No. 20-cv-599-TCF

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

Renita Connolly, et al.,

Appellants,

v.

National Laborers Holiday
and Vacation Fund,
Board of Trustees of the National
Laborers Holiday and Vacation Fund,
Joe Schlitz, Letitia Beck,
Regal Consulting LLC, and
Raul Demisay,

Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES REGAL CONSULTING LLC AND RAUL DEMISAY

Counsel for Appellees
Team 6

TABLE OF CONTENTS

TABLE OF CONTENTS .... *iii*

JURISDICTIONAL STATEMENT *1*

ISSUES PRESENTED *2*

STATEMENT OF THE CASE *3*

I. FACTUAL BACKGROUND 3

II. PROCEDURAL HISTORY 5

III. OPINIONS BELOW 5

SUMMARY OF THE ARGUMENT *7*

I. STANDARD OF REVIEW 9

II. THE FUND PARTICIPANTS' STOLEN INFORMATION AND DATA ARE NOT ERISA "PLAN ASSETS" OF THE FUND. 10

A. Participant Data Is Not a "Plan Asset," According to the Plain Language of the Relevant Regulations Prescribed by the Secretary of Labor. 11

B. The ERISA Definition of "Plan Assets" Appeared in the Act in 2006, and Relevant Regulations Were Issued in 1995 but None of the Relevant Provisions Were Amended to Include Data in Their Definitions 13

C. According to Authorities Interpreting the Statutory and Regulatory Definitions of "Plan Assets," Participant Data Is Excluded Generally and in this Case 15

1. In General, "Plan Assets" Must Have Demonstrable Value. 15

2. In General, Actors and Entities in the ERISA and Cybersecurity Industries Separately Define "Plan Assets" and "Plan Asset Data" or "Participant Information." 17

3. In this Case, Participant Data Is Not a "Plan Asset" Because the Beneficial Ownership Interest Test Is Not Satisfied: the Plan Sponsor (Defendant Board of Trustees) Did Not Expressly or Through Its Actions Represent that the Fund Owns the Participant Data. 20

D. ERISA Fiduciaries Must Be Able to Reasonably Rely on Available Guidance Regarding ERISA Definitions and the Boundaries of Their Fiduciary Duties 22

III. REGAL IS NOT LIABLE UNDER ERISA FOR THE LOSSES SUFFERED BY THE FUND AND ITS PARTICIPANTS BECAUSE THEY ARE NOT NAMED OR FUNCTIONAL FIDUCIARIES, AND CYBERCRIME, NOT BREACH OF FIDUCIARY DUTY, CAUSED THE LOSS TO THE PLAN. *23*

A. Regal Defendants Are Not Liable for the Theft Because They Are Neither Named Fiduciaries Under the Terms of the Contract nor Functional Fiduciaries Under ERISA. 24

1. Regal Defendants Are Not Named Fiduciaries Because, Whether the Agreement is Deemed Clear on Its Face or Patently Ambiguous, the Agreement Terms Do Not Demonstrate Any Conference of Named Fiduciary Status on Regal Defendants 25

2. Regal Defendants Are Not Functional Fiduciaries Under ERISA Because There is No Evidence That They Took Any Action Sufficient to Qualify as a Fiduciary Act. 34

B. Even if This Court Finds that Regal Defendants Are Fiduciaries, They Are Not Liable Because the Loss to the Plan Was Caused by Cybercrime Theft and Unrelated to Any Breach of Fiduciary Duty. 35

1. Regal Defendants Did Not Breach Any Fiduciary Duties and Therefore Cannot be Liable for the Loss to the Plan. 36

2. The Loss to the Plan Was Caused by Criminal Cyberattack, Not Breach of Fiduciary Duty; Therefore, No Liability Under ERISA Can be Imposed on Regal Defendants. 39

CONCLUSION ***...42***

APPENDIX A ***...a***

TABLE OF AUTHORITIES

CASES

Ashcroft v. Iqbal, 556 U.S. 662 (2009) 10
Bafford v. Northrop Grumman Corp., 994 F.3d 1020 (9th Cir. 2021) 24
Baldwin v. Univ. of Pittsburgh Med. Ctr., 636 F.3d 69 (3d Cir. 2011) 27
Bartnett v. Abbott Labs., No. 20-CV-02127, 2021 U.S. Dist. LEXIS 23452 (N.D. Ill. Feb. 8, 2021) 37
Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) 10
Bettis v. Islamic Republic of Iran, 315 F.3d 325 (2003) 23
Bidlack v. Wheelabrator Corp., 993 F.2d 603 (7th Cir. 1993) 27, 28
Boone v. United States, 944 F.2d 1489 (9th Cir. 1991) 9
Brotherston v. Putnam Invs., LLC, 907 F.3d 17 (1st Cir. 2018) 39
Browe v. CTC Corp., 15 F.4th 175 (2d Cir. 2021) 33
Burtch v. Milberg Factors, Inc., 662 F.3d 212 (3d Cir. 2011) 10
Cent. Valley Ag. Coop. v. Leonard, 986 F.3d 1082 (8th Cir. 2021) 30, 38
Chevron Corp. v. Naranjo, 667 F.3d 232 (2d Cir. 2012) 9
**Connolly v. Nat'l Laborers Holiday and Vacation Fund et al.*, No. 20-cv-599-TCF (D.C.C. Nov. 13, 2021) .... passim
Dalzell v. Dueber Watch-Case Mfg. Co., 149 U.S. 315 (1893) 26
David P. Coldesina, D.D.S., P.C., Emp. Profit Sharing Plan & Tr. v. Estate of Simper, 407 F.3d 1126 (10th Cir. 2005) 31
Delker v. Mastercard Int'l, Inc., No. 20-3600, 2022 U.S. App. LEXIS 218 (8th Cir. Jan. 5, 2022) 37
Depot, Inc. v. Caring for Montanans, Inc., 915 F.3d 643 (9th Cir. 2019) 16
Divane v. Nw. Univ., No. 16-C-8157, 2018 WL 2388118 (N.D. Ill. May 25, 2018) 15
Flacche v. Sun Life Assurance Co. of Can., 958 F.2d 730 (6th Cir. 1992) 30
Harmon v. Shell Oil, No. 3:20-cv-00021, 2021 BL 126207 (S.D. Tex. March 30, 2021) 15
Hi-Lex Controls, Inc. v. Blue Cross Blue Shield of Mich., 751 F.3d 740 (6th Cir. 2014) 16
**Hughes v. Nw. Univ.*, 142 S. Ct. 737 (2022) 36, 40
In re Fidelity ERISA Float Litig. v. Fidelity Mgmt. Trust Co., 829 F.3d 55 (1st Cir. 2016) 15, 20, 21
In re Ruti-Sweetwater, Inc., 836 F.2d 1263 (10th Cir. 1988) 10
In re Tatum v. RJR Pension Inv. Comm., 855 F.3d 553 (4th Cir. 2017) 39, 40

Int'l Shoe v. Washington, 326 U.S. 310 (1945) 1
IT Corp. v. Gen. Am. Life Ins. Co., 107 F.3d 1415 (9th Cir. 1997) 30, 31, 34
Kalda v. Sioux Valley Physician Partners, Inc., 481 F.3d 639 (8th Cir.) 20, 21
Leckey v. Stefano, 501 F.3d 212 (3d Cir. 2007) 36, 39
Leventhal v. The MandMarblestone Group LLC, No. 18-cv-2727 (E.D. Pa., 2019) 37
M & G Polymers U.S.A., LLC v. Tackett, 574 U.S. 427 (2015) 26
Martin v. Feilen, 965 F.2d 660, 671 (8th Cir. 1992) 39
McDonald v. Provident Indem. Life Ins. Co., 60 F.3d 234 (5th Cir. 1995) 39
Mertens v. Hewitt Assocs., 508 U.S. 248 (1993) 10
Mich. Cent. R. Co. v. Myrick, 107 U.S. 102 (1883) 26
Milofsky v. Am. Airlines, Inc., 404 F.3d 338 (5th Cir. 2005) 30
Orth v. Wis. State Emples. Union Council 24, 500 F. Supp. 2d 1130 (E.D. Wis. 2007) 27
**Patient Advoc., LLC v. Prysunka*, 316 F. Supp. 2d 46 (D. Me. 2004) 15, 16, 19
Patient Advoc., LLC v. Prysunka, No. 03-118-P-H, 2004 WL 114980 (Jan. 21, 2004) 16
**Pegram v. Herdrich*, 530 U.S. 211 (2000) 25
Perez v. Koresko, 86 F. Supp. 3d 293 (E.D. Penn. 2015) 20
Pioneer Centres Holding Co. Emp. Stock Ownership Plan & Tr. v. Alerus Fin., N.A.,
858 F.3d 1324 (10th Cir. 2017) 39
**Rossetto v. Pabst Brewing Co.*, 217 F.3d 539 (7th Cir. 2000) 25, 27, 28, 29
Rozo v. Principal Life Ins. Co., 949 F. 3d 1071 (8th Cir. 2020) 34
Santomenno ex rel. John Hancock Tr. v. John Hancock Life Ins. Co. (U.S.A),
768 F.3d 284 (3d Cir. 2014) 10, 24
Saumer v. Cliffs Natural Resources Inc., 853 F.3d 855 (6th Cir. 2017) 39
**Sec'y of Lab. v. Doyle*, 675 F.3d 187 (3d. Cir. 2012) 16, 20
Teets v. Great-West Life & Annuity Ins. Co., 921 F.3d 1200 (10th Cir. 2019) 34
Tibble v. Edison Int'l, 575 U.S. 523 (2015) 36
Tocker v. Kraft Foods N. Am., Inc. Ret. Plan, No. 11-2445-cv (2d Cir. 2012) 30
**Varity Corp. v. Howe*, 516 U.S. 489 (1996) 8, 24
Willett v. Blue Cross & Blue Shield of Ala., 953 F.2d 1335 (11th Cir. 1992) 39
Wright v. Or. Metallurgical Corp., 360 F.3d 1090 (9th Cir. 2004) 39

STATUTES

28 U.S.C. § 1331 1

29 U.S.C. § 1132 8

29 U.S.C. § 1001 .... 8, a, b

*29 U.S.C. § 1002 .... passim

29 U.S.C. § 1003 .... 11, a, c, d

29 U.S.C. § 1102 .... 24, 28, 29

*29 U.S.C. § 1104 .... 6, 30, 32, 36

*29 U.S.C. § 1105 .... passim

29 U.S.C. § 1135 .... 10, 18

29 U.S.C. § 1204 10

RULES

Fed. R. App. Proc. 4(a) 1

Fed. R. Civ. Proc. 12(b) 1

OTHER AUTHORITIES

166 Cong. Rec. S7563 (2020) 17

29 U.S.C. § 1002 (Jan. 12, 2018) 13

29 U.S.C. § 1002 (Jan. 15, 2013) 13

29 U.S.C. § 1002 (Jan. 3, 2007) 13

29 U.S.C. § 1002 (Jan. 5, 2015) 13

29 U.S.C. § 1002 (Jan. 7, 2011) 13

61 F.R. 153 (Aug. 7, 1996) 14

Advisory Council on Emp. Welfare & Pension Benefit Plans, *Cybersecurity Considerations For Benefit Plans* (Nov. 2016) 18

