In the
District of Columbia Court of Appeals

Renita Connolly, et al.

***Plaintiffs-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

***Defendants-Appellees*.**

On Appeal from the
United States District Court for the District of Columbia
Civil Action No.: 20-CV-599-TCF
The Honorable Thomas C. Farnam

BRIEF OF DEFENDANTS-APPELLEES

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 to consider claims under the Employee Retirement Income Security Act of 1974 ("ERISA").

The United States Court of Appeals for the Thirteenth Circuit has appellate jurisdiction. Under 28 U.S.C. § 1291, "[t]he courts of appeals…shall have jurisdiction of appeals from all final decisions of the district courts of the United States." The instant matter is an appeal from the final judgment of a district court.

ISSUES PRESENTED

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

STANDARD OF REVIEW

The court of appeals reviews de novo a district court's decision to allow a motion to dismiss for failure to state a claim, taking as true the well-pleaded facts in the complaint and drawing all reasonable inferences in favor of the plaintiff. Fed. Rules Civ. Proc. Rule 12(b)(6), 28 U.S.C.A., *Boyle v. City of Pell City*, 866 F.3d 1280, 1286 (11th Cir. 2017) ("We review de novo a district court's order granting a motion to dismiss for failure to state a claim.").

In order to survive a motion to dismiss, a complaint must be both plausible on its face and bring forth sufficient allegations that nudge the claim across the line from conceivable to plausible. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1959, 167 L. Ed. 2d 929 (2007), *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

Under the notice-pleading requirements of the Federal Rules of Civil Procedure, a complaint must "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Twombly*, 550 U.S. 544, 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)),

Divane v. Nw. Univ., No. 16 C 8157, 2018 WL 2388118, at *4 (N.D. Ill. May 25, 2018), *aff'd,* 953 F.3d 980 (7th Cir. 2020), *vacated and remanded sub nom. Hughes v. Nw. Univ.*, 142 S. Ct. 737 (2022). While a complainant does not need detailed factual allegations in order to survive a motion to dismiss, a plaintiff must provide more than "labels and conclusions," and a "formulaic recitation of a cause of action's elements will not do." *Twombly*, 550 U.S. 544-545.

STATEMENT OF THE CASE

This action arises out of the participation of Renita Connolly, et al. ("Appellants") in the National Laborers Holiday and Vacation Fund ("Fund"). ECF No. 10. The Fund is sponsored by the Board of Trustees of the National Laborers Holiday and Vacation Fund ("Board") and is co-managed by Letitia Beck and Joe Schlitz (collectively, "Fund Defendants"). *Id*. Regal Consulting LLC ("Regal") provides consulting, administration, and recordkeeping services to the Fund, which employed Raul Demisay ("Demisay") as its principal consultant from 1998 to 2020 (collectively, "Regal Defendants"). *Id*.

Appellants filed a claim in the United States District Court for the District of Columbia against Fund Defendants and Regal Defendants on September 1, 2020, which alleges that each of the defendants are fiduciaries under ERISA who had an obligation to prudently administer the Fund and safeguard its assets, including its information and data. ECF No. 10. The claim further alleges that the defendants failed to meet these obligations. *Id*. Appellants seek equitable relief under ERISA § 502(a)(3) and replacement of Regal as an administrative services provider to the Fund. *Id*.

The Fund Defendants and the Regal Defendants each moved to dismiss Appellants' claims. ECF 10. On November 30, 2021, the United States District Court for the District of Columbia granted these motions and dismissed Appellants' complaint with prejudice. *Connolley,*

et al. v. National Laborers Holiday and Vacation Fund, et al., Civil Action No. 20-cv-599-TCF, at *13 (D.D.C. Nov. 30, 2021). Appellants now appeal to this Court.

STATEMENT OF FACTS

Relevant Background Information

Defendant Fund is a multiemployer welfare benefit plan which has its offices in Washington, D.C. ECF No. 10-2. Defendant Board is the sponsor of the Fund, as well as its named fiduciary. ECF No. 10-3. The Board's responsibilities include appointing the Fund's Managers and hiring and monitoring its third-party service providers. ECF No. 10-3. The Fund is co-managed by Letitia Beck and Joe Schlitz ("Managers"), who both reside in Washington, D.C. ECF No. 10-4. Administration services for the Fund are provided by the Managers and two other employees. ECF No. 10-4. In accordance with Section 10 of the Fund, the Board has named Letitia Beck and Joe Schlitz as co-Managers, as discussed above; as per Board custom, the six union members who sit on the Board named Joe Schlitz, and the six employer representatives who sit on the Board named Letitia Beck. ECF No. 10-23.

