Team 4

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.*,

Plaintiff/Appellant,

vs.

Regal Consulting LLC and Raul Demisay,

Defendant/Appellee.

On Appeal from the

United States District Court for the District of Columbia

The Honorable Thomas C. Farnam, Presiding

BRIEF FOR APPELLEE

Team 4

Counsel for
Defendant/Appellee

February 26, 2022

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JURISDICTIONAL STATEMENT

This is an action brought under 29 U.S.C. § 1132(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"). The District Court for the District of Columbia had federal question jurisdiction under 28 U.S.C. § 1131, and exclusive subject matter jurisdiction under 29 U.S.C. § 1132(e)(1).

This Court has jurisdiction under 28 U.S.C. § 1291 because this is an appeal from the final decision of a district court of the United States.

ISSUES PRESENTED

1. Does participant information and data constitute "plan assets" under ERISA, where the plan documents state that all assets are to be held in cash?
2. Is Regal liable under ERISA for losses suffered by the Fund and its participants where it executed routine consulting, administration, and recordkeeping functions?

STATEMENT OF THE CASE

This action arises out of Renita Connolly's ("Appellant") participation in the National Laborers Holiday and Vacation Fund. (ECF No. 10,[3] ¶ 1). Following a cybersecurity breach of the Fund, Appellant's benefit distributions were delayed, and her bank account reportedly compromised. (*Id.* ¶¶ 12, 29–32). Appellant filed suit in the United States District Court for the District of Columbia against the Fund, the Board of Trustees and the Fund's co-managers, (collectively, "Fund Defendants"), along with its service provider Regal Consulting LLC, and Raul

[3] Stipulated Facts, *Connolley v. National Laborers Holiday and Vacation Fund*, Civil Action No. 20-cv-599-TCF, at *1–6 (D.D.C. Nov. 30, 2021) (Farnam, J.).

Demisay, a retired employee of Regal Consulting, (collectively, "Regal Defendants"). (*Id.* ¶¶ 2–6, 34), seeking equitable relief under 29 U.S.C. § 1132(a)(3), and to have Regal Consulting replaced as an administrative services provider. (*Id.* ¶ 35).

The Fund Defendants and Regal Defendants each moved to dismiss the complaint. The motion to dismiss was granted with prejudice by the District Court. *Connolley v. National Laborers Holiday and Vacation Fund*, Civil Action No. 20-cv-599-TCF, at *13 (D.D.C. Nov. 30, 2021). Appellant now appeals the dismissal of the Regal Defendants to the Court of Appeals for the Thirteenth Circuit.

STATEMENT OF THE FACTS

The National Laborers Holiday and Vacation Fund ("Fund") is a multiemployer welfare benefit plan headquartered in Washington, D.C. (ECF No. 10, ¶ 2). As of March 1, 2020, the Fund provided benefits to 1,321 participants. (*Id.*). The Fund is sponsored by the Board of Trustees (the "Board"). (*Id.* ¶ 3). The Board is the Fund's named fiduciary, and has responsibility for appointing the Fund's Managers, as well as hiring and monitoring the Fund's third-party service providers. (*Id.*); *see also* (*Id.* ¶ 22) ("Section 10 of the Fund provides that 'the individuals who are duly appointed by the Board shall be the Plan Administrator and named fiduciaries'"). The Fund is co-managed by Letitia Beck and Joe Schlitz (the "Managers"), and two additional employees provide administration services. (*Id.* ¶ 4).

The Fund maintains an account for each participant with at least 1,000 Hours of Services during the prior fiscal year. (*Id.* ¶ 18). Each participant thus

eligible is allocated $1, paid by the employer, for each hour worked during the current fiscal year. (*Id.*). These employer contributions, along with the Fund's earnings, compose the entirety of the Fund's assets. (*Id.* ¶ 19). As per Section 6(a) of the Fund's organizing documents, "all assets of the Fund are to be held in cash and in an account at the Union Bank of South Bend, Indiana." (*Id.* ¶ 21).

Regal Consulting LLC ("Regal") provides consulting, administration, and recordkeeping services for the Fund, in addition to two other ERISA plans. (*Id.* ¶ 5). Regal is located in New York, New York, and has offices in all major cities. (*Id.*). Raul Demisay served as Regal's principal consultant to the Fund from 1998 to 2020, and is now a retired employee of Regal. (*Id.*).

An Administrative Services Agreement between Regal and the Fund (the "Agreement") specifies Regal's obligations to the Fund. (*Id.* ¶ 13). Section 4.2 of the Agreement, "Contractual Duties," states: "Regal shall provide administrative services to include (i) maintenance of records for the Fund and (ii) a phone-in service center in which Fund participants can request information concerning account balances." (*Id.* ¶ 15).

Section 4.1 of the Agreement provides that "Regal [shall] [shall not] be regarded as a fiduciary for purposes of ERISA." (*Id.* ¶ 14). Finally, Section 8 of the Agreement provides:

> 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.

On February 21, 2020 Mr. Demisay met with a client for lunch at Panera Bakery in Washington, D.C. (*Id.* ¶ 7). During the meeting, the client sent an email to Mr. Demisay containing proposed edits to an actuarial valuation report ("AVR"). (*Id.*). Unable to download the file through his cellular service, Mr. Demisay connected to Panera's free Wi-Fi network, downloaded the report, and immediately disconnected from the network. (*Id.*). On March 10, 2020, Mr. Demisay retired from Regal. (*Id.*).

According to an Audit Report prepared by the independent cyber audit firm CyberJedis, LLC ("CyberJedis"), Mr. Demisay's laptop was hacked at 12:32 p.m. on the day of the meeting.[4] (*Id.* ¶ 8). The hacker copied all of the data on Mr. Demisay's laptop, including his email and contacts, to an unknown site on the dark web. (*Id.*). Joe Schlitz, a co-manager of the Fund, was included among these contacts. (*Id.*).

Mr. Schlitz received an email at 1:09 p.m. on February 21, 2020 from Demisay.Raul@Reegal.com. (*Id.* ¶ 9). The email read: "Dear Joe, I retire from Regal after 35 yrs: I am very much liking to keep with you. Please click the link below so we stay better friendly. VTY Raul." (*Id.*). Mr. Schlitz clicked the link included in the email, at which time a new web page opened and his computer became frozen, before rebooting. (*Id.*). The computer appeared to be functioning normally after this occurred. (*Id.*).

[4] Mr. Demisay's laptop was retrieved by CyberJedis from his home on March 31, 2020 (ECF No. 10, at ¶ 7).

An Excel spreadsheet containing all of the Fund participants' names, addresses, emails, Social Security numbers, and designation of employees was downloaded from Mr. Schlitz's computer at 1:16 p.m. on February 21, 2020. (*Id.* ¶ 10). At 1:32 p.m., a wire transfer of $2,642,863.12 from the Fund's account at the Union National Bank, to an account at GloboBank, N.A., was authorized by Mr. Schlitz's computer account. (*Id.* ¶ 11). Following this transfer, the money was again transferred to other banking institutions before being invested in Bitcoin. (*Id.*). Igor Olegovich Turashev and an accomplice named Henrietta Rose, working within the United States, are believed to be responsible for the hack. (*Id.* ¶ 12). Mr. Schlitz stated under oath that he did not access or email the Excel file, nor did he authorize the wire transfer. (*Id.* ¶ 25). Mr. Schlitz has been on administrative leave as of May 1, 2020. (*Id.* ¶ 26). Alice Chalmers was named by the Board as interim co-manager in place of Mr. Schlitz. (*Id.* ¶ 27).

According to the documents organizing the Fund, cash distributions are to be made to eligible participants for the balance in each participant's bookkeping account as of the end of the previous fiscal year.[5] (*Id.* ¶ 20). On March 31, 2020, these distributions were not made by the Fund. (*Id.* ¶ 29). Appellant demanded payment of her benefits by letter on May 15, 2020. (*Id.* ¶ 30). A reply letter from Ms. Chalmers on behalf of the Board, dated May 31, 2020, states that the Fund was undergoing an audit and would be indefinitely delayed in making distributions. (*Id.* ¶ 31). A second letter from Appellant alleges that her identity had been stolen and

[5] The Fund's fiscal year begins on March 1 of each year and ends on the last day of February of the following calendar year.

the money in her bank account transferred to an off-shore financial institution, and that the Board, the Fund, and "everyone involved in the administration of the Fund," were liable for the theft. (*Id.* ¶ 32). Replying to this letter, the Board apologized but denied responsibility for the theft. (*Id.* ¶ 33).