Advisory Council on Emp. Welfare & Pension Benefit Plans, *Privacy and Security Issues Affecting Employee Benefit Plans* (Nov. 2011) 18

David W. Opderbeck, *Cybersecurity, Data Breaches, and the Economic Loss Doctrine in the Payment Card Industry*, 75 Md. L. Rev. 935 (2016) 19

Gregg Moran, *Breaches within Breaches: The Crossroads of ERISA Fiduciary Responsibilities and Data Security*, 73 U. Miami L. Rev. 483 (2019) 17, 18

Lisa Van Fleet & Randy Sherer, *An Overview of Fiduciary Responsibilities Under ERISA*, St. Louis Bar J. 14 (Spring 2020) 30, 33

Meeting your Fiduciary Responsibilities, U.S. Dep't. of Lab., Emp. Benefits Sec. Admin. (EBSA) (Sept. 2021) 28, 38

Pub. L. 105-72 (1997) 13

Pub. L. 109-280, § 611(f) (2006) 13

U.S. Gov't Accountability Off., *Defined Contribution Plans: Federal Guidance Could Help Mitigate Cybersecurity Risks in 401(k) and Other Retirement Plans* (February 11, 2021) 17, 19

U.S. Senate, *PBGC: Is Stronger Management and Oversight Needed: Hearing of the Committee on Health, Education, Labor, and Pensions*, 111th Congress, 2d Sess. (Dec. 1, 2013) 17

JURISDICTIONAL STATEMENT

This appeal arises from a final judgment from the United States District Court for the District of Columbia that disposed of all parties' claims through dismissal with prejudice. *Connolly v. Nat'l Lab. Holiday and Vacation Fund et al.*, No. 20-cv-599-TCF, at *13 (D.C.C. Nov. 13, 2021). This Court has subject-matter jurisdiction over the action pursuant to 28 U.S.C. § 1331, which states that the "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." This case arises under the Employee Retirement Income Security Act of 1974 (ERISA), which is a law of the United States. *Connolly*, No. 20-cv-599-TCF, at *7.

Federal appellate courts have subject-matter jurisdiction over cases properly filed in a federal district court if the appeal is filed within 30 days of the district court's ruling. Fed. R. App. Proc. 4(a)(1)(A). Here, the district court's ruling was issued on November 30, 2021, and Appellant timely filed the appeal before December 30, 2021, so subject-matter jurisdiction is proper. *Connolly*, No. 20-cv-599-TCF, at *13.

This Court also has personal jurisdiction over the action under *Int'l Shoe v. Washington*, 326 U.S. 310 (1945). Plaintiff has lived in Washington D.C. for 24 years, and all Defendants maintain offices or otherwise conduct regular business in Washington D.C. Stipulated Facts and Proc. Background, p. 1. Also, neither party objected to personal jurisdiction, so it is considered waived. *See* Fed. R. Civ. Proc 12(b)(2).

ISSUES PRESENTED

1) Did the lower court properly hold that participant data did not constitute "plan assets" under the Employee Retirement Income Security Act of 1974 (ERISA) and its related regulations in February 2020, given the available guidance regarding fiduciary duties at the time?

2) Did the lower court properly hold that Regal Defendants are not liable for losses to the plan under ERISA because they are not named or functional fiduciaries under the Administrative Services Agreement or under statute but err in finding that Regal Defendants may have breached a fiduciary duty?

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Defendant Regal Consulting LLC ("Regal") provides consulting, administration, and recordkeeping services to multiemployer plans, including Appellee Fund (the "Fund") and two related Employee Retirement Income Security Act of 1974 ("ERISA") plans called the National Laborers Pension Fund and the National Laborers Health and Welfare Fund. Stipulated Facts and Proc. Background, p. 1. Defendant Raul Demisay ("Demisay") worked for Regal as its principal consultant to the Fund from 1998 to March 10, 2020, when he retired. *Id.* at 1–2.

Contributions made by employers and earnings constitute the entirety of the Fund's assets. *Id.* Each contributing employer pays $1 into the Fund for each hour worked by a union employee; Participants who worked at least 1,000 Hours of Service during the prior fiscal year are considered "Eligible Participants." *Id.* For Eligible Participants, the Fund maintains a bookkeeping account, and each year on March 31, the Fund distributes the balance in each Eligible Participant's bookkeeping account as of the end of the previous fiscal year. *Id.* at 4.

On February 21, 2020, Demisay met with a client, who was unrelated to the Fund, at Panera Bakery in Washington, D.C. R. at 2. Demisay was conducting final client meetings in February 2020 in anticipation of his retirement on March 10, 2020. *Id.* Within this meeting, the client emailed a file to Demisay for his review and revision, but Demisay could not download the file using his phone's cellular service. *Id.* Therefore, he briefly connected his Regal-issued laptop to Panera's free Wi-Fi, downloaded the file, and immediately turned off the Wi-Fi. *Id.*

On the same day, at 12:32pm, Demisay's laptop was hacked by an unknown source, and the data on the laptop was copied to an unknown site on the dark web. *Id.* The stolen information included all of Demisay's email and contact data. *Id.* One of the contacts was Defendant Joe Schlitz

("Schlitz"), who is a Fund co-manager, with Defendant Letitia Beck ("Beck"). *Id*. At 1:09pm, Schlitz received, in his Fund email inbox, an email from Demisay.Raul@Reegal.com that contained the following: "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*. Schlitz clicked the link, a new webpage opened on his computer, his computer briefly froze, and then it rebooted. *Id*. Schlitz stated that the computer appeared to work fine after this incident. *Id*.

However, at 1:16pm, a spreadsheet containing the Fund participants' names, addresses, emails, Social Security numbers, and employers was downloaded from Schlitz's Fund computer account to an unknown site on the dark web. *Id*. Substantially all the Fund's money, in the amount of $2,642,863.12, was held at Union National Bank. *Id*. At 1:32pm, Schlitz's account authorized the transfer of this full amount from Union National Bank to an account at GloboBank, N.A., and this transfer was completed at 9:19am the following morning. *Id*. Upon completion of the transfer, the money was distributed to accounts at other banks and immediately invested in Bitcoin. *Id*.

The Fund did not make distributions on March 31, 2020, and it had no liquid assets on that date. *Id*. Regal has received communications from approximately 126 people from Demisay's contact list asking about the legitimacy of emails similar to the one Schlitz received. *Id*. At least nine of these people stated that they clicked the link. *Id*. Plaintiff Renita Connolly ("Connolly"), a Fund participant, sent a letter on May 15, 2020, to demand that the Fund pay her the benefits she earned. *Id*. Ms. Chalmers replied to this letter, on behalf of Defendant Board of Trustees (the "Board"), to communicate that the Fund was undergoing an audit of "banking issues" and that distributions would be delayed indefinitely. *Id*.

On July 1, 2020, Connolly sent a second letter to the Board to notify them that her identity had been stolen and that all of the money in her bank account had been transferred to an offshore

financial institution. *Id.* at 5. On July 15, 2020, Ms. Chalmers again responded on behalf of the Board, stating that the Fund and the Board could not accept responsibility for her losses. *Id*. On September 1, 2020, Connolly initiated this action on behalf of herself and similarly situated Fund participants by filing this suit in the United States District Court for the District of Columbia against the Fund Defendants and Regal Defendants. *Connolly v. Nat'l Lab. Holiday and Vacation Fund et al*., No. 20-cv-599-TCF, at *5 (D.C.C. Nov. 13, 2021).

II. PROCEDURAL HISTORY

On September 1, 2020, Appellant Connolly filed suit, on behalf of herself and similarly situated Fund participants, in the United States District Court for the District of Columbia. She filed this suit against Defendants Regal Consulting LLC and Raul Demisay (collectively "Regal Defendants") and Defendants National Laborers Holiday and Vacation Fund, Board of Trustees of the National Laborers Holiday and Vacation Fund, Joe Schlitz, and Letitia Beck (collectively "Fund Defendants"). *Id*.

Regal Defendants and Fund Defendants filed separate Motions to Dismiss, and the District Court granted both motions, without prejudice, in a decision issued on November 30, 2021. *Id*. at *13. Appellants appealed to the United States Court of Appeals for the Thirteenth Circuit. Due to the parties' Partial Global Settlement, the Court will only consider the matters set forth above. *See supra* Issues Presented.

III. OPINIONS BELOW

The Regal Defendants and Fund Defendants filed separate Motions to Dismiss, and the District Court granted both motions, without prejudice, in a decision issued on November 30, 2021. *Connolly*, No. 20-cv-599-TCF, at *13. The District Court held that, based on ERISA case law, plan data is not an ERISA "plan asset." *Id*. at *11.

It also concluded that "neither of the Regal Defendants is an ERISA fiduciary with respect to the allegations in the Complaint." *Id.* at *9. The court based these conclusions on Section 4.1 of the Administrative Services Agreement (the "Agreement") and on case law interpreting fiduciary duties under 29 U.S.C. § 1104(a). *Id.* at *9–10. It found that "[n]either Regal Defendant took unilateral action with respect to Fund assets or the operation of the Fund," and Plaintiffs did not allege that Defendant Demisay "exercised discretionary authority or discretionary control respecting management of the Fund or . . . [its] assets," or that Defendant Demisay "had discretionary authority or . . . responsibility in the administration of such Fund." *Id.* at *10. Finally, the court found that, although Regal Defendants had been negligent, they could not be found liable for the losses given the boundaries of fiduciary duties under ERISA. *Id.* at *12.

SUMMARY OF THE ARGUMENT

This Court should affirm the District Court's decision and grant Regal Defendants' Motion to Dismiss, with prejudice. Regal Defendants cannot be found liable for the losses to the Fund because the stolen participant data does not constitute ERISA "plan assets," and Regal Defendants are neither named nor functional fiduciaries. Also, even if this Court were to find that Regal Defendants are fiduciaries, they still cannot be held liable for the losses because they did not breach any fiduciary duties, and no action by Regal Defendants is causally connected to the losses to the Fund.

Participant data does not constitute "plan assets" because statutory, administrative, and case-law guidance clearly establish that the term "plan assets" contemplates something of demonstrable value, such as money or its equivalent. The terms of the Agreement in this case further indicate that the Fund and Regal Defendants understood that the plan assets consisted entirely of the Fund's money held in Union National Bank. The United States Department of Labor—the entity responsible for issuing guidance regarding the scope of fiduciary duties—had issued little guidance at the time of this incident, so the plain language of the relevant provisions, the governing plan documents, and the parties' actions and representations must be controlling. Here, it is clear that participant data is excluded from the definition of "plan assets" in general and in this case.

Regal Defendants also cannot be found to be either named or functional fiduciaries of the Fund. The Agreement explicitly and implicitly provides that Regal Defendants did not agree to serve as fiduciaries and that neither party intended them to serve as fiduciaries. Regal Defendants' contractual duties were specifically limited to administrative duties, and there is no evidence in the

record that Regal Defendants acted outside the scope of those limited duties such that they would become functional fiduciaries.

Furthermore, even if this Court were to find that Regal Defendants were fiduciaries of the Fund, it could not find that any action by Regal Defendants rises to the level of a breach of a fiduciary duty or caused the loss to the Fund. Therefore, this Court must affirm the lower court's holding and find both that the lost participant data does not constitute ERISA "plan assets" and that Regal Defendants are not liable under ERISA.