The Fund's assets consist entirely of contributions that are made by employers and earnings. ECF No. 10-19. On March 31 of each year, the Fund makes cash distributions to each eligible participant for the balance in such Eligible Participant's bookkeeping account as of the end of the previous fiscal year. ECF No. 10-19. Section 6(a) of the Fund specifies that all assets of the Fund are to be held in cash in an account at the Union Bank of South Bend, Indiana. ECF No. 10-21. Further, Section 10 of the Fund provides that "the individuals who are duly appointed by the Board shall be the Plan Administrator and named fiduciaries." ECF No. 10-22.

Regal was hired by the Fund to provide consulting, administration, and recordkeeping services. ECF No. 10-5. Regal is located in New York City, and has offices in all major cities,

including Washington, D.C. ECF No. 10-5. Regal's principal consultant to the Fund from 1998 to 2020 was Mr. Raul Demisay. ECF No. 10-5. Mr. Demisay retired from Regal on March 10, 2020. ECF No. 10-7.

An Administrative Services Agreement between Regal and the Fund ("Agreement") provides that "Regal [shall] [shall not] be regarded as a fiduciary for purposes of ERISA." ECF No. 10-14. The Agreement also provides that "In 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 service center in which Fund participants can request information concerning account balances." ECF No. 10-15. Finally, the Agreement also includes an indemnification clause between the Fund and Regal. ECF No. 10-15.

The Data Breach

On February 21, 2020, Mr. Demisay logged into the Wi-Fi network at Panera Bakery in Washington, D.C. to download a file to his Regal-issued laptop during a client meeting. ECF No. 10-7. Mr. Demisay disconnected his laptop from the Panera Wi-Fi network immediately after downloading the file. ECF No. 10-7. While Mr. Demisay formally retired from Regal on March 10, 2020, his laptop was not returned to Regal until March 31, 2020, due to health concerns. ECF No. 10-7.

At 12:32 p.m. on February 21, 2020, Mr. Demisay's company-issued laptop was hacked; all data on the laptop, including Mr. Demisay's email account and all associated contact information, were copied to an unknown site on the dark web. ECF No. 10-8. Joe Schlitz, one of the co-Managers of the Fund, was one of Mr. Demisay's email contacts whose information was stolen. ECF No. 10-8.

Shortly after the initial hack occurred, at 1:09 p.m. on February 21, 2020, Mr. Schlitz received an email to his Fund email account from Demisay.Raul@Reegal.com, which included an embedded link. ECF No. 10-9. Mr. Schlitz clicked the link included in the email, which caused a new web page to open on his computer, and the device briefly appeared to "freeze." *Id*. Mr. Schlitz re-started his computer, after which it appeared to function properly. *Id*.

At 1:16 p.m. on February 21, 2020, an Excel spreadsheet containing all of the Fund participants' names, addresses, emails, social security numbers, and designation of employers was downloaded from Mr. Schlitz' computer account at the Fund to an untraceable site on the dark web. ECF No. 10-10. About fifteen minutes later, at 1:32 p.m., Mr. Schlitz's computer account at the Fund authorized a wire transfer of substantially all of the money in the Fund's account at the Union National Bank, $2,642,863.12, to an account at Globobank, N.A., and from there to accounts at other banking institutions, where the assets were promptly invested in Bitcoin. ECF No. 10-11.

Post-Breach

Mr. Schlitz has stated under oath that he did not access the email or the Excel file, and he did not authorize the wire transfer at issue. ECF No. 10-25. Mr. Schlitz was placed on administrative leave on May 1, 2020 and has not returned to his duties at the Fund. ECF No. 10-26. The Board named Alice Chalmers to be interim co-manager during Mr. Schlitz's leave of absence. ECF No. 10-27.

The Fund did not make any distributions on March 31, 2020, as the Fund had no liquid assets to distribute on that date. ECF No. 10-29. On July 1, 2020, Ms. Connolly, the named defendant in the instant matter and a Fund participant, sent a letter to the Board demanding that the Fund pay her the benefits she had earned. ECF No. 10-30. Ms. Chalmers replied to the letter

on behalf of the Board in a letter dated May 31, 2020 and stated that the Fund was undergoing an extensive audit of certain "banking issues" and would be delayed indefinitely in making distributions. ECF No. 10-31. On July 1, 2020, Ms. Connolly sent a second letter to the Board notifying the Fund that her identity had been stolen and that all of the money in her bank account had been transferred to an offshore financial institution. ECF No. 10-32. On July 15, 2020, Ms. Chalmers, on behalf of the Board, replied by letter to Ms. Connolly confirming that the Fund and the Board could not accept responsibility for Ms. Connolly's identity theft. ECF No. 10-33.