Appellant, on behalf of herself and all similarly-situated participants of the Fund, filed suit in the United States District Court for the District of Columbia against the Fund and Regal Defendants, on September 1, 2020. (*Id.* ¶ 34). The complaint alleges (a) that each of the Defendants are fiduciaries under ERISA; (b) that each Defendant had an obligation to prudently administer the Fund; (c) that each Defendant had an obligation to prudently safeguard the Fund's assets, including its information and data; and (d) that each Defendant breached its duty of prudence. (*Id.*). Appellant requested equitable relief under 29 U.S.C. § 1132(a)(3), and to have Regal replaced as an administrative services provider. (*Id.* ¶ 35).

The Fund and Regal Defendants each filed motions to dismiss. (*Id.* ¶ 36). The Fund Defendants stated (a) that Appellant failed to show they were fiduciaries under ERISA; and (b) that the Fund is not at fault for the loss. (*Id.*). The Regal Defendants stated (a) that Appellant failed to show they were fiduciaries under ERISA; (b) that the stolen information and data did not constitute "plan assets" under ERISA; and (c) that

> their roles are merely ministerial, that they performed all duties in accordance with the valid instructions of authorized individuals, and that the allegations in the Complaint do 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 District Court dismissed Appellant's Complaint. *Connolley*, Civil Action No. 20-cv-599-TCF, at *13. The court held that the Fund Defendants were fiduciaries, but that neither of the Regal Defendants were fiduciaries. *Id.* at *9. As part of this determination, the court held that the stolen information and data are not "plan assets" of the Fund. *Id.* at *10. Appellant now appeals to the United States Court of Appeals for the Thirteenth Circuit, solely against the Regal Defendants.

SUMMARY OF THE ARGUMENT

Appellant's complaint was properly dismissed for failure to state a claim that either of the Regal Defendants acted as a fiduciary and thereby breached any corresponding duties, or that the Regal Defendants are otherwise liable for the breach.

The first issue, whether participant information and data are "plan assets" of the Fund, is a question of first impression before this Court. These items are not defined as plan assets under ERISA. Where items are outside the definition of the statute, assets are identified on the basis of ordinary property rights. Two approaches exist to for this determination: The documentary approach, focused on the plan documents, and the functional approach, considering whether the item was used at the expense of participants and beneficiaries. This Court should adopt the documentary approach, due to the centrality of plan documents to ERISA. Looking

to the documents governing the Fund, information and data are not plan assets, because this term is explicitly defined as "cash."

Even if this Court adopts the functional approach, participant information and data are not assets of the Fund. The information and data at issue were used to provide services to the plan, and are not contemplated as something of value. In holding that information and data are not plan assets, this Court joins other courts that have looked at this issue.

The second issue regards the fiduciary status of the Regal Defendants, and alleged breach of fiduciary duties. The Regal Defendants are not fiduciaries. They are not named as fiduciaries under the plan documents, and they did not function as fiduciaries. Regal's role was ministerial, merely following routine processes of recordkeeping. Regal took no unilateral action and performed at the direction of the Fund. Appellant pleads no facts demonstrating that Regal exceeded the terms of its contract. Additionally, Regal had no control over plan assets since participant information and data are not assets of the Fund.

Even if Appellant plausibly alleged the Regal Defendants had fiduciary status, no fiduciary duty was breached. Regal could not have been aware of any suspicious activity at the time of the breach. Regal did not act below the prudent standard of care required of fiduciaries by connecting to public Wi-Fi to download a document unrelated to the Fund.

Since the Regal Defendants are not fiduciaries, the relief Appellant seeks is unavailable. Money damages are not considered equitable relief, and participant

information and data cannot be the basis of traceable assets contemplated by restitution.

For these reasons, the District Court's dismissal of Appellant's complaint should be affirmed. The complaint does not plausibly allege any claims against the Regal Defendants. Even if Appellant were given the opportunity to amend her complaint, she could not meet this pleading standard.

ARGUMENT

Appellant's complaint was properly dismissed, and the decision of the district court should be affirmed. Participant information and data are not "plan assets" under ERISA, and the documents controlling the Fund do not contemplate them as such. Regal is not named as a fiduciary in the plan documents, and was not acting as a fiduciary when it followed routine processes of recordkeeping, performed at the direction of the Fund. Appellant does not plead any facts demonstrating that Regal exceeded the terms of the contract. Additionally, Regal had no control over plan assets, since participant data and information are not assets of the Fund.

Even if Appellant made a plausible claim that Regal was functioning as a fiduciary, no fiduciary duty was breached. Regal could not have known of the suspicious activity at the time of the breach, and Mr. Demisay did not act below the prudent standard of care required of fiduciaries when connecting to public Wi-Fi to download a document unrelated to the Fund. Additionally, the remedy Appellant seeks under 29 U.S.C. § 1132(a)(3) is not available because money damages are not considered equitable relief. Although restitution may be permitted under this

section, the participant information and data stolen from Regal are not the sort of traceable assets contemplated by this form of equitable relief.

This Court reviews *de novo* an order granting a motion to dismiss with prejudice, and applies the same standards used by the district court. *Young Apartments, Inc. v. Town of Jupiter, Fla.*, 529 F.3d 1027, 1037 (11th Cir. 2008). In evaluating a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), all factual allegations in the complaint are taken as true and are viewed in the light most favorable to the plaintiff. *Republic Bag, Inc. v. Beazley Ins. Co.*, 804 F. App'x 451, 453 (9th Cir. 2020). However, the court does not assume the truth of legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2).

The case should be dismissed where the facts, taken as true, do not amount to a claim that is "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007). "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

III. Information and data are not plan assets because the term is defined as "cash" under the plan documents, and the information and data was used to benefit plan participants by providing consulting, administration, and recordkeeping services.

The information and data stolen from Regal are not ERISA "plan assets" of the Fund. This question is a case of first impression in this Court. In considering a case of first impression, the court "look[s] to the traditional signposts of statutory

construction"—the language of the statute, its legislative history, and the interpretation given to it by its administering agency. *Axess Int'l, Ltd. v. Intercargo Ins. Co.*, 183 F.3d 935, 941 (9th Cir. 1999). Additional guidance is to be found in the decisions of other circuits and lower courts that have considered this issue.

To determine whether items are plan assets, "the court first looks to the plain text of the statute." *Harmon v. Shell Oil Co.*, No. 3:20-cv-00021, 2021 WL 1232694, at *2 (S.D. Tex. Mar. 30, 2021) (citing *U.S. v. Locke*, 471 U.S. 84, 95 (1985)). According to ERISA, "plan assets" are to be "defined by such regulations as the Secretary [of Labor] may prescribe." 29 U.S.C. § 1002(42). The Secretary has prescribed two relevant regulations. The first regards "plan investments":

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

29 C.F.R. § 2510.3-101(a)(2). The second regards "participant contributions":

> [T]he assets of the plan include amounts (other than union dues) that a participant or beneficiary pays to an employer, or amounts that a participant has withheld from his wages by an employer, for contribution or repayment of a participant loan to the plan, as of the earliest date on which such contributions or repayments can reasonably be segregated from the employer's general assets.

29 C.F.R. § 2510.3-102(a)(1). Neither of these regulations define participant information and data as plan assets under ERISA. *See Harmon*, 2021 WL 1232694, at *3 ("[n]either of the promulgated regulations either expressly or by any plain-language interpretation includes participant data as plan assets under ERISA").

Where the items in question fall outside the scope of these regulations, the Department of Labor advises that "the assets of a plan generally are to be identified on the basis of ordinary notions of property rights under non-ERISA law." DOL Opinion No. 93-14A (E.R.I.S.A.), 1993 WL 188473, at *4; *see also* DOL Opinion No. 2005-08A (E.R.I.S.A.), 2005 WL 1208695, at *2. Courts have readily adopted this interpretation. *See Sec'y of Lab. v. Doyle*, 675 F.3d 187, 203 (3d Cir. 2012) ("in the absence of specific statutory or regulatory guidance, the term 'plan assets' should be given its ordinary meaning, and therefore should be construed to refer to property owned by an ERISA plan"); *Merrimon v. Unum Life Ins. Co. of Am.*, 758 F.3d 46, 56 (1st Cir. 2014) ("[s]everal of our sister circuits have adopted this formulation . . . [and w]e too find this formulation persuasive"); *Sec'y of Dep't of Lab. v. United Transp. Union*, 1:17 CV 923, 2019 WL 1382290, at *5 (N.D. Ohio Mar. 27, 2019) ("[w]here neither context is applicable, plan assets are determined on the basis of ordinary notions of property rights").