ARGUMENT

Congress enacted the Employee Retirement and Income Security Act of 1974 (ERISA) to protect employee benefit rights. *See* 29 U.S.C. § 1001(a) (identifying the impact of retirement plans on interstate commerce and federal taxes, and stating the need for minimum standards to govern such "plans and their financial soundness"). ERISA provides a comprehensive remedy scheme for certain persons who have suffered a harm related to an ERISA-governed plan. *See* 29 U.S. Code § 1132. ERISA preempts state-law remedies to the extent that they would provide relief for harms to an ERISA plan; therefore, claims related to harm to an ERISA plan must be brought under ERISA. 29 U.S. Code § 1132; *see Varity Corp. v. Howe*, 516 U.S. 489, 512, 515 (1996). Here, all harms alleged are harms to the plan, and Plaintiffs' claims seek to enforce rights under ERISA, so the claims may only be brought under § 1132(a)(2) to enforce and restore rights under the plan or § 1132(a)(3) for participants to seek equitable relief.

Liability under ERISA is fundamentally linked to persons' or entities' identification as fiduciaries. *See infra* Section III. In general, "a person is a [functional] 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 person may also be a named fiduciary under 29 U.S.C. § 1105(c)(1)(B). *Id*.

Here, Regal Defendants are not liable for the harms to the Fund: (1) they did not exercise "any authority or control respecting management or disposition of its assets" because the participant data with which they dealt do not constitute ERISA "plan assets"; and (2) they are not fiduciaries of the Fund because (a) they were not so named and (b) they did not exercise "any discretionary authority or discretionary control respecting management of such plan" or "any discretionary authority or discretionary responsibility in the administration of such plan." Furthermore, even if this Court finds that Regal Defendants are fiduciaries, they are still not liable for losses to the plan because there is no evidence of affirmative actions taken by Regal Defendants that rise to the level of a breach of a fiduciary duty or are sufficiently causally connected to the loss. Therefore, this Court should affirm the lower court's dismissal with prejudice.

I. STANDARD OF REVIEW

This Court must determine whether the District Court's decision to grant the Regal Defendants' Motion to Dismiss was proper. *Connolly*, No. 20-cv-599-TCF, at *13. The first issue as to whether participant data constitutes ERISA "plan assets" is a pure legal issue, so the standard of review is de novo. *See, e.g.*, *Chevron Corp. v. Naranjo*, 667 F.3d 232, 239 (2d Cir. 2012). The second issue as to whether Regal Defendants are liable for harms to the plan is a mixed question of law and fact, but there are no disputed facts, so a de novo review is also appropriate. *See Boone v. United States*, 944 F.2d 1489, 1492 (9th Cir. 1991) (finding mixed questions of fact and law are

reviewed de novo); *In re Ruti-Sweetwater, Inc.*, 836 F.2d 1263, 1266 (10th Cir. 1988) (finding mixed questions of fact and law with "primarily a consideration of legal principles" are reviewed de novo).

Under Federal Rule of Civil Procedure 12(b)(6), to survive a Motion to Dismiss a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). To meet the plausibility standard, the complaint must contain more than a "sheer possibility that a defendant has acted unlawfully." *Id.* Courts evaluate complaints according to *Twombly* and *Iqbal* using three steps: (1) "take note of the elements a plaintiff must plead to state a claim;" (2) identify the allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth;" and (3) "where there are well-pleaded factual allegations, . . . assume their veracity and then determine whether they plausibly give rise to an entitlement for relief." *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 221 (3d Cir. 2011) (alterations and citations omitted).

II. THE FUND PARTICIPANTS' STOLEN INFORMATION AND DATA ARE NOT ERISA "PLAN ASSETS" OF THE FUND.

"ERISA is a 'comprehensive' statute that is 'the product of a decade of congressional study of the Nation's private employee benefit system.'" *Santomenno ex rel. John Hancock Tr. v. John Hancock Life Ins. Co. (U.S.A)*, 768 F.3d 284, 291–92 (3d Cir. 2014) (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993)). As a "comprehensive" statute, ERISA is complex, so the U.S. Department of Labor and the U.S. Treasury coordinate to carry out ERISA provisions and issue guidance to help interpret ERISA's terms and its application. *See* 29 U.S.C. § 1204. The Department of Labor is the ERISA enforcement authority under 29 U.S.C. § 1132. 29 U.S.C. § 1135.

Certain ERISA provisions explicitly call upon the Secretary of Labor to apply its own regulations to the interpretation of the provision. For example, 29 U.S.C. § 1002(42) provides that "the term 'plan assets' means plan assets as defined by such regulations as the Secretary [of Labor] may prescribe." The Secretary has prescribed two such regulations: 29 C.F.R. § 2510.3-101 regarding "plan investments" and 29 C.F.R. § 2510.3-102 regarding "participant contributions."

ERISA requires that a plan fiduciary deal with plan assets in an ordinary and prudent manner and for the exclusive benefit of the beneficiaries of a plan. *See* 29 U.S.C. §§ 1003(a), 1002(21), 1104, 1106. Participant data is not a "plan asset" under the plain language or official interpretations of either related regulation from the Secretary of Labor.[1] Also, relevant legislative and administrative history demonstrate that neither Congress nor the Department of Labor intended to include data or information within the ERISA definition of "plan assets."[2] Case law analysis and industry usage of the term "plan assets" further support this conclusion and indicate that plan assets must have a demonstrable value in order to pass the "beneficial ownership interest" test.[3] Additionally, given fiduciaries' integral role within ERISA's scheme, they must be able to reasonably rely on available guidance regarding the extent of their duties, including what constitutes "plan assets."[4]

A. Participant Data Is Not a "Plan Asset," According to the Plain Language of the Relevant Regulations Prescribed by the Secretary of Labor.

Since Congress delegated the authority to define "plan assets" to the Secretary of Labor, the plain language of the relevant regulations (29 C.F.R. §§ 2510.3-101, 102) at the time of this incident, in February 2020, should guide this Court's understanding of plan assets. First, the

---

[1] *See infra* Section II.A.
[2] *See infra* Section II.B.
[3] *See infra* Section II.C.
[4] *See infra* Section II.D.

definition of "plan assets" as it relates to plan investments is provided in 29 C.F.R. § 2510.3-101. The general rule provides that "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." 29 C.F.R. § 2510.3-101(a)(2). Since no acquisitions or investments occurred on or around February 21, 2020—the relevant date here—this regulation does not apply. However, it does provide guidance as to what kind of assets were contemplated—"investments" deal with things of value.[5] The examples provided in § 2510.3-101(j) illustrate that "assets" related to plan investments have a definable value, whether in the form of securities, §§ 2510.3-101(j)(1), (5), (6); equity interests in a company, §§ 2510.3-101(j)(2)–(4), (8); real property, §§ 2510.3-101(j)(7), (9), (11); debt instruments, §§ 2510.3-101(j)(10); or trusts, §§ 2510.3-101(j)(12).

Second, the definition of "plan assets" as it relates to participant contributions is provided in 29 C.F.R. § 2510.3-102. Under this Section, "participant contributions" do not include participants' personal information even when that information was contributed to the ERISA plan by participants. The language of 29 C.F.R. § 2510.3-102 provides that, under the general rule, "the assets of the plan include *amounts* . . . 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." 29 C.F.R. § 2510.3-102(a)(1) (emphasis added). Notably, six key terms within the general rule of this definition are directly tied to money or currency. The examples provided in this Section illustrate that assets related to participant contributions refer to money or its equivalent. 29 C.F.R. § 2510.3-102(f). The examples explain the timeframe within which (1) employee payroll deductions, (2) employee deferral funds, and (3)

---

[5] See infra Section II.C for further discussion about "plan assets" as having demonstrable value.

employee-sent checks become plan assets after being deposited into the plan's account. *Id*. Each example clearly contemplates money or its equivalent.

Neither of the regulations that define ERISA "plan assets" explicitly provide that participant information constitutes "plan assets," and the related examples clearly contemplate money or its equivalent. Additionally, the statutory history of ERISA's definition of the term and the administrative history of both regulations issued by the Department of Labor demonstrate that participant information does not constitute ERISA "plan assets."

B. The ERISA Definition of "Plan Assets" Appeared in the Act in 2006, and Relevant Regulations Were Issued in 1995 but None of the Relevant Provisions Were Amended to Include Data in Their Definitions.

Since its initial enactment in 1974, ERISA's definitions Section, 29 U.S.C. § 1002, has been amended various times—some amendments merely altered the form of a Part, others added a new Part entirely. *Compare* Pub. L. 105-72 (1997) (codified at 29 U.S.C. § 1002(38)(B)) (adding introductory provisions to § 1002(38)(B)), *with* Pub. L. 109-280 (2006) (codified at 29 U.S.C. § 1002(42)) (adding Part 42 to create § 1002(42), which defines "plan assets"). Congress added Part 42 to § 1002, which provides the definition of ERISA "plan assets," in 2006. Pub. L. 109-280. This new Part appeared in the Act as printed in January 2007. *See* 29 U.S.C. § 1002 (Jan. 3, 2007), https://congressional.proquest.com/congressional/docview/t55.d56.2006-29-1002?accountid=37826. Section 1002 has also been amended at least four times since then. *See* 29 U.S.C. § 1002 (Jan. 7, 2011); 29 U.S.C. § 1002 (Jan. 15, 2013); 29 U.S.C. § 1002 (Jan. 5, 2015); 29 U.S.C. § 1002 (Jan. 12, 2018). However, Congress did not amend Part 42 within any of these amendments.

Under 29 U.S.C. § 1002(42), "the term 'plan assets' means plan assets as defined by such regulations as the Secretary may prescribe." Although it is within Congress's purview to provide

a full and exhaustive definition of "plan assets," it chose to delegate this authority to the Secretary of Labor. The Secretary of Labor had issued regulations defining "plan assets" in 1995. 29 C.F.R. 2510 (1995). The following year, it adopted amendments to this Section, and the Federal Register memorializes the discussion regarding these amendments. 61 F.R. 153 (Aug. 7, 1996). These Comments use the terms "asset" and "participant contributions" in context, which makes clear that the Secretary of Labor contemplated things of value—namely, money or currency.[6] *See id*. at 41221. The regulatory provisions defining "plan assets" were amended several more times between 1995 and 2020, but by 1997, the language was substantially the same as it is found today, including the illustrative examples provided at the end of each Section. 29 C.F.R. 2510 (1997); 29 C.F.R. § 2510.3-101(j); 29 C.F.R. § 2510.3-102(f). Importantly, the most recent amendment was in July 2020, but neither this amendment nor any other since 1995 included mention of participant data or digital information. 29 C.F.R. 2510 (2020). One illustrative example in 29 C.F.R. § 2510.3-102(f) mentions "financial data," but only to explain the deposit timing required for participant contributions to constitute "plan assets," not to identify data as a "plan asset." *Id*. at § 2510.3-102(f)(2).