SUMMARY OF THE ARGUMENT

I. The Stolen Information and Data are Not Plan Assets of the Fund

The information and data stolen during the data breach are not plan assets of the Fund. Under ERISA, plan assets must be held in trust, used for the exclusive benefit of plan participants and beneficiaries, and must be allocated among participants and beneficiaries upon termination of the plan. In this case, the stolen information and data at issue do not fulfill any of these requirements.

DOL regulations, advisory opinions, and case law all support the notion that plan assets must be something of monetary value and must be treated as plan assets. Here, the stolen information and data have not been shown to hold monetary value; their value is derived from the role they play in supporting the administration of the Fund. Further, the plan fiduciaries did not treat the stolen information and data as plan assets; they were not held in trust, governed by a contract or legal instrument, or otherwise approached as if they were plan assets. Rather, the stolen information and data are a by-product of Regal's plan administration functions, not plan assets of the Fund.

II. Regal is not liable for any loss suffered by the Fund and its Participants

Regal, the third-party administrator for the Fund, is not liable for any loss suffered by the Fund and its participants. First, Regal is not a fiduciary to the plan. Regal is not a named fiduciary nor any other type of fiduciary in accordance with ERISA. As a third-party administer that performs ministerial tasks for the Fund, Regal is also not a functioning fiduciary. Functioning fiduciaries have the ability to exercise discretionary authority over the plan which Regal does not have. Ministerial tasks, by contrast, are clerical and mechanical in nature and do not raise the level of fiduciary for ERISA purposes.

The Code, case law, and DOL regulations and "best practices" all support the notion that Regal is not a fiduciary and cannot be liable under ERISA for any loss suffered by the Fund and its participants. Here, regarding Regal, the loss suffered by the Fund and its participants are not governed by ERISA. Regal is not responsible for the plan loss because they are not an ERISA fiduciary. Regal is also not liable for the personal loss suffered by the Appellant. The Appellant's personal loss is not an ERISA plan asset.

ARGUMENT

Appellees' motion to dismiss was properly granted. In granting the parties' motions to dismiss, the Court properly determined that Appellants failed to state a claim upon which relief can be granted. Appellants failed to demonstrate that the information and data that was stolen are ERISA "plan assets" of the Fund, or that Regal is liable under ERISA for any loss suffered by the Fund and its participants. For the reasons discussed in detail below, the District Court's November 30, 2021 Order granting the parties' respective motions to dismiss should be sustained.

I. The Information and Data that were Stolen are Not ERISA "Plan Assets" of the Fund.

"Plan Assets" Under ERISA

While plan assets are not defined under ERISA, the statute delineates requirements that plan assets must fulfill. *Patient Advocs., LLC v. Prysunka*, 316 F. Supp. 2d 46, 48 (D. Me. 2004). Specifically, ERISA requires that plan assets be held in trust, 29 U.S.C. § 1103(a), be held for the exclusive benefit of plan participants and beneficiaries, 29 U.S.C. § 1103(c)(1), and be allocated among participants and beneficiaries upon termination of the plan. 29 U.S.C. § 1344.

Further, Department of Labor ("DOL") Regulations specify that plan investments in another entity and participant contributions both qualify as plan assets. 29 CFR § 2510.3-101, *id*. § 2510.3-102. DOL Advisory Opinions provide additional clarification and indicate that ordinary notions of property rights can be used to determine whether something can be considered an asset of an ERISA plan. *See* DOL Advisory Opinion 94-31A (Sept. 9, 1994). Further, "[a]pplying ordinary notions of property rights, the assets of a plan generally include any property, tangible or intangible, in which the plan has a beneficial ownership interest." DOL

Advisory Opinion 2013-03A (Jul. 3, 2013). Therefore, the identification of assets is a fact-specific analysis that requires consideration of any relevant contracts or legal instruments, as well as the actions and representations of the involved parties. *Id*. A plan will generally have a beneficial interest in particular assets "if the assets are held in a trust on behalf of the plan, …a separate account with a bank or other third party in the name of the plan, or if it is specifically indicated…that separately maintained funds belong to the plan." *Id*. (citing DOL Advisory Opinion 92-24A (Nov. 6, 1992).