Courts have developed two approaches for determining whether items not covered by the regulations constitute property of the plan. The first is the "documentary approach." Under this approach, the court looks to the "documents governing the plan and the relationships between the parties." *Haddock v. Nationwide Fin. Servs., Inc.*, 419 F. Supp. 2d 156, 168 (D. Conn. 2006); *see also Metzler v. Solidarity of Lab. Orgs. Health & Welfare Fund*, No. 95 Civ. 7247, 1998 WL 477964, at *5 (S.D.N.Y. Aug. 14, 1998), *aff'd sub nom. Herman v. Goldstein*, 224 F.3d 128 (2d Cir. 2000). The second is a "functional approach." Under this approach, the court "focus[es] on whether the item in question may be used to benefit the fiduciary at the expense of plan participants or beneficiaries." *Haddock*, 419 F. Supp. 2d at 168; *see also Metzler*, 1998 WL 477964, at *5.

This Court should adopt the documentary approach, and turn to the plan documents to determine whether the information and data at issue are to be construed as plan assets. ERISA plans are "established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). Congress clearly meant for these plan documents to be given effect: "A written plan is to be required in order that every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan." H.R. REP. NO. 93-1280, at 42 (1974) (Conf. Rep.). The centrality of plan documents has also been long recognized by the Supreme Court. *See US Airways, Inc. v. McCutchen*, 569 U.S. 88, 101 (2013) ("[t]he plan, in short, is at the center of ERISA"); *Curtiss-Wright Corp. v. Schoonejongen*,

514 U.S. 73, 83 (1995) (ERISA is a statutory scheme "built around reliance on the face of written plan documents").

Accordingly, this Court should "look[] to the terms of the plan." *See McCutchen*, 569 U.S. at 102.; *see also Doyle*, 675 F.3d at 205 ("[a]s a general rule, the first step in identifying the property of an ERISA plan is to consult the documents establishing and governing the plan"). "ERISA plans are contractual documents." *Johnson v. Am. United Life Ins. Co.*, 716 F.3d 813, 819 (4th Cir. 2013). As with other contracts, courts should seek an interpretation of the plan documents that gives effect to all its terms. *See id.* at 820; RESTATEMENT (SECOND) OF CONTRACTS § 203(a).

Applying the documentary approach, the Eastern District of New York held that scheduled diagnostic fees retained by an administrative services provider were not plan assets where they were explicitly exempted by the plan documents. *United Ben. Fund v. MagnaCare Admin. Servs. LLC*, No. 11–CV–4115, 2012 WL 3756298, at *2 (E.D.N.Y. Aug. 27, 2012). The court noted:

> [T]he Fund has not alleged any contractual basis for considering the scheduled diagnostic fee as a plan asset. And, in fact, the agreement between the Fund and MagnaCare provides that the diagnostic fees "shall not be considered for any purposes as Health Plan assets."

Id. In *Metzler*, the Southern District of New York looked to the language of plan documents in holding that the service fees at issue were to be construed as plan assets. 1998 WL 477964, at *6. The service fees were defined as a component of the

"employer's contributions," which themselves were "construed from the other governing documents . . . to constitute assets of the Fund." *Id*. Thus, the service fees were encompassed within the definition of plan assets found in the plan documents. *Id.* In reviewing this decision, the Second Circuit upheld this "analy[sis of] the terms of the documents governing the Fund." *Herman*, 224 F.3d at 129.

Employing this documentary approach, the information and data stolen from Regal are not "plan assets" of the Fund. Although participant information and data are not explicitly exempted by the plan's definition of plan assets, it is clear they are not contemplated as such. The documents governing the Fund specify that "[t]he Fund's assets consist *entirely* of contributions that are made by employers and earnings." (ECF No. 10, ¶ 19) (emphasis added). These employer contributions consist of cash, "pa[id] into the Fund $1 for each hour worked by a union employee during the fiscal year of the Fund." (*Id.*). Section 6(a) of the plan document further specifies "that *all assets of the Fund are to be held in cash and in an account at the Union Bank of South Bend, Indiana*." (*Id.* ¶ 21) (emphasis added).

This "contractual language" establishes that information and data are not assets of the plan. *See Metzler*, 1998 WL 477964, at *6. To construe information and data as plan assets would be to read out the terms of the plan documents identifying plan assets by references to cash. *See* RESTATEMENT (SECOND) OF CONTRACTS § 203(a). Accordingly, there is no "contractual basis" to find they are plan assets. *See United Ben. Fund*, 2012 WL 3756298, at *2.

If this Court adopts the functional approach, the same conclusion will be reached. The functional approach inquires whether use of the item is "to benefit the fiduciary at the expense of plan participants or beneficiaries." *Id.*; *see also Kayes v. Pac. Lumber Co.*, 51 F.3d 1449, 1467 (9th Cir. 1995); *Edmonson v. Lincoln Nat'l Life Ins. Co.*, 725 F.3d 406, 429 (3d Cir. 2013). Applying this approach in *Metzler*, the court found that service fees constituted plan assets, since by retaining these fees the administrator "profited at the expense of plan participants and beneficiaries" who were forced to pay higher premiums on account of the fees. 1998 WL 477964, at *7. In *Edmonson*, an insurer paid out life insurance to a beneficiary using a retained asset account. 725 F.3d at 411. Although the insurer invested the assets credited to the account for profit, it made the funds available upon request by the beneficiary. *Id.* at 411–12. The Third Circuit held that the funds did not constitute plan assets: "Although [the insurer] used the assets for its own benefit, it did not use them 'at the expense of plan participants or beneficiaries.'" *Id.* at 429.

Analyzing the information and data stolen from Regal under the functional approach demonstrates that these items were not used "at the expense of plan participants or beneficiaries." *See Haddock*, 419 F. Supp. 2d at 170. Rather, the information and data was held by Regal for the benefit of plan participants and beneficiaries in order to "provide[] consulting, administration, and recordkeeping services." *See* (ECF No. 10, ¶ 4). The information and data were key to Regal's performance of its contractual duties, specified in the Fund's Administrative Services Agreement with Regal: "In consideration of the Per Capita Fee specified in

Section 4.4 of the Agreement, Regal shall provide administrative services to include: (i) *maintenance of records for the Fund*." (*Id.* ¶ 15) (emphasis added). Appellant's complaint fails to allege that the information and data was used for other purposes. *See* (ECF No. 10).

Additionally, "[e]ven the broadest definition of 'plan assets' . . . contemplates something of value. . . .. Data or information that a plan administrator accumulates in the course of administering a plan are certainly not conventional 'plan assets.'" *Patient Advocs., LLC v. Prysunka*, 316 F. Supp. 2d 46, 48–49 (D. Me. 2004). Although participant information has been recognized as having potential value where it is used to market products to plan participants and beneficiaries, there is no evidence Regal used the information and data in this manner. *See Divane v. Nw. Univ.*, No. 16 C 8157, 2018 WL 2388118, at *12 (N.D. Ill. May 25, 2018), *vacated and remanded on other grounds sub nom. Hughes v. Nw. Univ.*, 141 S. Ct. 737 (U.S. 2022). Even so, "[w]hile 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 the purposes of ERISA." *Walsh v. Principal Life Ins. Co.*, 266 F.R.D. 232, 248 (S.D. Iowa 2010).

In holding that information and data do not constitute plan assets, this Court will join other courts that have reviewed this issue. *See Divane*, 2018 WL 2388118, at *12 ("[p]laintiffs cite no case in which a court has held that such information is a plan asset for purposes of ERISA. This Court does not intend to be the first"); *Harmon*, 2021 WL 1232694, at *3 ("[t]his view—that participant data does not

amount to 'plan assets' under ERISA—comports with how other courts have ruled on this question").