Congress defined ERISA "plan assets" in 2006, and the Secretary of Labor defined "plan assets" in 1995; both entities have had various opportunities—and 15 or 25 years, respectively—to amend the relevant provisions and respond to evolving circumstances regarding cybersecurity. However, neither entity chose to do so. This inaction must be interpreted as in an intent to continue

[6] For example, "The commenters stated that requiring plan fiduciaries to manage assets of such plans is contrary to the purpose of plans designed to comply with section 404(c), which is to permit the participants to exercise control over the assets allocated to their individual accounts"; "lump sum payments of participant contributions"; "deposit amounts." 61 F.R. 153, 41221 (Aug. 7, 1996)

to exclude participant data from the definition of "plan assets." To find otherwise would be to deliberately, and improperly, blur the line between law-making and law-interpreting.

C. According to Authorities Interpreting the Statutory and Regulatory Definitions of "Plan Assets," Participant Data Is Excluded Generally and in this Case.

1. In General, "Plan Assets" Must Have Demonstrable Value.

"Plan assets" do not include participant information or data. *Patient Advoc., LLC v. Prysunka*, 316 F. Supp. 2d 46, 49 (D. Me. 2004) (holding information and data was not "plan assets" under ERISA); *Harmon v. Shell Oil*, No. 3:20-cv-00021, 2021 BL 126207, *2–3 (S.D. Tex. March 30, 2021)[7] (holding "participant data" included identifying and contact information of plan participants but that such data did not constitute ERISA "plan assets"). Under ERISA, "plan assets" must be something of value held by the plan. *Patient Advoc., LLC*, 316 F. Supp. 2d at 49 (holding information and data was not "plan assets" under ERISA); *Divane v. Nw. Univ.*, No. 16-C-8157, 2018 WL 2388118, at *1–2 (N.D. Ill. May 25, 2018), *aff'd*, 953 F.3d 980 (7th Cir. 2020) (finding that, although data may have value, it could not conclude that it constitutes ERISA "plan assets"); *In re Fidelity ERISA Float Litig. v. Fidelity Mgmt. Trust Co.*, 829 F.3d 55, 60 (1st Cir. 2016) (holding cash, and interest accrued thereon, outside of the plan account was not "plan assets" because it was not held or intended to be held by the plan). The *Patient Advocates* court contrasted participant data with "stocks, bonds, cash, investment contracts and other 'hard' assets," pointing out that "claims information typically is not acquired for its value or held as an investment." *Patient Advoc., LLC*, 316 F. Supp. 2d at 49. It then recognized that "[d]ata or information that a plan administrator accumulates in the course of administering a plan are certainly not conventional 'plan assets.'" *Id.* at 49; *Patient Advoc., LLC v. Prysunka*, No. 03-118-P-H, 2004 WL 114980,

---

[7] Few published opinions directly address the definition of ERISA "plan assets," so unpublished opinions may provide guidance to this Court.

*4 (D. Me. Jan. 21, 2004) (information included the "name, address, social security number, age and medical history of participants; health treatment received; names of physicians; results of tests; amount of claims paid").

Whether a given asset is conventionally considered an ERISA plan asset or not, the plaintiff must produce evidence to demonstrate that asset's value. *Patient Advoc., LLC*, 316 F. Supp. 2d at 49 (finding "no evidence that the data in this case are valuable or that the plan sponsors viewed or treated the data as assets of the plans" and holding that the data were not plan assets); *Divane*, No. 16-C-8157, at *12 (finding that a mere allegation that "confidential information is a plan asset" is a legal conclusion and could not be added to plaintiff's amended complaint). This evidence must be more than a mere allegation because "[s]aying that the information has economic value does not make it so." *Patient Advoc., LLC*, 316 F. Supp. 2d at 48 (finding the bare allegation that the data was a "plan asset" was insufficient). In this case, Plaintiffs have offered no evidence of economic value and, indeed, merely assert bare allegations that the participant data constitute "plan assets." The fact that the stolen data led to loss of the money held in Union National Bank is not evidence of an identifiable value in the participant data itself.

Since Congress defined ERISA "plan assets" in 2006, no federal appellate court has found that participant data constitutes "plan assets" under the relevant regulations. *See, e.g.*, *Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643, 658 (9th Cir. 2019) (discussing "premiums paid to defendants with 'participant contributions' made into a self-funded plan as plan assets); *Hi-Lex Controls, Inc. v. Blue Cross Blue Shield of Mich.*, 751 F.3d 740, 744 (6th Cir. 2014) (stating "employee contributions constitute plan assets under ERISA once they are 'segregated from the employer's general assets'"); *Sec'y of Lab. v. Doyle*, 675 F.3d 187, 203 (3d Cir. 2012) (analyzing

"plan assets" according to plain language of regulations). Therefore, industry usage of the terms "assets" and "plan assets" may also be instructive to the Court.

2. *In General, Actors and Entities in the ERISA and Cybersecurity Industries Separately Define "Plan Assets" and "Plan Asset Data" or "Participant Information."*

Studies and discussions addressing how to better protect retirement plan assets from cybersecurity threats discuss plan assets separately from plan asset data or personally identifiable information (PII). *See, e.g.*, U.S. Gov't Accountability Off., *Defined Contribution Plans: Federal Guidance Could Help Mitigate Cybersecurity Risks in 401(k) and Other Retirement Plans*, at 11 (February 11, 2021) ("This is significant in that, according to DOL, in 2018, 106 million plan participants were enrolled in DC plans that held approximately $6.3 trillion in assets . . . . Some actors that can cause threats to IT systems (referred to as 'threat actors') only seek to steal participants' PII, while others aim to steal assets from an account."); Gregg Moran, *Breaches within Breaches: The Crossroads of ERISA Fiduciary Responsibilities and Data Security*, 73 U. Miami L. Rev. 483, 486 n. 8 (2019) ("This Article focuses solely on the theft of *data* from employee benefit plans; it does not address situations in which thieves use stolen data to steal actual plan assets.") (emphasis in original); U.S. Senate, *PBGC: Is Stronger Management and Oversight Needed: Hearing of the Committee on Health, Education, Labor, and Pensions*, 111th Congress, 2d Sess., at 49 (Dec. 1, 2013) (discussing "plan assets" and "participant information" as distinct kinds of assets). Congressional records also indicate that "plan assets" have a measurable value. *See, e.g.*, 166 Cong. Rec. S7563 (2020) (stating, for example, "the projection of plan assets shall be based on the fair market value of plan assets").

The Government Accountability Office (GAO) states that participant and beneficiary PII includes one's name, Social Security number, date of birth, address, username, and password. U.S.

Gov't Accountability Off., *Defined Contribution Plans: Federal Guidance Could Help Mitigate Cybersecurity Risks in 401(k) and Other Retirement Plans*, at 12 (February 11, 2021). It also states that participant and beneficiary plan asset data includes one's retirement account number and bank account information, *id*., or "sensitive information that is *associated with* participants' retirement assets." *Id*. at 13, n. b (emphasis added). Here, the stolen information was plan asset data associated with the plan, not assets of the plan.

Prior to the incident in February 2020, the Department of Labor had issued little guidance regarding fiduciary duties to protect plan asset data, as opposed to plan assets, from cybersecurity threats such as the one at issue in this case. Gregg Moran, *Breaches within Breaches: The Crossroads of ERISA Fiduciary Responsibilities and Data Security*, 73 U. Miami L. Rev. 483, 486–87 (2019) (summarizing available guidance and identifying need for additional guidance); *see* Advisory Council on Emp. Welfare & Pension Benefit Plans, *Cybersecurity Considerations For Benefit Plans* (Nov. 2016), https://www.dol.gov/sites/default/files/ebsa/about-ebsa/about-us/erisa-advisory-coun-ci1!2016-cybersecurity-considerations-for-benefit-plans.pdf (last visited February 23, 2022) (supplementing the 2011 report); Advisory Council on Emp. Welfare & Pension Benefit Plans, *Privacy and Security Issues Affecting Employee Benefit Plans* (Nov. 2011) (addressing, for the first time, cybersecurity privacy issues as they relate to ERISA). As the ERISA enforcement authority, it is critical for the Department of Labor to issue more instructive guidance regarding plan data even if it is not considered an ERISA "plan asset." *See* Gregg Moran, *Breaches within Breaches: The Crossroads of ERISA Fiduciary Responsibilities and Data Security*, 73 U. Miami L. Rev. 483, 487 (2019) (citing the Department of Labor's rulemaking authority under 29 U.S.C. § 1135 and emphasizing the need for the Department of Labor to proactively guide fiduciaries and advise them with respect to treatment of plan data). Guidance from other bodies

may be educational, but it will not adequately inform actors within the ERISA scheme of the scope of their liability under ERISA. If this Court provides relief to Plaintiffs by judicially broadening the definition of "plan assets" or scope of ERISA fiduciary duties, it will further disincentivize the Department of Labor from issuing that critical guidance and likely create a reactive, as opposed to proactive, scheme for relief to participants who suffer from a data breach. *Id.* 487–88; David W. Opderbeck, *Cybersecurity, Data Breaches, and the Economic Loss Doctrine in the Payment Card Industry*, 75 Md. L. Rev. 935, 937–38 (2016) (discussing difficulty recovering damages related to data breaches and the need for Department of Labor to instead be proactive).

Here, the stolen participant data consists of participants' names, addresses, emails, Social Security numbers, and employers. Stipulated Facts and Proc. Background, p. 2. According to GAO, this information is considered PII. None of this PII has inherent, fungible, or demonstrable value like money or certain investments. The information served as a stepping-stone that led the cyberthief to access plan assets—the money held in an account in Union National Bank—but the information itself has no demonstrable value. As the District Court in this case notes, the cybercriminal "seems to have . . . regarded" the participant data as "an asset," but case-law precedent and available administrative and regulatory guidance at the time clearly excluded such data from the definition of an ERISA "plan asset." *Connolly*, No. 20-cv-599-TCF, at *11.

Additionally, not only have Plaintiffs failed to produce evidence that the participant data has demonstrable value, but Plaintiffs have also failed to produce evidence that the participant data was treated like plan assets. *See Patient Advoc., LLC*, 316 F. Supp. 2d at 48 (reasoning, in part, that participant data was not an ERISA "plan asset" because "Patient Advocates . . . produced no evidence to show that it or the plan sponsors treated this information as a plan asset (before the current controversy)"). Much like a fiduciary may be created through an individual or entity acting

as a fiduciary, perhaps an asset can become a "plan asset" if treated as such. *See infra* Section III.A. However, here, no such treatment has been alleged or identified.

3. In this Case, Participant Data Is Not a "Plan Asset" Because the Beneficial Ownership Interest Test Is Not Satisfied: the Plan Sponsor (Defendant Board of Trustees) Did Not Expressly or Through Its Actions Represent that the Fund Owns the Participant Data.