The Stolen Information and Data Do Not Meet the Requirements of ERISA to Qualify as "Plan Assets"

Here, stolen information and data are not plan assets of the Fund under ERISA. First, the stipulated facts give no indication that the stolen information and data were held in trust, as required by 29 U.S.C. § 1103(a). ECF No. 10.

Next, 29 U.S.C. § 1103(c) provides that assets "shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." This indicates that assets are intended to be something of monetary value such as cash or investments, and could conceivably be used to pay benefits or plan administration costs. *Id*. While Appellee will likely argue that the stolen information and data have monetary value, it is highly unlikely that this information and data was ever intended to be used to fund a plan or defray plan expenses. The stipulated facts give no indication that the stolen information, including names, email addresses, and other identifying information, was ever intended to be sold or monetized by the fund, rather it is simply a by-product of administering the Fund. ECF No. 10.

ERISA further requires that assets must be allocated among participants and beneficiaries upon termination of the plan, which is not a requirement that can be fulfilled by the stolen

information and data. 29 U.S.C. § 1344. The statute specifically references "assets of the plan (available to provide benefits)"; this, again, makes clear that the requirement applies to monetary assets, not the identifying information stolen in the instant matter. *Id*. Further, the stolen information is not "available to provide benefits." *See* 29 U.S.C. § 1344. DOL regulations specifically cite plan investments in another entity and participant contributions as plan assets; both investments and participant contributions hold monetary value which could be used to provide cash benefits or to pay the costs of plan administration. 29 CFR § 2510.3-101, *id*. § 2510.3-102.

This argument is further bolstered by the DOL in its advisory opinions, which specify that plan assets can be identified by applying ordinary notions of property rights. *See* DOL Advisory Opinion 94-31A (Sept. 9, 1994). While the DOL confirms that the assets of a plan can be intangible, as in the instant matter, the assets of a plan must include property "in which the plan has a beneficial ownership interest." DOL Advisory Opinion 2013-03A (Jul. 3, 2013). Here, the Appellant has not provided any facts indicating that there is a relevant contract, legal interest, or relevant representation between the parties demonstrating that the plan has a "beneficial ownership interest" in the stolen information and data. ECF No. 10, *see also*, DOL Advisory Opinion 2013-03A (Jul. 3, 2013). As discussed in detail above, there is no indication that the assets are held in trust on behalf of the plan, nor is there a specific agreement related to the ownership of the stolen information and data. ECF No. 10.

In *Patient Advocates*., the Court assessed whether claims information was a plan asset, and stated that "[u]nlike stocks, bonds, cash, investment contracts and other 'hard' assets, claims information typically is not acquired for its value or held as an investment." *Patient Advocs*., at 49. Similarly, the data stolen from the Regal Defendants includes participants' names, addresses,

emails, social security numbers, and designation of employers. ECF No. 10-10. Like the claims information stolen in *Patient Advocates*, this is not information that was acquired for its value; Regal was in possession of the information solely as a by-product of administering the Fund.

While Appellant will argue that the stolen information and data is valuable, its value relates to its role in administering the Fund, not as a plan asset under ERISA. The assets of the Fund are derived entirely from employer contributions and earnings. ECF No. 10-19. In order to distribute money from the Fund, the Fund maintains a bookkeeping account for each participant who worked at least 1,000 Hours of Service during the prior fiscal year ("Eligible Participant"), and each such Eligible Participant is allocated $1 for each hour worked during the current fiscal year. ECF No. 10-18. The data is also used to administer cash distributions from the Plan to Eligible Participants on March 31st of each year. ECF No. 10-20.

In determining that data were not plan assets, the Court in *Patient Advocates* also determined that the fiduciaries did not view or treat the data as assets of the plan. *Patient Advocs.,* 316. Similarly, here, there is also no indication that either the Fund Defendants or Regal Defendants treated the stolen data as assets of the plan prior to the data breach. As discussed above, the stolen data did not meet any of the standard requirements of ERISA: the information and data were not held in trust, nor were there any contracts or legal instruments indicating that the materials were to be considered plan assets. ECF No. 10.

For the reasons discussed above, Appellee did not meet its burden in demonstrating that the stolen information and data are not plan assets of the Fund.