The information and data stolen from Regal are not ERISA "plan assets" of the Fund, because the plan documents define plan assets by reference to cash, and the participant data is used to fulfill Regal's contractual obligations as recordkeeper, and not at the expense of plan participants.

IV. Regal Defendants are not liable under ERISA for any loss suffered by Appellant because neither Regal Defendant is an ERISA fiduciary or breached any corresponding fiduciary duties.

Regal Defendants are not fiduciaries and have not breached any corresponding fiduciary duties. To state a claim for a breach of ERISA fiduciary duties, "a plaintiff must make a prima facie showing that the defendant acted as a fiduciary, breached its fiduciary duties, and thereby caused a loss to the Plan." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594–95 (8th Cir. 2009) (citations omitted).

To plead a breach of fiduciary duty under ERISA, Appellant must adequately allege fiduciary status of Regal Defendants. 29 U.S.C. § 1109(a) ("[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable"); *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000) (explaining that in a breach of ERISA fiduciary claim, "the threshold question is . . . whether that person was acting as a fiduciary . . . when taking the action subject to complaint"). A service provider may become a fiduciary under ERISA by contract, known as a

"named fiduciary," or under the statute, known as a "functional fiduciary." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993) (citing 29 U.S.C. §§ 1102(a), 1002(21)(A)).

A service provider becomes a named fiduciary when a plan appoints her to control and manage the operation and administration of the plan, 29 U.S.C. § 1102(a)(1), or when a plan administrator designates her as a fiduciary according to the plan document or pursuant to a procedure specified in the plan, 29 U.S.C. § 1102(a)(2). *Santomenno ex rel. John Hancock Tr. v. John Hancock Life Ins. Co. (U.S.A.)*, 768 F.3d 284, 290–91 (3d Cir. 2014). Here, Regal Defendants are not designated as trustees or plan administrators by the plan documents, nor otherwise named as fiduciaries. In fact, the parties stipulated pursuant to Section 4.1 of the Fund's Agreement with Regal that "Regal [shall not] be regarded as a fiduciary for purposes of ERISA." *See* (ECF No. 10, ¶14). Thus, Regal Defendants are not named fiduciaries of the Fund under § 1102(a)(1) or (2).

A service provider becomes a functional fiduciary with respect to a welfare benefit plan "to the extent" that

> (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. Such term includes any person designated under section 1105(c)(1)(B) of this title.

29 U.S.C. § 1002(21)(A). Pursuant to this section, a functional fiduciary would only be a fiduciary to the extent she exercises discretionary authority or control over the

management or administration of the plan, exercises authority or control over the plan assets, or provides investment advice. *Id.*

Section 1002(21)(A)(ii) is not implicated with respect to Regal Defendants because rendering "investment advice" was not part of the services that Defendant Regal provided respecting the plan. Under § 1002(21)(A)(ii), a person is a fiduciary if she renders "investment advice" with respect to any money or other property of a welfare plan. § 1002(21)(A)(ii). The parties stipulated that Defendant Regal provided "consulting, administration, and recordkeeping services" with respect to the welfare plan. *See* (ECF No. 10, ¶5). Providing "investment advice" with respect to the plan was not among Defendant Regal's services. Thus, Regal Defendants cannot be considered fiduciaries under § 1002(21)(A)(ii). Accordingly, Regal Defendants can only be considered functional fiduciaries with respect to the plan to the extent they engaged in the conduct listed in § 1002(21)(A)(i), (iii).

This Court should hold that Regal Defendants are not liable under ERISA because Regal Defendants did not exercise any discretionary authority or control in managing or administering the plan and Appellant fails to plead facts that show Regal Defendants acted as fiduciaries respecting the plan assets. In the alternative, should this Court find that Regal Defendants are fiduciaries, the Court should still affirm the district court's dismissal of Appellant's complaint with prejudice because Appellant fails to plausibly allege an ERISA breach of fiduciary duty.

D. Regal Defendants did not exercise any "discretionary" authority or discretionary control in "managing" or "administering" the plan.

Appellant fails to plead plausibly that Regal Defendants exercised *discretionary* authority or *discretionary* control respecting management or administration of the plan. Even if Appellant were to revise her complaint, she would not be able to establish that Regal Defendants are fiduciaries because their duties were purely ministerial and neither Regal Defendants took unilateral action respecting the operation of the plan. A person who provides management or administration services to a plan is a fiduciary only to the extent she exercises discretionary authority or control. 29 U.S.C. § 1002(21)(A)(i), (iii). To be a fiduciary for their services to the Fund and the plan participants, Regal Defendants must (1) exercise "discretionary" authority over the plan and (2) engage in "management" or "administration" of the plan.

3. Regal Defendants did not exercise any "discretionary" authority over the management or administration of the plan.

Discretion is the threshold to establish fiduciary status for a person managing or administering the plan under ERISA. 29 U.S.C. § 1002(21)(A)(i), (iii). The plain meaning of "discretion" is the "power of free decision or choice" or "individual choice or judgment." *See Coldesina, D.D.S., P.C. Emp. Profits Sharing Plan & Tr. v. Est. of Simper*, 407 F.3d 1126, 1132 (10th Cir. 2005) (quoting *Webster's Ninth New Collegiate Dictionary* 362 (1991)). If a function does not require individual judgment, it is a non-discretionary function or a ministerial function. *Id.* at 1132. Such ministerial functions may be inherently ministerial or may include functions that are closely controlled by the plan policies and procedures. *Id.* (citations omitted). Further, a service provider exercises discretion if the service

provider does not merely follow a term of an arm's-length contract or takes a unilateral action respecting plan management without the participants or the plan's opportunity to reject it. *Teets v. Great-West Life & Annuity Ins. Co.*, 921 F.3d 1200, 1212 (10th Cir. 2019); *Rozo v. Principal Life Ins. Co.*, 949 F.3d 1071, 1074 (8th Cir. 2020).

b. Regal Defendants' duties were purely ministerial.

Regal Defendants were not fiduciaries because the Regal Defendant's task of maintaining records was purely ministerial. The Department of Labor has issued interpretive bulletins, "questions and answers," that service providers performing "purely ministerial duties" are not per se ERISA fiduciaries. *See* 29 C.F.R. § 2509.75-8 (explaining that "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"). Certain functions, like "maintenance of participants' service and employment records," "calculation of benefits," and "preparation of reports concerning participants' benefits," do not render the service provider a fiduciary when they are undertaken within the plan policies and procedures. *Id.* at D-2. A service provider "whose sole function is to calculate the amount of benefits to which each plan participant is entitled in accordance with a mathematical formula," provides purely ministerial services, but a service provider who has "the final authority to authorize or disallow benefit payments in cases where disputes exist or as to the interpretation of the plan" becomes a fiduciary. *Id.* at D-3.

The courts have adopted the Department of Labor's distinction as to "purely ministerial duties" for a variety of services. In *Lebahn*, the court found that "calculating and reporting pension benefits, without more," did not render a person a fiduciary under ERISA because "conducting a routine computation, as required by one's job, does not inherently require discretion" and was thus purely ministerial. *Lebahn v. Nat'l Farmers Union Unif. Pension Plan*, 828 F.3d 1180, 1183–84 (10th Cir. 2016). Also, in *Schmidt,* the court found that a benefit analyst, who provided wrong beneficiary designation forms to a participant, did not have discretionary authority because her duties, which included "applying pension rules, requesting additional information from applicants, determining benefit amounts due under the plan, and responding to participants' inquiries about pension benefits," were purely ministerial. *Schmidt v. Sheet Metal Workers' Nat. Pension Fund*, 128 F.3d 541, 544, 544 n.1 (7th Cir. 1997).

Providing "routine" services by following the normal procedure under a plan constitutes ministerial functions. In *Johnston*, an insurance company received a routine application for a policy and transferred it to a broker through its normal underwriting process and continued handling the application through the normal procedure and sending notification to the participant. *Johnston v. Paul Revere Life Ins. Co.*, 241 F.3d 623, 631 (8th Cir. 2001). The court found that the routine process of processing an application and sending notification to a participant do not render the insurance company a fiduciary because it is inherently ministerial. *Id.* at 632–33.