Outside of the plain language and administrative history of the relevant regulations, courts have applied the "beneficial ownership interest" test, which looks to "ordinary notions of property rights," to determine what constitutes "plan assets" under particular circumstances. *Sec'y of Lab. v. Doyle*, 675 F.3d 187, 203 (3d Cir. 2012). *See, e.g.*, *Perez v. Koresko*, 86 F. Supp. 3d 293, 377 (E.D. Penn. 2015). The Department of Labor itself "has opined that 'plan assets' . . . generally are to be identified on the basis of ordinary notions of property rights under non-ERISA law." *Patient Advoc., LLC*, 316 F. Supp. 2d at 48 n. 3 (citing Dep. of Lab. Letter Op. 92-02A (Jan. 17, 1992)). Under this approach, courts have found that, in the absence of statutory or regulatory guidance, "plan assets" should be given its ordinary meaning. *Doyle*, 675 F.3d at 203; *Perez*, 86 F. Supp. 3d at 377. *See also Divane*, No. 16 C 8157, at *12 (stating that "courts consider 'ordinary notions of property rights under non-ERISA law'" when defining "plan assets"; even when data may have value, it is not "owned" according to ordinary notions of property rights, so the court could not conclude that data was a "plan asset."); *Kalda v. Sioux Valley Physician Partners, Inc.*, 481 F.3d 639, 647 (8th Cir.) (stating that Secretary of Labor defines "plan assets" with respect to "ordinary notions of property rights"); *In re Fidelity ERISA Float Litig.*, 829 F.3d at 60 (discussing ordinary notions of property rights in the context of "float").

The Eighth Circuit has stated that "whether a plan has acquired a beneficial interest depends on whether the plan sponsor expressed an intent to grant such a beneficial interest or has acted or made representations sufficient to lead participants and beneficiaries of the plan to reasonably

believe that such fund separately secures the promised benefits or are otherwise plan assets." *Kalda*, 481 F.3d at 647. *See also Solis v. Koresko*, 884 F. Supp. 2d 261, 286 (E.D. Penn. 2012).

To determine what constitutes property of an ERISA plan, contracts and other legal instruments "involving the plan, including the plan documents," must first be considered because ERISA protects "contractually defined benefits." *Patient Advoc., LLC*, 316 F. Supp. 2d at 48 n. 3; *In re Fidelity ERISA Float Litig.*, 829 F.3d at 60; *Solis*, 884 F. Supp. 2d at 287. Here, the contract explicitly states in Section 6(a) that "all assets of the Fund are to be held in cash and in an account at the Union Bank of South Bend Indiana." Stipulated Facts and Proc. Background, p. 4. The Fund and its participants intended only for that which was held by Union Bank to be considered "plan assets."

Where the governing documents do not express an intent to confer a beneficial interest, something may still be a "plan asset" if it is held in trust. *Id*. ERISA explicitly provides that, with some exceptions not relevant here, "all assets of an employee benefit plan shall be held in trust by one or more trustees." 29 U.S.C. § 1103; *Patient Advoc., LLC*, 316 F. Supp. 2d at 48 (finding, in part, information alleged to be "plan assets" was not held in trust so found not constitute "plan assets"). Although it would be odd and likely impractical to hold participant data in trust, to do so might indicate an intention to hold that data as a plan asset. Here, however, no such measures were taken, so no such inference can be made.

Next, "the actions and representations of the parties involved" must be considered—particularly those of the plan sponsor. *Patient Advoc., LLC*, 316 F. Supp. 2d at 48 n. 3; *Kalda*, 481 F.3d at 647. Here, the Fund's plan sponsor, Defendant Board of Trustees, has not taken actions or made representations to lead participants or beneficiaries of the plan to reasonably believe that the plan owns—not just utilizes and stores—the participant data. No facts in the record indicate that

the Board took any such actions or made any such representations regarding the status of the participant data.

Since neither the governing documents of the Fund nor the actions and representations of the Board indicate that the participant data was owned by the plan, the beneficial ownership interest test fails, and the data cannot be considered a "plan asset."

D. ERISA Fiduciaries Must Be Able to Reasonably Rely on Available Guidance Regarding ERISA Definitions and the Boundaries of Their Fiduciary Duties.

If this Court does not accept the plain language of the statute and related regulations, the administrative history of those regulations, or the text of the parties' contract as proof enough that the participant data cannot be considered ERISA "plan assets," it must also look to the available ERISA-interpreting guidance at the time of this incident. In February 2020, the Department of Labor had issued little guidance regarding how cyberthreats would change fiduciary duties, and fiduciaries had no reason to believe that the definition of "plan assets" would change in the context of digital data storage. *See supra* Section II.C. Also, case law that interpreted the relevant statutory and regulatory provisions both explicitly and implicitly excluded participant data—such as the personally identifiable information at issue in this case—from the definition of "plan assets." *See supra* Section II.C(3). As the lower court acknowledged,[8] precedent at the time of this incident clearly excluded participant data from the ERISA definition for "plan assets." *Connolly*, at *11. Adjudicating claims brought under ERISA according to precedent is particularly critical given the complexity of the ERISA scheme. If fiduciaries cannot trust the ERISA interpretation provided by available guidance from the Department of Labor and case-law precedent, they cannot know with certainty the boundaries of their liability under ERISA. *See infra* Section III (discussing fiduciary

---

[8] *See supra* Section II.C.

liability in general and in this case). This uncertainty would likely disincentivize persons and entities from acting as fiduciaries, to avoid taking on liabilities that they could not anticipate. Since the ERISA scheme requires willing fiduciaries, such a disincentive could threaten the entire system.

A loss was undeniably sustained in this case, but Regal Defendants cannot be held liable, and the loss was not causally connected to Regal Defendants, in part because the participant data that Regal Defendants stored on their devices does not constitute "plan assets." This Court is a policy-making appellate court, but it has acknowledged in the past that facts of a case are not "license for judges to legislate from the bench." *See Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 338 (2003) (interpreting narrowly the cause of action for intentional infliction of emotional distress according to precedent, even when dealing with terrorist acts of torture). Therefore, this Court must find that, as the law stood at the time of this incident and according to relevant administrative guidance, the participant data stolen from Regal Defendants' computers does not constitute ERISA "plan assets."

III. REGAL IS NOT LIABLE UNDER ERISA FOR THE LOSSES SUFFERED BY THE FUND AND ITS PARTICIPANTS BECAUSE THEY ARE NOT NAMED OR FUNCTIONAL FIDUCIARIES, AND CYBERCRIME, NOT BREACH OF FIDUCIARY DUTY, CAUSED THE LOSS TO THE PLAN.

Even if this Court finds that participant data is a plan asset under ERISA, Regal Defendants are not liable for the plan's loss from cybercrime theft because they are neither named fiduciaries under the terms of the Agreement nor are they functional fiduciaries under ERISA. Regal Defendants cannot be found functional fiduciaries because they do not have sufficient control or authority to act discretionarily under the terms of the Agreement, and extrinsic evidence from the record does not indicate that Regal Defendants ever stepped outside the scope of their contractual duties. However, even if Regal Defendants were found to be named or functional fiduciaries, no

specific act or omission transpired that would constitute a breach of fiduciary duty causing loss to the plan. Furthermore, the plan was harmed by a third-party cybercrime, not a fiduciary act taken by Regal Defendants. Therefore, Regal Defendants are not liable for any claims under ERISA, and the lower court properly found Regal Defendants not liable for the loss to the plan; this Court should uphold its ruling.

A. Regal Defendants Are Not Liable for the Theft Because They Are Neither Named Fiduciaries Under the Terms of the Contract nor Functional Fiduciaries Under ERISA.

Regal cannot be held liable for the theft from the Fund because they are neither named nor functional fiduciaries. As such, they do not carry any ERISA-imposed fiduciary duties or liability for the loss to the plan. 29 U.S.C. § 1002(21). Under ERISA, there are two paths to establishing fiduciary status and duties. "Named fiduciaries" are explicitly identified in the plan's language. 29 U.S.C. § 1102(a); *Santomenno ex rel. John Hancock Tr.*, 768 F.3d at 290–91 (stating "a person or entity is a fiduciary if they are named in the plan as such") (quotations omitted); *Bafford v. Northrop Grumman Corp.*, 994 F.3d 1020, 1026 (9th Cir. 2021) (holding "a party that is designated in the plan instrument as a fiduciary is a named fiduciary") (quoting *Depot Inc. v. Caring for Montanans, Inc.* 915 F.3d 643, 653 (9th Cir. 2019)) (quotations omitted). "Functional fiduciaries" are created when a person or entity exercises discretionary control or authority over the plan or its assets. 29 U.S.C. § 1002(21)(A). *Compare Varity Corp.*, 516 U.S. at 498 (holding that an employer who deliberately misled beneficiaries was acting in capacity as ERISA fiduciary), *with Peters v. Aetna Inc.*, 2 F4th 199, 239 (4th Cir. 2021) (finding business contract between Aetna and Optum did not confer fiduciary status to Optum because Aetna "retained the reigns" and Optum conducted purely administrative services), *and Pegram v. Herdrich*, 530 U.S. 211, 225–26 (2000) (finding

no fiduciary breach because eligibility decisions in employer-sponsored insurance plan are business decisions, not fiduciary functions).

The lower court correctly held that Regal Defendants are neither named nor functional fiduciaries. Once the whole Agreement and extrinsic evidence are considered, as required under ERISA when a court finds ambiguity, the meaning of the Agreement becomes clear on its face: Regal Defendants' job duties, as detailed in the Agreement and carried out in practice, do not meet the threshold of control to trigger functional fiduciary status or the associated duties and liabilities.

1. Regal Defendants Are Not Named Fiduciaries Because, Whether the Agreement is Deemed Clear on Its Face or Patently Ambiguous, the Agreement Terms Do Not Demonstrate Any Conference of Named Fiduciary Status on Regal Defendants.

The terms of the Agreement between Regal Defendants and the Fund make clear that Regal Defendants are neither named nor functional fiduciaries. The lower court correctly held that the Agreement could not sensibly be read to assign fiduciary duties to Regal Defendants because the plain text—or lack thereof—makes it "impossible to conclude" that Regal Defendants affirmatively agreed to take on the duties and liabilities of an ERISA fiduciary. *Connolly*, No. 20-cv-599-TCF, at *9 (holding clerical error of missing checkmark was insufficient to find fiduciary status). To assess whether a term or clause is ambiguous, courts first consider whether there is a clear meaning when read in context with the rest of the document; if so, the defendant is "off the hook as a matter of law." *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 542 (7th Cir. 2000). However, if plaintiffs proffer objective evidence of alternate meanings informed by real-world context as evidence of latent ambiguity (the "latent ambiguity rebuttal"), courts will proceed to evaluating patent or latent ambiguity. *Id.* at 547.

Though the missing checkbox may appear patently ambiguous because it is a defective element of the contract at issue, the terms of the Agreement as a whole make clear that neither

Regal Defendants nor the Fund intended Regal Defendants to serve as fiduciaries. Regal Defendants' job duties are strictly limited to non-fiduciary acts, and the indemnification clause in Section 8 of the Agreement assigns quasi-fiduciary duties[9] that would have been duplicitous and unnecessary had Regal Defendants been true co-fiduciaries with matching obligations to the Fund. 29 U.S.C. §§ 1105(a)(1)–(3). Neither the text of the Agreement nor any facts in the record suggest that Regal Defendants affirmatively agreed to serve as fiduciaries or that the Fund intended Regal Defendants to carry out any fiduciary functions. Therefore, whether the contract is deemed clear on its face or patently ambiguous, when the Agreement as a whole and extrinsic evidence are considered, this Court cannot find that Regal Defendants are ERISA fiduciaries.

i. Regal Was Not a Named Fiduciary Under the Agreement Because Section 4.1 is Unambiguously Insufficient to Confer Named Fiduciary Status.

