, 786 F.3d at 519. Here, an amendment would not be futile, because there are facts in the complaint that are broad that are left open for more discovery.

CONCLUSION

ERISA's primary purpose is to protect its plan participants. Regal breached their fiduciary duties, especially the duty of prudence, in handling the plan assets. In their fiduciary capacity, Regal negligently mishandled the fund, leading to the loss of $2,642,863.12, Connolly's stolen identity and the emptying of her hard-earned savings.

WHEREFORE, Plaintiff-Appellant, Renita Connolly, respectfully requests that this Court reverses the U.S. District Court for the District of Columbia's motion to dismiss and remands for further proceedings.

Respectfully submitted,

Team 3
Attorneys for Appellant

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