Here, all of the services that Regal provided under the Agreement, which 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," (ECF No. 10, ¶¶ 13, 15), were purely ministerial. Like the service provider in *Lebahn*, Regal did not engage in any action that required inherent autonomy and authority. *See* 828 F.3d at 1183–84. Further, like the service provider in *Schmidt,* Regal did not perform any active role in managing data or account balances. *See* 128 F.3d at 544. Finally, like the service provider in *Johnston*, Regal followed the routine process of recordkeeping and performing call-in services which entailed a normal passive maintenance of records and response to the participants' inquiries about their account balances. *See* 241 F.3d at 631. Moreover, Regal Defendants' function of recordkeeping and providing information to Fund participants concerning account balances through a phone-in service center was closely controlled by the plan policies and procedures. *See id.* Accordingly, the administrative services that Regal provided to the plan and the participants were purely ministerial services.

c. Regal Defendants merely adhered to specific contractual terms and neither Regal Defendants took unilateral action with respect to the operation of the Fund.

Appellant fails to plead with sufficient particularity that Regal Defendants exceeded the terms of an arm's-length contract with the Fund or took any unilateral action respecting the Fund. When a service provider adheres to specific contractual terms and does not take a unilateral action respecting plan management, or when

the participants have the opportunity to reject the service provider's actions, the service provider does not exercise discretion over the plan. *Teets*, 921 F.3d at 1212; *Rozo*, 949 F.3d at 1074.

In *Teets*, a service provider was permitted to set a credit rate on a regular basis without any input from the plan or its participants. 921 F.3d at 1217. However, the service provider was not allowed to impose fees or penalties for withdrawals when participants disagreed with its imposed credit rates and did not prohibit them from obtaining comparable investment options. *Id.* at 1218–20. The court found that because the participants had the opportunity to reject the proposed credit rates by the service provider, the service provider did not perform any unilateral action that would render it an ERISA fiduciary. *Id.* at 1221; *see also Lebahn*, 828 F.3d at 1184 (holding that discretionary control requires "the freedom to decide what should be done in a particular situation").

In contrast, in *Rozo*, a service provider's contract authorized it to set the interest rate on the participants' accounts without any specific term in the contract controlling the rate or any opportunity for participants to reject the rate. 949 F.3d at 1073. The court found that absent a specific contractual term controlling the rate, by setting the rate, the service provider was acting with discretionary authority. *Id.* at 1074. The court further explained that the participants did not have any opportunity to reject the interest rate, making the service provider a fiduciary. *Id.*

Here, Appellant does not plead any facts to show that Regal Defendants performed any unilateral actions as to the management of the Fund. Like the

service provider in *Teets*, the Fund had authority to reject Regal Defendants' services, which Appellant pleads broadly to include "consulting, administration, and recordkeeping services" to the Fund. *See* 921 F.3d at 1221; (ECF No. 10, ¶5). In this role, Regal Defendants could offer their consultation or administration, or recordkeeping services to the Fund and the Fund would decide how much and how often to accept Regal Defendants' consultation.

Without more, Appellant does not show that, like the plan in *Rozo*, the Fund was not free to reject the services offered by Regal Defendants to make its own determinations. 949 F.3d at 1074. Further, Appellant pleads that Regal provided "(i) maintenance of records for the Fund and (ii) a phone-in service center in which Fund participants can request information concerning account balances." (ECF No. 10, ¶¶ 13, 15). Appellant does not plead any facts that Regal Defendants exceeded the terms of the Agreement respecting their contractual duties of maintaining the Fund's records or providing balance accounts to the participants. Accordingly, Appellant fails to plead plausibly that Regal Defendants took any unilateral action as to the plan.

4. Regal Defendants did not exercise any "management" or "administration" of the plan.

Appellant does not sufficiently plead that Regal Defendants' actions constitute plan management or plan administration. Pursuant to Sections 1002(21)(A)(i), (iii), a service provider acts as a fiduciary when she exercises discretionary *management* or *administration* of the plan. *Varity Corp. v. Howe*, 516

U.S. 489, 502–03 (1996); *Allen v. Credit Suisse Sec. (USA) LLC*, 895 F.3d 214, 225 (2d Cir. 2018).

In *Varity Corp.*, the Supreme Court defined "administration" of the plan as "to perform the duties imposed, or exercise the powers conferred," by the plan or the necessary and appropriate powers that are implicitly conferred under the plan. 516 U.S. at 502–03 (citation omitted). Applying this definition, the court found that conveying information about the future of plan benefits to the plan participants to help them decide to remain with the plan constituted administration under ERISA. *Id.* at 503. Thus, where a service provider does not exercise any power over the plan, it does not engage in administration or management of the plan. In *Allen*, banks and their affiliates executed plan transactions pursuant to directions from plan's independent investment managers and matched the plan with the banks' available services at different rates. 895 F.3d at 220. The court held that the banks did not manage the plan when they merely matched customer's desires with their inventory like a salesman at the discretion of the plan managers. *Id.* at 224–25.

Here, Appellant does not sufficiently plead that Regal Defendants exercise any explicit or implicit powers to act respecting the plan. Unlike the service provider in *Varity Corp.*, which conveyed information to the participants about the future of the plan to decide whether to remain in the plan, Regal provided a phone-in service center in which Fund participants could only request information about the current status of their account. *See* 516 U.S. at 502; (ECF No. 10, ¶ 15). Regal's

service to the participants was passive and merely informational without being able to influence the participants' decision as to their participation in the plan.

Further, like the banks in *Allen*, which merely matched the plan with their available services, pursuant to Section 4.2 of the Agreement, Regal only matched the Fund with its recordkeeping and phone-in service. *See* 895 F.3d at 220; (ECF No. 10, ¶15). None of these duties render any power on Regal Defendants to enforce the plan or influence the participants' rights to benefits. Such powers are bestowed on the Fund managers who initiate the request for Regal Defendants' available services to the plan. Accordingly, Appellant fails to plausibly allege that Regal Defendants engaged in management or administration of the plan.

E. Appellant fails to plead facts that show Regal Defendants acted as fiduciaries respecting the plan assets.

Appellant fails to plausibly allege that Regal Defendants acted as fiduciaries regarding the plan assets. Pursuant to § 1002(21)(A)(i), a service provider is a fiduciary respecting a plan, to the extent, she exercises any authority or control over the plan assets. 29 U.S.C. § 1002(21)(A)(i). As discussed in Section I, above, the data and information of the Fund are not ERISA plan assets. Accordingly, Regal Defendants are not fiduciaries regarding the data and information of the Fund.

Even if this Court finds that the data and information of the Fund are ERISA plan assets, Appellant fails to plead sufficient facts that show Regal Defendants acted as fiduciaries. ERISA describes fiduciaries only "to the extent" that they act in such a capacity in relation to a plan or the plan assets. *Pegram*, 530 U.S. at 226

(citing 29 U.S.C. § 1002(21)(A)). In a breach of ERISA fiduciary claim, "the threshold question 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." *Id.*

To establish that Regal Defendants breached their fiduciary duty to Appellant, Appellant must plead facts to show that Regal Defendants were acting as fiduciaries when Mr. Demisay connected his computer to the Panera free Wi-Fi, (ECF No. 10, ¶7), and that there was a nexus between Regal Defendants' fiduciary duties and the theft of the Excel file of the Fund participants' data and information from Mr. Schlitz's computer by a cyber-criminal, (ECF No. 10, ¶¶ 10, 12). Appellant's claim fails for two reasons. First, Appellant fails to plead facts to show that Regal Defendants acted as fiduciaries to the Fund respecting the plan assets when the data breach occurred. Second, Appellant fails to plead facts to show any nexus between the alleged basis for Regal Defendants' fiduciary responsibilities and the alleged wrongdoing.

3. Appellant fails to show that Regal Defendants acted as fiduciaries to the Fund respecting plan assets when the data breach occurred.

Appellant does not plausibly allege that Regal Defendants were acting as fiduciaries to the Fund when Mr. Demisay connected his computer to the Panera free Wi-Fi. (ECF No. 10, ¶7). To determine whether a service provider was

performing a fiduciary function, the courts consider whether the acts in question were actions or decisions about managing or disposing ERISA plan assets. *Darcangelo v. Verizon Commc'ns, Inc.*, 292 F.3d 181, 192–93 (4th Cir. 2002) (citing *Pegram*, 530 U.S. at 235–36) (internal quotation marks omitted). Further, the courts consider whether a service provider who wears multiple hats was engaging in providing traditionally fiduciary services when the misconduct in question happened. *DeLuca v. Blue Cross Blue Shield of Michigan*, 628 F.3d 743, 746–47 (6th Cir. 2010). *See also Allen*, 895 F.3d at 225 ("wrongdoing in performing non-fiduciary services does not transform the alleged wrongdoer into a fiduciary").