The clerical error in Section 4.1 of the Agreement, a missing selection between "[shall]" and "[shall not]," is sufficient on its face to find Regal Defendants are not a named fiduciaries under the Agreement. Under common law contract doctrine, the absence of affirmative agreement by Regal Defendants' indicates an insufficient meeting of the minds for Regal Defendants to have accepted the duties of a named fiduciary. *See, e.g.*, *M & G Polymers U.S.A., LLC v. Tackett*, 574 U.S. 427, 435–36 (2015) (holding lower court erred when, within contract interpretation, it inferred intent to vest certain benefits based on other contractual provisions and absence of extrinsic evidence to the contrary); *Dalzell v. Dueber Watch-Case Mfg. Co.*, 149 U.S. 315, 320 (1893) (holding absence of express agreement for employee to convey patent to employer, employer is not entitled to such conveyance); *Mich. Cent. R. Co. v. Myrick*, 107 U.S. 102, 105 (1883) (holding

[9] See infra Section III.A for further discussion of preemption issues with the indemnification clause.

railroad company not bound to transport goods beyond termination of railroad absent express agreement to such).

However, even if this Court finds the missing checkmark ambiguous rather than clear on its face, ambiguous terms in contracts related to ERISA plans are evaluated for both patent and latent ambiguity. *Rossetto*, 217 F.3d at 542 (establishing rules for ambiguity analysis in collective bargaining agreements, ERISA plans, and "maybe litigation over other types of contracts as well").

Patent ambiguity arises when language is defective, obscure, or insensible and "any reasonable reader of the document would conclude that the term in question is ambiguous." *Orth v. Wis. State Emples. Union Council* 24, 500 F. Supp. 2d 1130, 1135 (E.D. Wis. 2007); *Rossetto*, 217 F.3d at 545 (stating "a search for patent ambiguity must canvass the entire agreement" to see if linguistic context clarifies meaning). In contrast, latent ambiguity occurs when language appears clear on its face but has multiple meanings based on real-world context. *Baldwin v. Univ. of Pittsburgh Med. Ctr.*, 636 F.3d 69 (3d Cir. 2011) (finding the term "children" was latently ambiguous in an ERISA health insurance policy when challenged by an adoptive mother who was denied coverage for her adoptive children); *Rossetto*, 217 F.3d at 547 (describing latent ambiguity as "when something might not mean what it says").[10] Courts use the text of the agreement and objective extrinsic evidence from the parties to determine whether patent or latent ambiguity exists. *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 606 (7th Cir. 1993) (noting that "there must be either contractual language on which to hang the label of ambiguous or some yawning void" to admit extrinsic evidence). If, with extrinsic evidence and a close reading of the terms, a court finds no ambiguity, the original meaning stands; but, if ambiguity does exist, the court can re-apply the

[10] The classic latent ambiguity example comes from first-year contracts class, with two ships named Peerless that, on the face of the contract, appeared to be the same ship but were different ships entirely. *Raffles v. Wichelhaus*, 2 H. & C. 906, 159 Eng. Rep. 375 (Ex. 1864).

same objective extrinsic evidence to re-define the ambiguous term based on the context presented in the evidence. *Rossetto*, 217 F.3d at 547; *Bidlack*, 993 F.2d at 606.

In the instant case, the missing selection between the checkboxes of Section 4.1 regarding the ERISA fiduciary liability is not necessarily ambiguous in meaning, only blank. The lower court properly found that the meaning was clear and there was neither patent nor latent ambiguity regarding Regal Defendants' fiduciary status. Although fiduciary responsibilities can be contractually delegated through plan instruments under 29 U.S.C. § 1105(c), 29 U.S.C. § 1102(a)(1) requires named fiduciaries to be either (1) named in the "plan instrument" or (2) identified as a fiduciary pursuant to a procedure specified in the plan. *Id*. Section 4.1 of the Agreement fails to meet either of these requirements. First, the Agreement does not qualify as part of the "plan instrument." 29 U.S.C. § 1105(c). Guidance issued from the U.S. Department of Labor in 2021 explained that the key elements of a plan are:

- A written plan that describes the benefit structure and guides day to day operations;
- A trust fund to hold the plans assets;
- A recordkeeping system to track the flow of monies going to and from the retirement plan; and
- Documents to provide plan information to employees participating in the plan and the government.

Meeting your Fiduciary Responsibilities, U.S. Dep't. of Lab., Emp. Benefits Sec. Admin. (EBSA) (Sept. 2021). This list does not include any business contracts similar to the Agreement at issue in this case. Therefore, a contractual agreement entered into without following ERISA's procedural requirements cannot be found to establish a named fiduciary. 29 U.S.C. § 1102(a)(1). However, even if the Agreement *were* defined as part of the plan instrument, Section 4.1 fails to affirmatively name Regal Defendants as fiduciaries, because no selection was made on the form. *Connolly*, No. 20-cv-599-TCF at *9 (D.C.C. Nov. 13, 2021). The failure to select an option means that Regal Defendants were not affirmatively named under 29 U.S.C. § 1102(a)(1), and no duties can attach.

If the court instead finds that Section 4.1 of the Agreement qualifies as a "procedure outlined in the plan" under 29 U.S.C. § 1102(a)(1), since the procedure outlined in the plan ostensibly requires making a selection on a form, failing to make that selection disqualifies an individual from satisfying the plan terms. The procedural failures under ERISA alone are sufficient to find that, on its face, the Agreement does not name Regal Defendants as fiduciaries.

ii. <u>Regal Defendants Are Not Named Fiduciaries Because the Terms of the Agreement Indicate Regal Defendants Did Not Have Fiduciary Obligations or Liabilities.</u>

The work duties and indemnity clauses of the Agreement provide further contextual evidence of the meaning of the missing checkbox. In determining whether a term is patently ambiguous, courts consider both the agreement as a whole and extrinsic evidence from each party that clarifies the standard meaning of the potentially ambiguous term at issue. *Rossetto*, 217 F.3d at 543. The Agreement as a whole here reveals that (a) the Fund explicitly limited Regal Defendants' work duties to non-fiduciary functions, and (b) the liability Regal incurred through the Agreement was different from what would apply as a co-fiduciary under ERISA. These meaningful differences regarding duty and liability signify that Regal Defendants were not perceived as or intended to become fiduciaries under the Agreement and, therefore, cannot be held liable under ERISA for the loss to the Fund. *Connolly*, No. 20-cv-599-TCF at *4; 29 U.S.C. §§ 1105(a)(1)–(3).

a. Regal Defendants Are Not Named Fiduciaries Because Their Job Duties Under the Agreement Are Purely Administrative.

The Agreement limited Regal Defendant's job duties solely to administrative and clerical tasks with no control or discretion, which indicates that they were not intended to be fiduciaries. ERISA differentiates liability for fiduciary functions, which attach liability, and purely administrative functions, which do not. *Flacche v. Sun Life Assurance Co. of Can.,* 958 F.2d 730,

734–35 (6th Cir. 1992) ("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. . . .") (quoting 29 C.F.R. § 2509.75-8(D-2) (1991)). Fiduciary functions include, for example, being a plan sponsor, appointing other plan fiduciaries, selecting and monitoring plan investment options, interpreting plan provisions, and providing investment advice for a fee. 29 U.S.C. § 1104(a); *see also* Lisa Van Fleet & Randy Sherer, *An Overview of Fiduciary Responsibilities Under ERISA*, St. Louis Bar J. 14 (Spring 2020).

In contrast, purely administrative activities include, for example, applying rules that do not require exercise of discretion, calculating service and compensation credits for benefits, maintaining participants' service and employment records, preparing reports, orientating new participants, and processing claims. *Id.* None of these tasks require individualized discretion or authority to interpret and, therefore, are non-fiduciary in nature and do not attach ERISA liability. *See, e.g.*, *Milofsky v. Am. Airlines, Inc.,* 404 F.3d 338, 341 (5th Cir. 2005) ("Third-party administrators who perform merely administrative duties . . . are not fiduciaries under ERISA."); *Cent. Valley Ag. Coop. v. Leonard*, 986 F.3d 1082, 1086–88 (8th Cir. 2021) (holding on behalf of beneficiaries and distinguishing liability among defendant parties since defendants that acted with discretion with respect to compensation became a fiduciary).; *Tocker v. Kraft Foods N. Am., Inc. Ret. Plan,* No. 11-2445-cv, *2 (2d Cir. 2012) (holding that mid-level benefits manager communicating to a beneficiary a decision that has already been "rubber stamped" was not fiduciary); *see also IT Corp. v. Gen. Am. Life Ins. Co.*, 107 F.3d 1415, 1419–20 (9th Cir. 1997) (clarifying that "putting the magic words in the contract, purely ministerial duties,' does not avoid fiduciary responsibility, if the characterization, 'purely ministerial duties,' is not correct and

holding that persons who have no power to make any decisions as to plan policy, interpretation, practices or procedures are not fiduciaries) (quoting 29 C.F.R. § 2509.75-8 at D-2).

The Agreement's language regarding anticipated job duties provides critical contextual evidence to interpret the checkboxes in Section 4.1 of the Agreement. Section 4.2 , "Contractual Duties," provides that "[i]n consideration of the Per Capita Fee . . . Regal shall provide administrative services to include: (i) maintenance of records for the Fund and (ii) a phone-in services center in which Fund participants can request information regarding account balances." *Connolly*, No. 20-cv-599-TCF at *4. The Fund itself is responsible for making distributions to eligible participants, and the undisputed named fiduciaries are appointed by the Board under Section 10. *Id*.

Within the language of the job description alone, Regal Defendants do not meet any of the three factors: their job duties are purely administrative, including maintenance of records and providing account balances to beneficiaries, and they do not make any discretionary decisions, control any assets, or provide investment advice to individuals. *Connolly*, No. 20-cv-599-TCF at *4; *David P. Coldesina, D.D.S., P.C., Emp. Profit Sharing Plan & Tr. v. Estate of Simper*, 407 F.3d 1126, 1133–1134 (10th Cir. 2005) (emphasizing that control over assets is treated differently under ERISA than control over management because of the obligation of loyalty that arises when someone directly controls assets that another person owns); *IT Corp.*, 107 F.3d at 1420 (holding that anyone with check-writing authority took fiduciary action, even if taking instruction and finding that, because "discretionary" modifies control over management and administration in the statute but control over assets is unmodified, anyone with control of money is a *de facto* fiduciary).

Regal Defendants never touched assets and instead performed quintessential ministerial functions: sharing information, answering account balance questions, and following instructions

from the Fund. *Connolly*, No. 20-cv-599-TCF at *4. Although Regal Defendants could theoretically step outside the scope of their work duties and into fiduciary liability, there is no evidence that this occurred here. Therefore, the terms of the job description make the meaning of the missing checkmark clear and unambiguous: Regal Defendants were not hired to serve as fiduciaries, which is made clear by the contract as a whole, and they did not act outside of the scope of the purely administerial contractual duties under the Agreement.

b. Regal Defendants are not named fiduciaries because the Agreement's indemnity clause applies different liabilities than those applicable to fiduciaries and co-fiduciaries under ERISA.