II. Regal Is Not Liable Under ERISA for Any Loss Suffered by the Fund and Its Participants

Every employee benefits plan must have at least one "named fiduciary" and a plan administrator. The named fiduciary is a person designated in the plan document as having the "authority to control and manage the operation and administration of the plan." 29 U.S.C. § 1102(a)(1). In addition, other individuals, such as investment managers or those who have or exercise discretionary control over the plan administration or its assets will also be considered functional fiduciaries under ERISA. 29 U.S.C. §§ 1102(c)(3), 1002(21)(A)(iii), see also *Walsh v. Principal Life Ins. Co.*, 266 F.R.D. 232 (2010).

Regal Defendants are Not Named Fiduciaries

Under ERISA, employee benefit plans are required to have one or more named fiduciaries that have authority to control the operation and administration of the plan. 29 U.S.C. § 11102(a)(1)–(2). These named fiduciaries must be "named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identifiable as a fiduciary … by a person who is an employer or employee organization with respect to the plan …" *Id*. According to the plan document, the Board is the named fiduciary. Regal is not listed in the plan document as a named fiduciary.

Regal Defendants are not Functional Fiduciaries

As outlined in *Walsh v. Principal Life Ins. Co.*, "fiduciary status under ERISA is a functional concept, and if Defendants have acted like a fiduciary, they may have incurred fiduciary obligations." *Id.* at 241. Whether a third-party administrator, such as Regal, qualifies as a plan fiduciary generally depends on the level of discretion granted to them or exercised by them. 29 U.S.C. § 1002(21)(A)(i) and (iii). Here, the claims against Regal are restricted to breach

of fiduciary duty, and therefore the court must grant Regal Defendants' motion to dismiss if they are not fiduciaries.

There is no definition of "discretion" in ERISA and courts do not employ a consistent definition. Discretion generally suggests decision making power. For example, the court in *Coldesina v. Simper*, 407 F.3d 1126 (10th Cir. 2005) stated that discretion exists when a party has the "power of free decision" or "individual choice." *Id.* at 1132. In addition, in *Herman v. NationsBank Trust Co.*, 126 F.3d 1354 (11th Cir. 1997), the court stated, "a person must know that he can decide an issue and be aware of the choices he has" and that for a person to exercise discretion, they must "engage in conscious decision-making or knowledgeable control over assets." *Id*. at 1365. According to the DOL 2017 publication, *Meeting Your Fiduciary Responsibilities*, the DOL has stated that "[t]he key to determining whether an individual or an entity is a fiduciary is whether they are exercising discretion or control over the plan." Dep't of Labor, *supra* note 23.

ERISA defines a fiduciary to a plan as one who:

> (i) ... exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) ... renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) ... has any discretionary authority or discretionary responsibility in the administration of such plan....

29 U.S.C. § 1002(21)(A). *See* 29 U.S.C. § 1109(a). A third-party administrator, such as Regal, does not hold a fiduciary duty if its powers are merely "clerical, mechanical [and] ministerial." *Pohl v. National Benefits Consultants, Inc.*, 956 F.2d 126, 129 (7th Cir. 1992) (plan

administrator not fiduciary and not liable for negligent misrepresentation when it merely performed the ministerial functions listed in ERISA regulations). According to DOL Interpretive Bulletin 75-8, 29 C.F.R. § 2509.75-8, "persons who have no power to make any decisions as to plan policy, interpretations, practices or procedures, but who perform…[merely] administrative functions for an employee benefit plan, within a framework of policies, interpretations, rules, practices and procedures made by other persons, [are not] fiduciaries with respect to the plan." For example, the following administrative functions will not make a third-party administrator a fiduciary: (1) preparation of employee communications material, (2) maintenance of participants' service and employment records, and (3) preparation of reports concerning participants' benefits. *Id*. at D-2.

A plan administrator may be a fiduciary under ERISA if they exercise discretion over the plan, but they are not a fiduciary when they merely follow the guidelines of the plan. *Pohl*, 956 F.2d at 129. Section 4.2 of the Agreement delegates to Regal limited ministerial authority. ECF No. 10-15. These ministerial services include the "(i) maintenance of records for the Fund and (ii) a phone-in service center in which Fund participants can request information concerning account balances." *Id*. Applying DOL Interpretive Bulletin 75-8, 29 C.F.R. § 2509.75-8, these administrative services would not constitute Regal as having any power to make decisions as to plan policy, interpretations, practices, or procedures. These services are merely ministerial functions for the plan in accordance with the Agreement. *Id.* Since discretionary authority, responsibility or control is a prerequisite to fiduciary status, third party administrators such as cannot be fiduciaries because they do not have discretionary roles and only perform purely ministerial functions. *Confer v. Custom Eng'g Co.*, 952 F.2d 34, 39 (3d Cir. 1991). Based on

these facts, Regal Defendants are not fiduciaries, because, as ministerial third-party administrators, they do not have the ability to exercise discretion over the plan.