The acts in question must occur in the course of managing plan assets or distributing property to plan participants. In *Darcangelo*, a service provider to an ERISA plan obtained private medical information of an employee to provide it to her employer so that the employer could find a reason to discharge her. 292 F.3d at 182. However, the service provider did not obtain the employee's information while carrying on its duties under the plan. *Id.* The court held that the service provider was not acting as a fiduciary when it improperly disclosed the employee's information because it did not disclose the information in the process of its duty of managing the plan assets. *Id.* at 192–93. The court further explained that the service provider was not simply acting as a faulty plan administrator, instead the service provider was acting as a rogue administrator outside the scope of its duties under the plan. *Id.* at 193.

Additionally, when a service provider undertakes multiple capacities, it must be acting within its duties as a fiduciary under the plan to be considered an ERISA fiduciary. In *DeLuca*, a service provider acted in two capacities during its business relations with an ERISA plan and committed misconduct while it was serving under the capacity which was unrelated to the terms of the plan. 628 F.3d at 746. The court held that because the conduct at issue did not constitute managing the plan assets but was instead a decision that had an impact on an ERISA plan, the service provider was not subject to fiduciary duties. *Id.* at 747 (citations omitted). *See also Leimkuehler v. Am. United Life Ins. Co.*, 713 F.3d 905, 913–14 (7th Cir. 2013) (holding that a service provider's handling of a plan beneficiaries' accounts did not create an ERISA breach of fiduciary cause of action against it when it engaged in misconduct respecting its two other unrelated services to the plan).

Here, Appellant fails to plausibly allege that Mr. Demisay's conduct at issue occurred in the course of managing the plan assets or disposition of the assets. Like the service provider's conduct in *Darcangelo*, which did not occur in the course of managing the plan assets, Mr. Demisay's conduct of connecting to the Panera free Wi-Fi did not occur while Mr. Demisay was undertaking its duties to the Fund. *See* 292 F.3d at 18. Mr. Demisay was having "a lunch" with "a client" at Panera Bakery when the client sent him an email with "proposed edits to an actuarial valuation report ('AVR')." (ECF No. 10, ¶ 7). Having a lunch at a public bakery is a personal matter undertaken for personal pleasure even when it is done with business partners or clients. Moreover, Mr. Demisay only connected to the Panera free Wi-Fi

to download that file to his laptop and turned off the Wi-Fi immediately without engaging in any other actions that could be related to managing the Fund's plan assets. (*Id.*). Appellant fails to plead facts that Mr. Demisay was acting as a faulty plan administrator, but instead alleges that he engaged in the conduct at issue while he was working on matters outside managing the plan assets.

Similarly, Appellant failed to allege that Regal Defendants acted within the scope of their duties to the Fund when Mr. Demisay's conduct at issue occurred because Regal provides services to two other related ERISA plans. (*Id.* ¶ 5). Appellant does not allege that the client who sent Mr. Demisay the AVR to go over the edits with him was a Fund's beneficiary or the AVR was related to the Fund or its assets. (*Id.*). Like the service provider in *DeLuca*, Regal Defendants wear multiple hats, albeit with regards to multiple plans. *See* 628 F.3d at 746–47. Regal Defendants could only be an ERISA fiduciary when Mr. Demisay was in the course of administering the Fund's plan assets, not when he engaged in a fiduciary function towards the other two related Funds. Accordingly, this Court should hold that Regal Defendants are not ERISA fiduciaries with respect to the data breach because they did not act as fiduciaries when Mr. Demisay's conduct at issue occurred.

4. Appellant fails to show any nexus between the alleged basis for Regal Defendants' fiduciary responsibilities and the alleged wrongdoing.

Appellant fails to show any nexus between Regal Defendants' putative fiduciary status and theft of the data and information of the Fund. To establish

breach of fiduciary duty, a plaintiff must plausibly allege that there was a nexus between the service provider's fiduciary duties and the alleged wrongdoing. *McCaffree Fin. Corp. v. Principal Life Ins. Co.*, 811 F.3d 998, 1004–05 (8th Cir. 2016).

In *McCaffree Financial Corp.*, a service provider who rendered investment advice to a plan charged excessive fees for managing separate unrelated accounts. 811 F.3d at 1004–05. The court held that the service provider was not liable because there was no nexus between the alleged misconduct respecting the separate unrelated accounts and the service provider's services to plan participants. *Id.*; *see also Santomenno*, 768 F.3d at 297 (holding that participants failed to plausibly allege that a service provider breached its ERISA fiduciary duty when they alleged that the service provider charged excessive fees but did not allege that it rendered faulty investment advice); *Trs. of the Graphic Commc'ns Int'l Union Upper Midwest Loc. 1M Health & Welfare Plan v. Bjorkedal*, 516 F.3d 719, 732 (8th Cir. 2008) (holding that not making employer contributions to an ERISA plan is a breach of contract unrelated to an employer's ERISA fiduciary status and thus is not a breach of its ERISA fiduciary duty).

Here, like the plaintiff in *McCaffree Financial Corp.* who failed to show a nexus between the service provider's misconduct of overcharging fees and its ERISA duty of rendering investment advice, Appellant fails to show a nexus between the theft of the data stored on Mr. Schlitz's computer from his computer and Regal Defendants' ERISA duties. *See* 811 F.3d at 1004–05. Mr. Demisay's only conduct

was that he connected his laptop to the Panera free Wi-Fi to download the AVR file to go over the edits with a client at lunch. (ECF No. 10, ¶ 7). Several other steps were taken by others before hackers obtained the data and information of the Fund. Hackers copied Mr. Demisay's emails and contacts. (*Id.* ¶ 8). Mr. Schlitz clicked on a link and, shortly thereafter, cyber-criminals downloaded an Excel spreadsheet containing all of the Fund participants' data and information from Mr. Schlitz's computer. (*Id.* ¶¶ 9–10, 12). Additionally, Appellant does not allege that the data and information of the Fund were under Regal Defendants' control or management when they were stolen. Accordingly, this Court should hold that because there was no nexus between Regal Defendants' ERISA fiduciary duties and the theft of the data and information, Regal Defendants are not liable under ERISA.

F. In the alternative, if Regal is a fiduciary, this Court should still affirm the district court's dismissal of Appellant's complaint because Appellant fails to plausibly allege any breach of ERISA fiduciary duty.

While the Court need not reach the issue, even if Regal Defendants are considered fiduciaries, this Court should still affirm the district court's decision granting Regal's motion to dismiss because Appellant fails to establish an ERISA breach of duty claim.

An ERISA complaint cannot survive on a motion to dismiss if it is a "formulaic recitation" of legal conclusions that simply recite the elements of section 1104(a) of ERISA. Here, Appellant's complaint cannot survive on a motion to dismiss because it has failed to plead the requisite elements necessary to establish

an ERISA breach of duty claim. *See Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 415 (2014).

This Court should affirm the district court's decision granting Regal's motion to dismiss because Appellant's complaint is based on legal conclusions that simply recite the formulaic elements of Section 1104(a). *See Iqbal*, 556 U.S. 662, 678 (2009).

Additionally, the Court should ignore the district court's contingent conclusions of law made "[f]or the sake of facilitating such appeal." The district court misinterprets ERISA. First, ERISA contains no formal statutory provision governing "prudent cybersecurity." Second, a fiduciary's imprudence may not be presumed.

3. Congress has not implemented a comprehensive federal law governing cybersecurity for benefit plan service providers.

The compelling need for cybersecurity is uncontested. Unfortunately, as recognized by the ERISA Advisory Council in 2016, there is no comprehensive federal law governing cybersecurity for benefit plan service providers.[6] Although no statutory provision answers the question of whether cybersecurity is a fiduciary duty, the call for legislative action has prompted informal guidance from the ERISA Advisory Council and more recently from the Department of Labor's Employee Benefit Security Administration.[7]

Here, Regal, like the district court, is sympathetic to Appellant. However, the district court presumes Regal breached ERISA in the context of cybersecurity. The

[6] The ERISA Advisory Council, established under section 512 of ERISA, consists of 15 members appointed by the Secretary of Labor. The duties of the council are to advise the Secretary and submit recommendations regarding the Secretary's functions under ERISA. 29 U.S.C § 1142(a)–(c).
[7] *See also* U.S. Dep't of Labor, Emp. Benefits Security Admin., Opinion Letter 2018-01A (Nov. 5, 2018) (declining to issue formal regulations under ERISA despite recognizing the "compelling need" for cybersecurity and the "tempting target" retirement plans pose for cybercriminals).

plain language of section 1104(a) contains no formal guidance concerning a fiduciary's duties in regard to "prudent cybersecurity." *See* 29 U.S.C § 1104(a)(1)(B).