In the Agreement, Regal Defendants and the Fund included an indemnity clause in Section 8 that would be largely duplicitous if Regal Defendants were intended to be fiduciaries[11] or co-fiduciaries[12] under ERISA. This contractual decision indicates that neither Regal Defendants nor the Fund intended for Regal Defendants to take on fiduciary duties or liabilities through the Agreement. This superfluous "duties" clause indicates that the parties were not relying upon ERISA's fiduciary duties for liability within the relationship, and instead created their own. Had Regal Defendants or the Fund intended for Regal Defendants to serve as fiduciaries or co-fiduciaries, the obligations in the Agreement would have matched ERISA's fiduciary duties, or been omitted entirely, as they would have attached under ERISA regardless of the terms of the Agreement.

Under ERISA, fiduciaries are individually and personally liable according to six central affirmative duties that overlap: prudence, diversification of plan assets, compliance with the terms of the plan, loyalty, and payment of only reasonable plan expenses. 29 U.S.C. § 1104(a)(1); Lisa

---

[11] 29 U.S.C. § 1104.
[12] 29 U.S.C. § 1105.

Van Fleet & Randy Sherer, *An Overview of Fiduciary Responsibilities Under ERISA*, St. Louis Bar J. 14 (Spring 2020). Fiduciaries are also jointly liable for the breaches of co-fiduciaries in circumstances that involve a shared-knowledge element. 29 U.S.C. §§ 1105(a)(1)–(3); *Browe v. CTC Corp*., 15 F.4th 175, 200 (2d Cir. 2021) (holding that under ERISA, co-fiduciaries in breach are jointly and severally liable) (quoting *In re Masters Mates & Pilots Pension Plan & IRAP Litig.,* 957 F.2d 1020, 1023 (2d Cir. 1992)).

Since state law remedies are largely preempted by ERISA,[13] the Fund likely could not recover an indemnity claim using this contract under ERISA because most courts only allow indemnity claims against co-fiduciaries. *Browe,* 15 F.4th at 183; *In re Masters Mates & Pilots Pension Plan & IRAP Litig*., 957 F.2d at 1023. If the Fund intended to make Regal Defendants true co-fiduciaries and have the option to indemnify them, either it would have been clearly articulated throughout the Agreement, or the indemnity clause would be omitted entirely because ERISA alone would be sufficient to attach all of the duties and liabilities listed in the Agreement.

Analyzing the Agreement as a whole and considering the failure to opt-in to fiduciary duties through checkboxes in Section 4.1, the meaning of the Agreement becomes clear and unambiguous: Regal Defendants were hired exclusively to perform solely ministerial functions and did not have the requisite authority or control to be considered fiduciaries. Therefore, Regal

---

[13] "ERISA's broad preemption power" refers in part to the Supreme Court's holding in *Aetna Health, Inc. v. Davila*, that "any state law cause of action that duplicates, supplements, or supplants the ERISA enforcement remedy" is preempted by remedies in 29 U.S. § 1132(a). 542 U.S. 200, 208 (2004). This means that for those with employer benefits or insurance plans, all state law tort and contract claims and remedies against employers, third-party administrators, and fiduciaries are off the table. Only a beneficiary may bring a claim to recover benefits, enforce rights, or clarify rights, but under 29 U.S.C. § 1132(a)(2), all remedies are given directly to the plan. 29 U.S. § 1132(a)(3) allows for individual equitable relief, which can include attorney's fees and limited damages, but only for breach of fiduciary duty and violation of statutory obligation. Since Regal Defendants do not have fiduciary duties or statutory obligations, they are not liable under 29 U.S. § 1132(a).

Defendants are not named fiduciaries under the Agreement and cannot be held liable for losses to the plan.

2. *Regal Defendants Are Not Functional Fiduciaries Under ERISA Because There is No Evidence That They Took Any Action Sufficient to Qualify as a Fiduciary Act.*

Regal Defendants cannot be considered functional fiduciaries because they stayed within the scope of their job description and took no actions that could be considered "fiduciary" in nature. Under ERISA, a person may be a fiduciary—even if they are not named in the plan—if they

> (i) [exercise] 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) [render] investment advice for a fee or other compensation . . . or has any authority or responsibility to do so, or (iii) [have] any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A). Acts that do not require discretion or authority and only administer the decisions already made by plan fiduciaries are considered purely administrative and do not rise to fiduciary status. *IT Corp.,* 107 F.3d at 1420; *see supra* Section III.A(1). If there is, however, any kind of independent or discretionary control carried out, even if it is outside of the typical job description, the individual can be found to be a fiduciary and held personally liable if their fiduciary act breaches a duty under ERISA. *See Rozo v. Principal Life Ins. Co.,* 949 F. 3d 1071, 1074 (8th Cir. 2020) ("If the provider's actions (1) conform to specific contract terms or (2) a plan and participant can freely reject it, then the provider is not acting with "authority" or "control" respecting the "disposition of [the plan's] assets") (quoting 29 U.S.C. § 1002(21)(A); *see also Teets v. Great-West Life & Annuity Ins. Co.*, 921 F.3d 1200, 1212 (10th Cir. 2019) (creating the test *Rozo* iterated: a service provider is not 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").

There is no evidence in the record that Regal Defendants took any authoritative or discretionary actions concerning the plan, nor that they stepped outside the job duties listed in the Agreement, nor that they took control of any assets or wrote any checks. The only action in the record affirmatively taken by Regal Defendants was when Defendant Raul Demisay, while at lunch with a client, opened a file using the restaurant's Wi-Fi network. *Connolly*, No. 20-cv-599-TCF, at *3. There is no other relevant "action" taken by Regal Defendants in the record, and being flexible to accommodate a client during a meeting is hardly execution of discretionary authority or control.

Courts' analyses of "functional fiduciaries" center on the existence of an affirmative act taken outside an individual's job duties, demonstrating discretionary control, or demonstrating clear authority over assets. 29 U.S.C. § 1002(21). Here, Regal Defendants have taken no action that comes close to qualifying. As pure administrators with solely ministerial duties and no independent control over the plan, Regal Defendants cannot be found functional fiduciaries under ERISA.

B. Even if This Court Finds that Regal Defendants Are Fiduciaries, They Are Not Liable Because the Loss to the Plan Was Caused by Cybercrime Theft and Unrelated to Any Breach of Fiduciary Duty.

Should Regal Defendants be considered fiduciaries under ERISA, they would still not be liable for the loss to the plan because they neither breached a fiduciary duty nor caused a loss to the plan. To prove a fiduciary breached their duties under ERISA, plaintiffs must establish that defendants are either named or functional fiduciaries[14] and that the fiduciary's breach of an ERISA-imposed duty was the cause of harm to the plan. 29 U.S.C. § 1002(37); *see Leckey v. Stefano*, 501

[14] *See supra* Section III.A.

F.3d 212, 225–26 (3d Cir. 2007) (summarizing "a plaintiff must demonstrate (1) a plan fiduciary,[15] (2) breaches to an ERISA-imposed duty (3) causing a loss to the plan"). Even if this Court finds Regal Defendants fiduciaries, Regal Defendants cannot be held liable for the loss to the plan because, (1) they committed no breach of fiduciary duty and (2) the loss to the plan was caused by criminal acts of cyberhackers, not fiduciary breach by Regal Defendants.

1. Regal Defendants Did Not Breach Any Fiduciary Duties and Therefore Cannot be Liable for the Loss to the Plan.

Regal Defendants, should they be found fiduciaries, did not breach any fiduciary duties under ERISA while serving the plan and, therefore, cannot be held liable for any loss. As discussed in Section III.A, explicit fiduciary duties include prudence, loyalty, diversification of plan assets, compliance with the terms of the plan, payment of only reasonable plan expenses, and disclosure and reporting requirements. 29 U.S.C. §§ 1104(a)(1)(A)–(D)); 29 U.S.C. § 1021. As courts continue to interpret duties under ERISA, the fiduciary duties have expanded, incorporating elements such as investment monitoring under the duty of prudence.[16] *See Hughes v. Nw. Univ.*, 142 S. Ct. 737, 742 (2022) (holding that since "the content of the duty of prudence turns on the circumstances. . . prevailing at the time the fiduciary acts, the appropriate inquiry will necessarily be context specific") (quoting §1104(a)(1)(B)) (internal quotations omitted); *Tibble v. Edison Int'l*, 575 U.S. 523, 530 (2015) (discussing duty to monitor investments, stating "the duty of prudence under ERISA, as under trust law, requires plan fiduciaries . . . to examine periodically the prudence of existing investments and to remove imprudent investments within a reasonable period of time").

---

[15] *See id.*

[16] ERISA plan fiduciaries must discharge their duties "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." §1104(a)(1)(B).

This approach is slowly starting to expand to due diligence in cybersecurity, but case law has not progressed as far or as clearly as *Tibble*'s duty to monitor. *See generally Bartnett v. Abbott Labs.*, No. 20-CV-02127, 2021 U.S. Dist. LEXIS 23452, *27–28 (N.D. Ill. Feb. 8, 2021) (declining to apply liability because employer's decisions were not objectively unreasonable, but preserving claims against third-party administrator); *see generally Leventhal v. MandMarblestone Grp. LLC*, 2020 U.S. Dist. LEXIS 219942 (E.D. Pa. 2020) (denying motion to dismiss claim against third-party administrator, then dealing with novel issue of settlement validity); *Berman v. Estee Lauder*, No. 4:19-cv-06489 (N.D. Ca., 2019) (participant suit against plan sponsor, committee and third-party record-keeper settled). The focus of the analysis in these cases, like much of ERISA's fiduciary analysis, which fiduciary had sufficient control to make the decision regarding service provider hiring or plan cybersecurity policies, and did that fiduciary act prudently and with due diligence when they made said choice?

Regal Defendants have a very narrow scope of job duties and execute purely ministerial functions for the Fund. *See supra* Section III.A. Regal Defendants did not have the access or authority to remove or diversify plan assets, so they cannot be liable for breaches like imprudent diversification or violating the duty of loyalty through self-serving investing. Furthermore, Regal Defendants took nearly no affirmative actions, which would be required for breach of an ERISA fiduciary duty. Although within the duty of loyalty there is a duty of disclosure to beneficiaries that goes beyond the formal reporting requirements, *see* 29 U.S.C. §§ 1001, 1021, under which failing to disclose would be a breach, that was not an issue in the instant case. *See, e.g. Delker v. Mastercard Int'l, Inc.,* No. 20-3600, 2022 U.S. App. LEXIS 218 (8th Cir. Jan. 5, 2022) (finding a fiduciary duty to avoid misleading and reiterating that the duty of loyalty requires an ERISA fiduciary to communicate any material facts which could adversely affect a plan member's

interests) (quoting *Shea v. Esensten*, 107 F.3d 625, 628 (8th Cir. 1997)) (quotations omitted). Further, fiduciaries are only directly liable for that which they have control and knowledge over.