Even if Defendants were Fiduciaries, They did not Breach the Duty of Prudence

ERISA defines the duties required of fiduciaries under 29 U.S.C. § 1104, which include the duty to administer the plan for the exclusive benefit of the participants and beneficiaries, the duty of prudence, the duty to diversify plan assets, and the duty to follow the plan document so long as the document follows the dictates of ERISA. Here, Plaintiffs have alleged that Defendants are fiduciaries under ERISA and breached their duty of prudence when they failed to prudently administer the fund and safeguard its assets, including the data that was stolen. As discussed above, Defendants should not be considered fiduciaries of the Fund under ERISA since they had no discretion in handling plan assets or deciding claims against the plan. However, even if the Court finds that Defendants are fiduciaries, they did not breach the duty of prudence in their handling of plan data.

As also discussed above, the data that was stole is not a plan asset, and even if it were, the courts have held that it is "not imprudent to allow a company tasked with plan administration to access participants' personal information…for plan administration purposes." in *Divane v. Northwestern University*, 953 F.3d 980 (7th Cir. 2020). The *Divane* court noted that Plaintiff failed to cite a single case in which a court has held that releasing confidential information or allowing someone to use this information constitutes a breach of fiduciary duty, or that such information is a plan asset. *Divane v. Nw. Univ.*, 953 F.3d 980.

Additionally, while the DOL has issued a series of cybersecurity tips and best practices to address cybersecurity risks, these tips are merely guidance and not codified in the Code or ERISA.. In the DOL *Tips for Hiring a Service Provider*, the DOL recommends that when

contracting with a third party, provisions that should be incorporated into the contract include (1) an annual third-party audit to determine compliance with information security policies and procedures; (2) obligations to keep private information private and to prevent the use or disclosure of confidential information without written permission, and "a strong standard of care to protect confidential information against unauthorized access, loss, disclosure, modification, or misuse"; (3) speedy notification of cybersecurity breaches; and (4) compliance with records retention and destruction, privacy and information security federal, state, and local laws. Here, the Agreement between the Fund and Regal did not include any of these DOL recommended provisions. The Agreement only stipulated that Regal would provide ministerial service such as record keeping and provide information to Fund participants upon request regard concerning their account balances, and the Fund agreed to indemnify and hold Regal and its employees harmless for all claims related to the administration or operation of its ministerial services unless Regal was found to be grossly negligent or engaged in willful misconduct, a knowing deviation from prudent practices, or any violation of established standards of care.

In DOL guidance *Online Security Tips*, the DOL recommends to "be wary of free Wi-Fi" because free public Wi-Fi may pose an increased security risk of having sensitive information stolen by criminals and the use of a cellphone is better practice. Here, Mr. Demisay attempted to download a file using his cellphone during a client meeting but was unsuccessful. To continue his client meeting at Panera Bakery in Washington, D.C., Mr. Demisay connected Panera Bakery's free Wi-Fi on his laptop, performed the sole action of downloading the file, and promptly disconnected from the free Wi-Fi. These actions were prudently done in a fast and efficient manner.

Defendants are Not Liable to Appellants for Losses Outside the Plan

Under ERISA, a fiduciary is liable to the plan to which they owe their fiduciary duties. 29 U.S.C. § 1109(a). Defendant Connolly, a Fund participant, claims damages for financial losses sustained to her personally when her assets outside the plan were stolen. While she may have standing to bring a claim for breach of fiduciary duty under ERISA, only relief that would result in making the plan whole would result. Defendant Connolly's personal financial losses, while unfortunate, find no claim for damages under ERISA, since she is a separate entity from the plan to which the duties are owed.

For the reasons discussed above, Appellee did not meet its burden in demonstrating that Regal should be held liable under ERISA for any loss suffered by the Fund and its participants.

CONCLUSION

For the reasons stated above, this Court should affirm the district court's decision to dismiss Appellants' claims.

Respectfully submitted,

s/ Team No. 8
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