4. The district court may not construct a presumption of imprudence.

This district court's contingent conclusion of law requests this court to presume imprudence from a misinterpreted "prudence" standard and based on the events occuring *after* the alleged breach. *See Dudenhoeffer*, 573 U.S. at 410, 425 (2014); *Bartnett v. Abbott Lab'ys*, 492 F. Supp. 3d 787, 795 (N.D. Ill. 2020); *Leventhal v. MandMarblestone Grp. LLC*, No. 18-cv-2727, 2019 WL 1953247, at *1, *5–6 (E.D. Pa. May 2, 2019).

Under Section 1104(a) of ERISA, fiduciary acts prudently when he discharge[s] [his] duties "with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man in a acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character with like aims." 29 U.S.C § 1104(a)(1)(B); *see also Dudenhoeffer*, 573 U.S. at 415."[T]he fiduciary's duty of care "requires prudence, not prescience," and the appropriateness of an [alleged act] is to be determined from [the objective] perspective of the time the [alleged act] was made, not from hindsight." *See Keach v. U.S. Tr. Co. N.A.*, 313 F. Supp. 2d 818, 863 (C.D. Ill. 2004), *aff'd*, 419 F.3d 626 (7th Cir. 2005).

A court may not presume imprudence from hindsight based on events that occurred *after* the act. "To state a claim for breach of the duty of prudence, a complaint must plausibly allege an alternative action that the defendant could have taken . . . that a prudent fiduciary in the same circumstances would not have

viewed as more likely to harm the fund than to help it." *Dudenhoeffer,* 573 U.S. at 425.

When evaluating if a fiduciary has acted prudently, the court must focus on the "extent to which fiduciaries at a given point in time reasonably could have predicted the outcome that followed [the fiduciary's act]." *See Dudenhoeffer*, 573 U.S. at 430 (demanding context specific inquiry when evaluating ERISA duty of prudence claims); *Bartnett,* 492 F. Supp. 3d at 795.

In *Dudenhoeffer*, the Court considered whether ERISA contained a "presumption of prudence" for ESOP fiduciaries. 573 U.S. at 420. While seven U.S. Courts of Appeals had previously adopted the "presumption of prudence," the court rejected the presumption and remanded the case back to the lower court. *Id.* at 412. The Court determined neither Congress nor the plain language of ERISA was effectuated with a presumption of prudence. *Id*. at 421, 422. Although the lower courts' constructed the presumption to help "weed out" meritless ERISA claims, the Court disagreed and determined "[s]uch a rule does not readily divide the plausible sheep from the meritless goats." *Id.* at 425.

The Court used its holding in *Dudenhoeffer*, as an opportunity to establish guidelines for the lower courts to apply when evaluating the efficiency of an ERISA breach of duty claim at the pleading stage. 573 U.S. at 430. The appellant's complaint alleged the fiduciary *should have known* the stock was overvalued and risky because "newspaper articles provided early warning signs." *Id* at. 413. The Court was not convinced such allegations were sufficient to establish an ERISA breach of duty claim. *Id*. The Court vacated the Sixth Circuit's holding that Appellant had plausibly alleged an ERISA breach of duty claim. *Id*. Aligned with the plain language and purpose of ERISA, the Court established that the lower

courts must evaluate an ERISA breach of duty claim with a context-specific analysis of the prevailing circumstance at the time of the alleged breach. ERISA's fact-sensitive nature requires such an analysis to determine if the allegations are actually sufficient under the pleading standards established in *Twombly*/*Iqbal*. *Id.* at 410, 421, 425.

Here, the district court attempts to impermissibly construct it's own presumption of imprudence. Like the lower courts' "desire" in *Dudenhoeffer* to "reconcile congressional directives that are in tension with each other," here too, the district court made such "contingent conclusions of law" for the "sake" of appeal. *See* 573 U.S. at 415. This Court should ignore the district court's conclusory allegations because it requests this Court to impose a presumption of imprudence that has been expressly rejected by the Supreme Court. *See id.* at 415–20.

The district court attempts to hold Regal to a standard of "prescience," and established by the Court in *Dudenhoeffer*, if Regal is a fiduciary under ERISA, Regal, like all fiduciaries, is subject to a standard of prudence *not* prescience. Like the "newspaper articles [that] provided early warning signs," in *Dudenhoeffer*, that the Court found insufficient to establish an ERISA breach of duty claim, here too, the general knowledge public Wi-Fi is less secure than a private network is insufficient to establish an ERISA breach of duty. 573 U.S. at 430. In accordance with ERISA's plain language, purpose, precedent established in *Dudenhoeffer,* this Court must reject the district court's presumption of "imprudence.

b. Even in the unregulated context of cybersecurity, the district court may not presume Regal was imprudent under ERISA.

Although the expanding intersection of ERISA and cybersecurity remains unregulated and relatively uncharted, a court may not automatically presume

imprudence when a breach occurs. *See Dudenhoeffer*, 573 U.S. at 412. The district court ignores the unfortunate truth: a cyberattack threat is inevitable.[8]

Accordingly, even when a breach occurs, a fiduciary may be found to act prudently if it followed established procedures and had no reason to suspect any suspicious behavior. *Bartnett*, 492 F. Supp. 3d at 797; *Foster v. PPG Indus., Inc.*, 693 F.3d 1237, 1239 (10th Cir. 2012).

In *Bartnett*, the Eastern District of Illinois held that the participant failed to allege an ERISA breach of prudence claim following a cybersecurity data breach. 492 F. Supp. 3d at 793-94. The plan participant brought suit after an imposter hacked into her account and used her information to impersonate her over the phone. *Id*. The imposter made several calls to the service center requesting fraudulent withdrawals. *Id*. The court granted the fiduciary's motion to dismiss for failure to state a claim because the appellant's complaint was insufficient to establish the fiduciaries were at fault. *Id*. Although the fiduciary authorized the imposter to withdraw the funds, the complaint failed to allege the fiduciary had actual knowledge of suspicious activity at the time of the alleged breach. *Id*. at 797.

Similarly in *Foster*, the Tenth Circuit held that a fiduciary was not liable for the third party's fraudulent conduct of the participant's ex-wife. 693 F.3d at 1237. The court determined the fiduciary was not liable under ERISA because the fiduciary followed established procedures and lacked any actual knowledge of the fraudulent conduct. *Id*. at 1236, 1237. The Tenth Circuit also relied on the fact that the actual nexus between the fiduciary and the alleged breach was the fraudulent

[8] *See* Advisory Council on Emp. Welfare & Pension Benefit Plans, Emp. Benefit Plans: Considerations for Nativating Cybersecurity Risks, at 7 (2016) ("[c]yber threats cannot be eliminated but they can be managed. Cyber experts say that it is not a question of *if* you will have a cyber-attack, rather it is a question of *when.*")

conduct of the ex-wife that was a result of the plan participant's failure to change his address and user information. *Id.* at 1236. The court determined the fiduciary did not fail to safeguard the Plan assets and had no reason to assume suspicious activity because it was entitled to rely on the legitimacy of the electronic requests. *Id*.

Conversely, a fiduciary that has actual knowledge of frequent, suspicious, activity, but takes no steps to verify the requests and does not notify the participant of the fraudulent behavior, may violate ERISA's duty of prudence. *See Leventhal*, WL 1953247, at *5–6. In *Leventhal*, the Eastern District of Pennsylvania found a plan participant had sufficiently pleaded an ERISA breach of duty by alleging the fiduciaries failed to act with requisite prudence following a cybersecurity data breach. *Id.* The district court relied on the fact the plaintiffs had obtained documents from the fiduciaires allegedly showing the fiduciaries were *aware* of the "frequency" and "peculiar nature" of the fraudulent withdrawal forms. *Id*. at *6. The court determined the plaintiffs plausibly alleged the fiduciaries failed to implement typical safeguards because they had knowledge of the suspicious activity but neither notified the participants nor verified the fraudulent requests. *Id*.