Regal Defendants could not have breached any fiduciary duties in the cybersecurity context because cybersecurity-specific duties that may arise in the instant case attach only to those fiduciaries who have control over plan decisions and cybersecurity management practices. *Meeting your Fiduciary Responsibilities*, U.S. Dep't. of Lab., Emp. Benefits Sec. Admin. (EBSA), at 13 (Sept. 2021). Regal Defendants, as service providers or third-party administrators, cannot be found to have breached any duties of due diligence over cybersecurity practices because they do not control these practices. *Cent. Valley Ag Coop.*, 986 F.3d at 1087 (holding defendants that did not have control over pay could not be held liable). Recent guidance from the Department of Labor indicates that *employers* have the duty to prudently select and monitor service providers, but it does not articulate any specific duty that attaches to the service providers themselves. *Meeting your Fiduciary Responsibilities*, U.S. Dep't. of Lab., Emp. Benefits Sec. Admin. (EBSA), at 5 (Sept. 2021) ("Hiring a service provider in and of itself is a fiduciary function. . . . An employer should document its selection (and monitoring) process, and, when using an internal administrative committee, educate committee members on their roles and responsibilities."). Accessing a public Wi-Fi network while assisting a client and unknowingly having an email account hacked is nowhere near sufficient to find breach of duty of prudence or loyalty, because there is no act of control or discretion to repudiate as a breach. There is also no breach for failure to follow plan documents because there is no cybersecurity policy articulated in the record. Regal Defendants, should they be found fiduciaries, are not responsible for any breaches of duty or liable for any loss to the plan.

2. *The Loss to the Plan Was Caused by Criminal Cyberattack, Not Breach of Fiduciary Duty; Therefore, No Liability Under ERISA Can be Imposed on Regal Defendants.*

Finally, to impose liability under ERISA fiduciary duties, there must be a causal link between the breach of duty and the loss to the plan. *Lecky*, 501 F.3d at 225–26. However, circuits are split as to which party carries the burden of proving causation. In *Tatum v. RJR Pension Inv. Comm.*, the Fourth Circuit explained that when a beneficiary accuses an ERISA fiduciary of breaching the duty of prudence, the fiduciary then bears the burden of proving either that the breach did not cause the losses to the plan, or that, despite the breach, the fiduciary was not liable because a hypothetical prudent fiduciary would have done the same. 855 F.3d 553, 566 (4th Cir. 2017) (dealing with an imprudent sale of stock, where using loss causation analysis, the fiduciary was found not liable because a prudent fiduciary would have done the same with the same information available); *see generally Brotherston v. Putnam Invs.*, LLC, 907 F.3d 17 (1st Cir. 2018); *Martin v. Feilen*, 965 F.2d 660, 671 (8th Cir. 1992); *McDonald v. Provident Indem. Life Ins. Co.*, 60 F.3d 234 (5th Cir. 1995). However, other circuits have rejected the burden shifting approach, holding "the burden falls squarely on the plaintiff asserting a breach . . . to prove losses to the plan 'resulting from' the alleged breach of fiduciary duty." *Pioneer Centres Holding Co. Emp. Stock Ownership Plan & Tr. v. Alerus Fin., N.A.*, 858 F.3d 1324, 1337 (10th Cir. 2017); *Saumer v. Cliffs Natural Resources Inc.*, 853 F.3d 855, 863 (6th Cir. 2017); *Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090, 1099 (9th Cir. 2004); *Willett v. Blue Cross & Blue Shield of Ala.*, 953 F.2d 1335, 1343 (11th Cir. 1992).

Regardless of which standard this circuit adopts, the causal link between the loss and any affirmative action by Regal Defendants loss is too strained to impose liability. Here, the loss was caused by a criminal cyberattack rather than breach of fiduciary duty under ERISA, Regal

Defendants acted reasonably under the circumstances, and another prudent fiduciary would have done the same. Although circuits are split as to which party bears the burden of proving causation of loss in the ERISA context, regardless of which approach this court adopts and whether Regal Defendants are found fiduciaries or not, Regal Defendants did not cause the loss to the plan.

The only affirmative action related to the loss that Regal Defendants took was when Defendant Demisay momentarily accessed Panera's public Wi-Fi network; however, the causal link between that temporary access and the loss to the plan is tenuous. The genuine cause of the loss was not Defendant Demisay's connection to the Wi-Fi but rather was the cybercriminal's takeover of Demisay's account—or the client's decision to open the fraudulent email sent from Demisay's computer by the cybercriminal, which resulted in the download of participant data. *Connolly*, No. 20-cv-599-TCF at *3. There is insufficient causation between Regal Defendants' actions and the loss to the plan to impose liability.

Furthermore, even if this Court finds that the causal link is sufficient here, it cannot find that a prudent fiduciary would have acted differently than Regal Defendants. *Tatum,* F.3d at 566. Like a reasonable fiduciary would, Defendant Demisay did the best he could under the circumstances. *Id*. As affirmed in *Hughes*, "the content of the duty of prudence turns on the circumstances. . . prevailing at the time the fiduciary acts." 142 S. Ct. 737, 742 (2022). In this case, among the relevant circumstances was the lack of guidance regarding fiduciary duties within the world of cyberthreats. *See supra* Section II.C (discussing available, limited, administrative guidance). Despite this lack of guidance, Demisay acted with reasonable caution, and he had no way of anticipating that a hacker would access his computer—or that his client would open a spam email. Additionally, using the public Wi-Fi network was not Demisay's first option; he tried to access the document on his phone, but because he was wasting precious time with a client and

about to retire, he made do with the resources available. *Connolly*, No. 20-cv-599-TCF at *2. He also tried to mitigate any hypothetical risk by immediately disconnecting from the network and took no other actions to grant access to the hackers. *Id*. at *2–3. Therefore, as in the *Hughes* and *Tatum* courts, there is an insufficient causal link between Defendant Demisay's actions and the loss, and Regal Defendants acted as a prudent fiduciary would at the time given the minimal guidance available regarding how to protect ERISA plans from cyberthreats, so liability cannot be imposed on Regal Defendants.

The lower court was correct in finding the Agreement did not confer fiduciary duties to Regal Defendants, and there is no evidence in the record to support that they evolved into functional fiduciaries. Therefore, Regal Defendants are neither named nor functional fiduciaries and cannot be liable under ERISA for losses to the plan. Even if Regal Defendants were to be found fiduciaries, they would still not be liable for the loss to the plan because Regal Defendants did not breach any applicable fiduciary duty, and there is an insufficient causal link between Demisay's momentary access to public Wi-Fi and the cyberattack on the plan assets. Circuit Courts, the Supreme Court, and the Department of Labor alike continue to grapple with evolving fiduciary duties and frequent ambiguities that accompany new technology. In this case, the lower court was correct in finding that, as the law stood at the time of the incident, Regal Defendants were not fiduciaries under ERISA, and this Court should uphold the District Court's decision.

CONCLUSION

For the foregoing reasons, this Court should AFFIRM the District Court's dismissal with prejudice.

Respectfully submitted,

____

Counsel for Appellees Regal Consulting LLC and Raul Demisay
Team 6

APPENDIX A

TABLE OF CONTENTS

Relevant Statutory Provisions

29 U.S.C. § 1001 . . . . b
29 U.S.C. § 1002(21) . . . . b, c
29 U.S.C. § 1002(42) c
29 U.S.C. § 1003. c
29 U.S.C. § 1105(a). . . . . c, d
29 U.S.C. § 1105(c). . . . . d

Relevant Regulatory Provisions

29 C.F.R. § 2510.3-101. . . . . d, e
29 C.F.R. § 2510.3-102. . . . . e

Relevant Statutory Provisions

29 U.S.C. § 1001
(a) *Benefit plans as affecting interstate commerce and the Federal taxing power*. The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans are carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.
(b) *Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries*. It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.
(c) *Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance*. It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

29 U.S.C. § 1002(21)
(A) Except as otherwise provided in subparagraph (B), 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. Such term includes any person designated under section 1105(c)(1)(B) of this title.
(B) If any money or other property of an employee benefit plan is invested in securities issued by an investment company registered under the Investment Company Act of 1940 [15 U.S.C. 80a–1 et seq.], such investment shall not by itself cause such investment company or such investment company's investment adviser or principal underwriter to be deemed to be a fiduciary or a party in interest as those terms are defined in this subchapter, except insofar as such investment company or its investment adviser or principal underwriter acts in connection with an employee benefit plan covering employees of the investment company, the investment adviser, or its principal underwriter. Nothing contained in this subparagraph shall limit the duties imposed on such investment company, investment adviser, or principal underwriter by any other law.

29 U.S.C. § 1002(42)
the [4] term "plan assets" means plan assets as defined by such regulations as the Secretary may prescribe, except that under such regulations the assets of any entity shall not be treated as plan assets if, immediately after the most recent acquisition of any equity interest in the entity, less than 25 percent of the total value of each class of equity interest in the entity is held by benefit plan investors. For purposes of determinations pursuant to this paragraph, the value of any equity interest held by a person (other than such a benefit plan investor) who has discretionary authority or control with respect to the assets of the entity or any person who provides investment advice for a fee (direct or indirect) with respect to such assets, or any affiliate of such a person, shall be disregarded for purposes of calculating the 25 percent threshold. An entity shall be considered to hold plan assets only to the extent of the percentage of the equity interest held by benefit plan investors. For purposes of this paragraph, the term "benefit plan investor" means an employee benefit plan subject to part 4,[5] any plan to which section 4975 of title 26 applies, and any entity whose underlying assets include plan assets by reason of a plan's investment in such entity.

29 U.S.C. § 1003
(a) In general
Except as provided in subsection (b) or (c) and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained—
(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or
(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or
(3) by both.

29 U.S.C. § 1105(a)
(a) Circumstances giving rise to liability. In addition to any liability which he may have under any other provisions of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
(2)if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

29 U.S.C. § 1105(c)
(c) Allocation of fiduciary responsibility; designated persons to carry out fiduciary responsibilities
(1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.
(2) If a plan expressly provides for a procedure described in paragraph (1), and pursuant to such procedure any fiduciary responsibility of a named fiduciary is allocated to any person, or a person is designated to carry out any such responsibility, then such named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility except to the extent that—
(A) the named fiduciary violated section 1104(a)(1) of this title—
(i) with respect to such allocation or designation,
(ii) with respect to the establishment or implementation of the procedure under paragraph (1), or
(iii) in continuing the allocation or designation; or
(B) the named fiduciary would otherwise be liable in accordance with subsection (a).
(3) For purposes of this subsection, the term "trustee responsibility" means any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust instrument of a named fiduciary to appoint an investment manager in accordance with section 1102(c)(3) of this title.

<u>Relevant Regulatory Provisions</u>

29 C.F.R. § 2510.3-101 - Definition of "plan assets" - plan investments.
(a) In general.
(1) This section describes what constitute assets of a plan with respect to a plan's investment in another entity for purposes of subtitle A, and parts 1 and 4 of subtitle B, of title I of the Act and section 4975 of the Internal Revenue Code. Paragraph (a)(2) of this section contains a general rule relating to plan investments. Paragraphs (b) through (f) of this section define certain terms that are used in the application of the general rule. Paragraph (g) of this section describes how the rules in this section are to be applied when a plan owns property jointly with others or where it acquires an equity interest whose value relates solely to identified assets of an issuer. Paragraph (h) of this section contains special rules relating to particular kinds of plan investments. Paragraph (i) describes the assets that a plan acquires when it purchases certain guaranteed mortgage certificates. Paragraph (j) of this section contains examples illustrating the operation of this section. The effective date of this section is set forth in paragraph (k) of this section.

(2) 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 CFR § 2510.3-102 - Definition of “plan assets” - participant contributions.
(a)
(1) General rule. For purposes of subtitle A and parts 1 and 4 of subtitle B of title I of ERISA and section 4975 of the Internal Revenue Code only (but without any implication for and may not be relied upon to bar criminal prosecutions under 18 U.S.C. 664), the 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.