Here, Regal was not aware of any risk to the Fund at the time of the alleged breach. The district court requests this Court to infer imprudence simply because Mr. Demisay connected to public Wi-Fi and then a cybersecurity breach occurred. (ECF No. 10, ¶ 7). This Court, like the courts in *Bartnett* and *Foster*, should find that even though a breach occurred, Regal cannot be liable under ERISA. Like the fiduciaries in *Barnett* and *Foster,* that could not be liable for the cyberattack, here too, Regal cannot be liable for the cyberattack. *See* 492 F. Supp. 3d at 793-94; 693 F.3d at 1237. However, *unlike* the fiduciaires in *Barnett* and *Foster,* who were not

liable under ERISA, despite being in direct contact with the cybercriminals, Regal had no direct contact with the unknown cybercriminals. *See* (ECF No. 10, ¶ 7). The complaint is devoid of any allegation that Regal had actual knowledge of the cyberattack.

A determinative difference between this case and *Leventhal* is that the district court in *Leventhal* could rely on the fact that Appellant had obtained documentation *from* the fiduciaires. Unlike the documents obtained by the participants in *Leventhal*, which showed actual knowledge of the suspicious activity, Appellant has not obtained (and would not be able to provide) such documentation. *See Leventhal*, WL 1953247, at *6. Further, Regal, unlike the fiduciaries in *Leventhal,* who neither notified the participant about the frequency of the withdrawal requests nor verified the legitimacy of the requests, here, once Regal was aware a breach occurred, actively responded. *See id.*; (ECF No. 10, ¶ 28). In fact, Regal's response to the cybersecurity breach actually aligns with several sub-regulatory informal ERISA suggestions in regard to cybersecurity.[9] Regal verified 126 requests inquiring about the legitimacy of the email and had worked with CyberJedis, an independent cyber audit firm. (*Id.* ¶¶ 7, 28)

This Court should find that Regal is not liable under ERISA for the cybersecurity breach because Appellant has failed to state a plausible ERISA claim. The compelling need for cybersecurity is real and recognized. However, the district court's contingent conclusions of law must be ignored because it requires this Court to construct an impermissible presumption of *imprudence* and attempts to hold

[9] U.S. Dep't of Labor, Emp. Benefits Security Admin.*, Cybersecurity Best Practices*, 1–5 (2021), https://www.dol.gov/sites/dolgov/files/ebsa/key-topics/retirement-benefits/cybersecurity/best-practices.pdf.

Regal to a standard of "prescience." This is simply not the law. Accordingly, this Court should affirm the district court's decision to grant Regal's motion to dismiss.

V. Appellant fails to sufficiently plead facts to support that any equitable relief is available against Regal Defendants.

Appellant fails to plausibly allege that Regal Defendants are liable for any equitable relief under ERISA. To state a claim for "equitable relief" against non-fiduciaries under ERISA, a plaintiff must show that the defendant caused a remediable wrong and request available equitable remedies under ERISA. *Mertens*, 508 U.S. at 253–54. Pursuant to § 1132(a),

> **(a) Persons empowered to bring a civil action**
> A civil action may be brought . . .
> **(3)** by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . ..

29 U.S.C. § 1132(a)(3). Pursuant to this provision, no equitable relief is available to Appellant against Regal Defendants because Regal Defendants did not cause any remediable wrong, money damages are not available as equitable remedies under ERISA against non-fiduciaries, and restitution is not available as an equitable remedy because the stolen data is not traceable.

D. Regal Defendants did not cause Appellant any remediable wrong.

Appellant fails to plead sufficiently that Regal Defendants violated any ERISA provision or any provision of the plan. ERISA only authorizes "appropriate equitable relief" for the purpose of "redress[ing] such violations or enforcing any provisions of" ERISA or an ERISA plan. 29 U.S.C. § 1132(a)(3). ERISA does not

impose a liability on non-fiduciaries for only participating in a fiduciary's breach of fiduciary duty. *Mertens*, 508 U.S. at 253–54. ERISA civil enforcement provisions were carefully drafted, and a court may not infer causes of actions not expressly authorized in the ERISA. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146–47 (1985). *See also CIGNA Corp. v. Amara*, 563 U.S. 421, 440–41 (2011) (holding that a reformation of a contract is an equitable remedy not encompassed by ERISA).

Here, Appellant fails to plausibly allege that Regal Defendants engaged in any violation of ERISA or the plan provisions, independent from the Fund's violations of fiduciary duty to the participants. Under *Mertens*, Regal Defendants may not be liable for any equitable damage just because they participated in the Fund's breach of its fiduciary duties to the participants. *See Mertens*, 508 U.S. at 253–54. Appellant fails to show how Regal Defendants violated ERISA or the plan when the data stored on Mr. Schlitz's computer was stolen from his computer. (ECF No. 10, ¶ 8). Mr. Demisay's only conduct was that he connected his laptop to the Panera free Wi-Fi to download the AVR file to go over the edits with a client at lunch. (*Id.* ¶ 7). Without a remediable wrong, no equitable relief is available to Appellant. Accordingly, this Court should affirm the district court's dismissal of Appellant's equitable relief.

E. Equitable relief does not encompass money damages.

Appellant requests "appropriate equitable relief available" under section 502(a)(3) of ERISA but she does not seek a remedy that is traditionally available in equity. 29 U.S.C. § 1132(a)(3). Money damages, including compensatory or punitive

damages, are legal remedies that are not available as an equitable remedy under this provision. *Mertens*, 508 U.S. at 255 (citing *U.S. v. Burke,* 504 U.S. 229, 238 (1992) (interpreting a similar language in Title VII of the Civil Rights Act as to exclude money damages.) Here, to the extent that Appellant seeks money damages equal to the stolen funds from the Fund, such remedy is not available to them under ERISA provision that allows granting an appropriate equitable relief.

F. Restitution is not available because the stolen data and the stolen funds are not traceable.

Appellant is not entitled to an equitable relief for the stolen data and information under section 502(a)(3) of ERISA because the remedy of restitution against non-fiduciaries is only available for traceable items. *Harris Tr. and Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 250 (2000); *Montanile v. Bd. of Tr. of Nat. Elevator Indus. Health Benefit Plan*, 577 U.S. 136, 144–45 (2016).

In *Harris Trust*, a non-fiduciary was subjected to restitution under section 502(a)(3) of ERISA. *Harris Tr.*, 530 U.S. at 245. The Court applied the law on restitution in trust law and held that the property that was subject to transfer in breach of fiduciary duty could be restituted. *Id.* at 250. However, trustees or beneficiaries must maintain an action for restitution of the property or disgorgement of the proceeds, if the property was disposed of, which requires tracing of the stolen property under trust law. *See id.* (internal citations omitted).

Similarly, in *Montanile*, a plan participant was required to reimburse the plan after he received any payments for his injuries in the future but spent his settlement award without reimbursing the plan. *Montanile*, 577 U.S. at 139–40.

The Court reiterated that, in line with the law of trust, equitable relief is available "only against specifically identified funds that remain in the defendant's possession or against traceable items that the defendant purchased with the funds." *Id.* at 144–45. Even where the funds are identifiable, if the funds are spent on "nontraceable items," restitution would not be available. *Id.*

Here, like the funds *Montanile*, the stolen data and information from the Fund were transferred in a nontraceable manner. The Excel spreadsheet containing all of the Fund participants' information and data were downloaded from Mr. Schlitz 's computer account at the Fund to an untraceable site on the dark web. (ECF No. 10, ¶ 10). Further, Mr. Schlitz 's computer authorized a wire transfer to an account and the fund was eventually invested in Bitcoin. (*Id.* ¶ 11). Neither the data nor the transferred money is traceable. Under *Harris Trust*, the restitution of the data and information which is not traceable is not an appropriate equitable remedy under section 502(a)(3) of ERISA. *See* 530 U.S. at 250. Accordingly, this Court should dismiss Appellant's claim for an equitable relief.

CONCLUSION

For the reasons stated herein, this Court should affirm the district court's dismissal of Appellant's claims.

Respectfully, submitted,
/s/ Team 4
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Attorneys for Appellees

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